REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR
STATE OF MINNESOTA

1957 - 1958

MILES LORD
Attorney General

To His Excellency

Honorable Orville L. Freeman

Governor

Sir:

In compliance with statutes relating thereto, I herewith transmit the report of this Department for the biennium 1957-1958.

Respectfully yours,

Miles Lord,
Attorney General.

December 31, 1958.

ATTORNEYS GENERAL OF MINNESOTA

TERRITORIAL

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

STATE

Charles S. Berry	May 24, 1858, to Jan. 2, 1860
Gordon E. Cole	Jan. 4, 1860, to Jan. 8, 1866
William Colville	Jan. 8, 1866, to Jan. 10, 1868
F. R. E. Cornell	Jan. 10, 1868, to Jan. 8, 1874
George P. Wilson	Jan. 9, 1874, to Jan. 10, 1880
Charles M. Start	Jan. 10, 1880, to Mar. 11, 1881
W. J. Hahn	Mar. 11, 1881, to Jan. 5, 1887
Moses E. Clapp	Jan. 5, 1887, to Jan. 2, 1893
H. W. Childs	Jan. 2, 1893, to Jan. 2, 1899
W. B. Douglas	Jan. 2, 1899, to Apr. 1, 1904
W. J. Donahower	Apr. 1, 1904, to Jan. 2, 1905
Edward T. Young	Jan. 2, 1905, to Jan. 4, 1909
George T. Simpson	Jan. 4, 1909, to Jan. 1, 1912
Lyndon A. Smith	Jan. 1, 1912, to Mar. 5, 1918
Clifford L. Hilton	Mar. 8, 1918, to Dec. 30, 1927
Albert Fuller Pratt	Jan. 1, 1928, to Jan. 28, 1928
G. A. Youngquist	Feb. 2, 1928, to Nov. 19, 1929
Henry N. Benson	Nov. 20, 1929, to Jan. 3, 1933
Harry H. Peterson	Jan. 3, 1933, to Dec. 15, 1936
William S. Ervin	Dec. 15, 1936, to Jan. 1, 1939
J. A. A. Burnquist	Jan. 1, 1939, to Dec. 31, 1954
Miles Lord	Jan. 1, 1955 to

STAFF

ATTORNEY GENERAL

Miles Lord

DEPUTY ATTORNEYS GENERAL

Robert W. Garrity
Melvin J. Peterson
Robert W. Mattson
Wayne H. Olson
Paul A. Skjervold

SOLICITOR GENERAL

Charles E. Houston

ASSISTANT ATTORNEYS GENERAL

Joseph J. Bright
Ordner T. Bundlie, Jr.
George C. Gubbins, Jr.
Robert Latz
David R. Leslie
John R. Murphy
Edward J. Parker
Harold J. Soderberg
Harley G. Swenson
Perry G. Voldness

SPECIAL ASSISTANT ATTORNEYS GENERAL

George Adzick
Sydney Berde
P. C. Bettendorf
Richard H. Bins
James N. Bradford
John F. Casey, Jr.
Jerome F. Chapman
Paul J. Doerner
Milton G. Dunham
Thomas P. Gallagher
Edward J. Gearty
Gerald H. Geheren
Ward P. Gronfield
Richard J. Gunn
Raymond A. Haik
James T. Hurley
David Johnson
Donald P. Kane
Richard J. Kantorowicz
John A. Labenski
Paul W. Lohmann
George P. Mavrelis
Henry W. McCarr, Jr.
Robert B. McCarthy
Thomas F. Meany
Victor J. Michaelson
Eugene Minenko
Walter F. Mondale
Gordon C. Moosbrugger
Michael R. Moriarty
Frank J. Murray
Albert H. Newman
Hartley Nordin
Fred C. Norton
Paul Nycklemoe
Donald J. Paquette
Joseph Perry
Ralph W. Peterson
Neale Stuart Radsom
G. Stanley Rischard
Arthur C. Roemer
John H. Sandor
William M. Serbine
Jerome J. Sicora
Rolf O. Slen
Russell A. Sorenson
Robert J. Stenzel
William J. Young

CHIEF CLERKS

Mary Ann Hagberg
Roberta R. Schneider

TABLE OF CONTENTS

UNITED STATES SUPREME COURT

DOCKET	TITLE	ACTION	DECISION
6576	Duluth, Missabe & Iron Range Railway Co. v. Minnesota, et al.	Appeal	352 U. S. 804
6719	Edward Savage v. State of Minnesota	Writ of certiorari	355 U. S. 918 78 S. Ct. 348
	Northwestern States Portland Cement Co. v. State of Minnesota	Income Tax—Commerce Clause	358 U. S. 450 79 S. Ct. 357
6754	State of Wisconsin, Minnesota, et al. v. State of Illinois	Water diversion	Pending
966-A	Albert Henry Black v. State of Minnesota	Writ of certiorari	359 U. S. 954 79 S. Ct. 742
970-A	Martin Leo Benjamin v. State of Minnesota	Writ of certiorari	80 S. Ct.

UNITED STATES DISTRICT COURT

6708	Daniel B. McGraw, et al. v. Joseph L. Donovan, et al	Declaratory Judgment Legislative Reapportionment	Final decision deferred
6712	State ex rel. Richard Naus v. Douglas C. Rigg	Writ of certiorari	Denied
6742	Land O'Lakes Creameries, Inc. (State Intervenor) v. State of Louisiana, et al	Milk marketing barrier	Motion to intervene denied
	State ex rel. Ben E. Pederson v. Douglas C. Rigg	Writ of certiorari	Denied
6823	William P. Rogers as successor to the alien property custodian v. Stafford King, et al		Pending
	Seaboard Surety Co. v. Reither Construction Co. et al	Legal counsel for States of Arizona and Nevada—Enforcement of claims	Payment made
	United States v. Wilbert J. Tobin et al. (State of Minn.)	Priority of Liens	Pending

MINNESOTA SUPREME COURT, CIVIL

DOCKET	TITLE	ACTION	DECISION OR STATUS
	Finckbone v. Mesaba-Cliffs Mining Co.	Writ of certiorari	Discharged
	State of Minnesota v. N.W. Portland Cement Co.	Income Tax—Commerce Clause	250 Minn. 32 84 N.W. 2d 373
	Addison Miller, Inc. v. Commissioner of Taxation	Income Tax—Tax Avoidance	249 Minn. 24 81 N.W. 2d 89
	1st Natl. Bank of Mpls., Administrator of Estate of Frederick B. Wells, Jr., Decd., v. Commissioner of Taxation	Inheritance Tax Power of Appointment	250 Minn. 122 84 N.W. 2d 55
	Lyal F. Langland, Brother of Jerome K. Langland, v. State	Workmen's Compensation	Hearing Closed 10-25-59 10-9-57
6281	State v. Robert Morford Adams, et al.	Lake Bed	251 Minn. 521 89 N.W. (2d) 661
6416	State v. John Anderson et al.	Intervention—Lac qui Parle Flood	251 Minn. 401 87 N.W. (2d) 839, 928
6629	Master Barbers and Beauticians, et al. v. Eischen and Odegard	Quo Warranto	246 Minn. 559 76 N.W. (2d) 385
6659	In re Stanley Edward Dehning	Habeas Corpus	251 Minn. 120 86 N.W. (2d) 723
6686	Cyrilla Yaeger v. Delano Granite Works, et al.	Certiorari—Industrial Commission	250 Minn. 303 84 N.W. (2d) 363
6691	Doryce Mathison v. John A. Keuther dba Mille Lacs Trsp. et al.	Certiorari—Industrial Commission	250 Minn. 303 84 N.W. (2d) 363
6693	Marie Reichert v. Victory Granite Co. et al.	Certiorari	249 Minn. 407 82 N.W. (2d) 497
	Ole Volden, et al. v. George A. Selke, Commr. of the Department of Conservation, et al.	Conservation—Condemnation	251 Minn. 349 87 N.W. (2d) 696
6706	Chester P. Orth v. Shiely Petter Crushed Stone, et al.	Certiorari—Industrial Commission Order	253 Minn. 142 91 N.W. (2d) 463
6721	State ex rel. Carl E. Stout v. Douglas C. Rigg	Habeas Corpus	252 Minn. 503 90 N.W. (2d) 910
6725	State ex rel. Donald Pontius v. Douglas C. Rigg	Habeas Corpus	251 Minn. 164 86 N.W. (2d) 726
	State, by Lord v. Shirk	Condemnation	253 Minn. 291 91 N.W. (2d) 437
	Bergseth v. Zinsmaster Baking Co.	Writ of Certiorari	252 Minn. 63 89 N.W. (2d) 172
	State v. S. H. Taran	Service of Process	253 Minn. 158 91 N.W. (2d) 444
	McCree & Co. v. State	Contract Case	253 Minn. 295 91 N.W. (2d) 713

MINNESOTA SUPREME COURT—Continued

DOCKET	TITLE	ACTION	DECISION OR STATUS
	Blue Diamond Poultry Farms, Inc. v. Commissioner of Taxation	Inheritance Tax—Life Insurance	253 Minn. 265 91 N.W. (2d) 595
6728	Anchor Casualty Company v. Bongards Cooperative Creamery Assn.	Certiorari—Vacation of Order	253 Minn. 101 91 N.W. (2d) 122
6731	State v. Myhra G.M.C. Truck & Equipment Co. et al	Condemnation—Moorhead State College	254 Minn. 17 93 N.W. (2d) 204
6732	State of Minnesota v. Edgar C. Haight et al	Condemnation—Moorhead State College	
6743	Casper D. Visina v. Orville L. Freeman, et al	Port Authority Bonds—Constitutionality	252 Minn. 177 89 N.W. (2d) 635
6753	State ex rel. Al. McGinnis v. Police Civil Service Commission of Golden Valley, et al	Veterans Preference—Amici Curiae	253 Minn. 62 91 N.W. (2d) 154
6757	State ex rel. Ernest George Adams v. Douglas C. Rigg	Habeas corpus	252 Minn. 283 89 N.W. (2d) 298
	State, by Lord v. LaBarre	Condemnation	255 Minn. 309 96 N.W. (2d) 642
	Thompson v. Schraiber	Writ of Certiorari	253 Minn. 46 90 N.W. (2d) 915
	Minn. Amusement Co. v. Commissioner of Taxation	Income Tax—Deduction of Federal Taxes	Order dated Jan. 13, 1959 Remanded to Comm. of Tax.
	Reuben L. Anderson v. Commissioner of Taxation	Income Tax—Corporate Reorganization	253 Minn. 528 93 N.W. (2d) 523
	State, by Lord v. Red Wing Laundry & Dry Cleaning Co.	Condemnation	253 Minn. 570 93 N.W. (2d) 206
	Anson v. Fisher Amusement Corporation	Writ of Certiorari	254 Minn. 93 93 N.W. (2d) 815
	State, by Lord v. Pahl	Condemnation	254 Minn. 349 95 N.W. (2d) 85
	Minneapolis Gas Co. v. L. P. Zimmerman	Public Utilities Condemnation	253 Minn. 164 91 N.W. (2d) 642
	State v. George C. Phillips	Condemnation	Dismissed
	Clement K. Quinn v. Commissioner of Taxation	Income Tax—Capital Gain	Writ discharged by stipulation
6760	State ex rel. Joseph P. Redenbaugh aka E. H. Hamilton v. Douglas C. Rigg	Habeas corpus—Certiorari	255 Minn. 281 96 N.W. (2d) 555

MINNESOTA SUPREME COURT—Continued

DOCKET	TITLE	ACTION	DECISION OR STATUS
6763	State ex rel. Lester Sanford v. Douglas C. Rigg	Habeas corpus	255 Minn. 197 96 N.W. (2d) 26
	State v. Frank S. Bradok, et al.	Condemnation	Pending
	State v. Parcel 48B-LeGrand Lull, doing business as Lull Engineering Company	Condemnation	Remanded to District Court by Order of Supreme Court
	Margaret Sevcik v. Commissioner of Taxation	Inheritance Tax—Deductions	Briefs Filed
6764	Herbert M. Asch d.b.a. Myron Jewelry Co. et al. v. Housing and Redevelopment Authority of City of St. Paul, et al.	Declaratory Judgment	256 Minn. 146 97 N.W. (2d) 656
6772	Arthur Naftalin v. Stafford King	Certificate of Indebtedness	252 Minn. 381 90 N.W. (2d) 185
6777	State ex rel. Norman David Adams v. Carl J. Jackson	Habeas corpus	254 Minn. 164 94 N.W. (2d) 285
6780	State ex rel. Robert Thomas v. Douglas C. Rigg	Habeas corpus	255 Minn. 227 96 N.W. (2d) 252
	Stilwell Company v. Commissioner of Taxation	Income Tax—Dividend received credit	Briefs Filed
	Walgreen Co. v. Commissioner of Taxation	Income Tax—Apportionment	Pending
6790	State, ex rel. Nicholas J. Flynn v. Douglas C. Rigg	Habeas corpus	256 Minn. 304 98 N.W. (2d) 79
6793	State ex rel., Vernon C. O'Neill v. Douglas C. Rigg	Habeas corpus	256 Minn. 293 98 N.W. (2d) 142
6809	Jose Arthur Roybol v. Probation Dept. of the State of Minn. U. S. Marshal of Spokane, Wash., as agent	Petition for Habeas corpus	Pending
6814	State ex rel. Joseph G. Brown et al. d.b.a. Brownie's Bake Shop v. Charles W. Johnson et al.	Unfair Labor Practice—Certiorari	255 Minn. 134 96 N.W. (2d) 9
6815	State of Minn. v. Benjamin J. Jude, et al.	Condemnation St. Cloud State College Land Acquisition	Pending
6819	State ex rel. Roy G. Swords v. Douglas C. Rigg	Habeas corpus	Pending
6820	State of Minnesota ex rel. Floyd Lutz v. Douglas C. Rigg	Habeas corpus	256 Minn. 241 98 N.W. (2d) 243
6822	W. Earl Williams, H. E. Swenson v. Joseph L. Donovan	Order to Show Cause	253 Minn. 493 92 N.W. (2d) 915
6826	State ex rel. Ralph Wesley Crippen v. Douglas C. Rigg	Habeas corpus	256 Minn. 41 96 N.W. (2d) 875

MINNESOTA SUPREME COURT—Continued

DOCKET	TITLE	ACTION	DECISION OR STATUS
6828	Leonard Hohmann v. Herbert Walch	Habeas corpus	255 Minn. 165 95 N.W. (2d) 643
6832	Karels v. General Air, Inc. et al.	Constitutionality of M.S.A. 360.012 Subd. 4 (Aviation Absolute Liability Statute)	Pending
6833	State ex rel. Elmer A. Olson v. Douglas C. Rigg	Habeas corpus	Pending
	State of Minnesota v. M. & St. L. Ry. Co.	Gross Earnings Tax—Trucking Operation	Briefs Filed
	L. P. Zimmerman v. Hans N. Ojard, Jr.	Drivers License	Dismissed
	State of Minnesota v. Theodore and Beatrice Bies	Income Tax—Closing Agreement	Pending
	Park Construction Co. v. H. N. Leighton Co. and the State of Minnesota	Contract Case	Dismissed

MINNESOTA SUPREME COURT, CRIMINAL

DOCKET	TITLE	ACTION	DECISION OR STATUS
948-A	State v. Ben E. Pederson	Writ of Error	251 Minn. 372 88 N.W. (2d) 13
950-A	State v. Francis E. Warren		252 Minn. 261 89 N.W. (2d) 702
952-A	Chester Hesson v. State		Dismissed
953-A	State v. David C. James	Writ of Error	252 Minn. 243 89 N.W. (2d) 904
954-A	State v. Ernest L. Armstrong	Writ of Error	Pending
955-A	State v. Ernest Coursolle	Appeal	255 Minn. 384 97 N.W. (2d) 472
956-A	State v. Cunningham		Pending
957-A	State v. Norman David Adams	Appeal	254 Minn. 164 94 N.W. (2d) 285
958-A	State ex rel. John Williams v. County of Hennepin	Coram Nobis	256 Minn. 568 99 N.W. (2d) 450
959-A	State v. Perry James Ruffin	Petition for writ of error carnal knowledge	253 Minn. 445 92 N.W. (2d) 676
967-A	State v. John F. Beltkowski	Writ of Error	256 Minn. 220 98 N.W. (2d) 252
968-A	State v. George Martineau	Writ of Error	Pending
969-A	State v. Richard Eugene Hammond	Writ of Error Coram Nobis	256 Minn. 539 99 N.W. (2d) 452
971-A	State v. Robert B. Thomas	Coram Nobis	252 Minn. 227 96 N.W. (2d) 252
976-A	State v. Irvin Koeckeritz		Pending
977-A	State v. Thomas D. Johnson	Writ of Error	256 Minn. 337 98 N.W. (2d) 145
968-A	State v. James Mancino	Appeal	Pending
980-A	State v. Stanley W. Holtan	Appeal	Pending

MINNESOTA DISTRICT COURTS, CIVIL

DOCKET	TITLE	ACTION	DECISION OR STATUS
6699	State ex rel. Trades Publishing Co. v. Albert Lea Typographical Union No. 824	Certification—Labor Conciliator	
6700	Leo Cassidy v. Dean M. Schweickhard Comm'r of Education	Mandamus	
6701	Leo Cassidy v. Dean Schweickhard, Comm'r of Education	Declaratory Judgment	
6702	Independent School District No. 26 of Dakota County v. Harrison Cadwell, Sr.	Condemnation	
6703	Arthur H. May v. Pete Jahr and Bemidji State Teachers College	Damages	
6705	State v. Helen K. (Thayer) Conrad	Failure to carry workmen's compensation	
6707	David J. M. Park v. Howard F. Larsen (State) et al	Tax judgment	
6709	Richard J. O'Brien v. A. Whittier Day, Director of Y.C.C.	Money Judgment	
6710	Regents of University of Minnesota v. Frank Hall, et al	Condemnation—University of Minnesota	
6713	Richard W. Sandmann v. State Teachers College Board	Injunction	
6715	In the Matter of the Application of Vernon Worden, Walter Olson et al. to have vacated plat described as Crescent Park, City of Litchfield	Vacation of Plat	
6716	State ex rel. Irvin Warren vs. Douglas Rigg	Habeas corpus	
6720	Ed. Linehan, Relator v. A. E. Ramberg, Robert E. Faricy and William T. Holzinger, Industrial Commission	Certiorari	
6723	In the Matter of the Application of W. B. Stroschein	Certificate—Public Convenience and Necessity	
6724	Regents of University of Minnesota	Adverse Claims	
6726	State v. John Patzen	Compensation Insurance—Injunction	
6733	State v. Margaret L. Lazaretti	Condemnation—Employment Security	
6734	Arthur Naftalin v. Stafford King	Declaratory Judgment	
6735	State ex rel. George H. Bryant v. Douglas C. Rigg	Habeas Corpus	
6736	State ex rel. v. Douglas C. Rigg	Habeas Corpus	
6737	Edward W. Jameson v. County of Koochiching and State of Minnesota	Void Tax Sale	
6738	State ex rel. Warren Geisler v. Douglas C. Rigg	Habeas Corpus	
6739	Burr Ray v. Thomas R. Jones, Paul A. Engstrom and Howard W. Lundquist, as members of the State Board of Parole	Injunction	

MINNESOTA DISTRICT COURTS, CIVIL—Continued

DOCKET	TITLE	ACTION	DECISION OR STATUS
6740	State ex rel. Simon Jackson v. Douglas C. Rigg	Habeas Corpus	
6741	State by J. W. Clark, Commissioner of the Dept. of Business Development v. Albert E. Pederson, d.b.a. Pederson Dairy	Injunction—Dairy Industry Unfair Trade	
6744	State v. Bonnie Newman	Workmen's Compensation —Failure to carry	
6745	State v. Robert Dingman	Workmen's Compensation —Failure to carry	
6746	State by Miles Lord v. Jessie R. Britton et al	Condemnation—Brainerd Hospital	
6747	Northwestern Bell Telephone Rate Matter	Rate Increase	
6748	State ex rel. Donald Newton v. Douglas C. Rigg	Habeas Corpus	
6749	State v. Hugo L. Coleman	Workmen's Compensation —Failure to carry	
6750	In the Matter of an Investigation into the rates on sand, gravel, crushed rock, crushed stone, agricultural limestone etc.	Rate Investigation	
6752	State ex rel. Robert Farrington Pett v. Carl J. Jackson	Habeas Corpus	
6755	Paul Stone v. Public Employees Retirement Association	Money Judgment	
6756	State ex rel. Alan Harden v. Douglas Rigg, Warden	Habeas Corpus	
6758	State ex rel. Everett Welger v. Douglas C. Rigg, Warden	Habeas Corpus	
6759	Regents of the University of Minnesota v. Irma Viola Councilman et al. and Stanley J. Kinbel et al	Condemnation	
6761	State ex rel. Leo Bennett v. Douglas Rigg	Habeas Corpus	
6762	Bertelson Lumber Co. v. James S. Johnson et al. (State)	Foreclosure of Mechanics Lien	
6765	In the Matter of the Petition of the Minneapolis and St. Louis Ry. Co. to adjust and make economies in the operation of and service at several agency stations on its lines of railroad in Minnesota	Appeal from R.R. & Whse. Comm. Order	
6766	State ex rel. Paul William Collins v. Carl J. Jackson	Habeas Corpus	
6767	State ex rel. Kenneth Melvin Veblen v. Douglas C. Rigg	Habeas Corpus	
6768	State v. Alexander Richard, et al.	Condemnation Capitol Approach Area	
6769	State v. Lyle W. Cater et al.	Condemnation	

MINNESOTA DISTRICT COURTS, CIVIL—Continued

DOCKET	TITLE	ACTION	DECISION OR STATUS
6770	State v. Frederick L. Hensel, et al.	Condemnation (Highway Building Site)	
6771	State v. The Park District of the City of Bemidji, et al.	Condemnation	
6773	Chicago and Northwestern Railway v. State of Minn. Railroad and Warehouse Commission	Appeal from R.R. & Whse. Comm. Order	
6775	State v. Leonard Leroy Burridge	Coram Nobis	
6776	Cladmir, Inc. v. State	Condemnation for additional office space for offices in Ramsey County	
6778	County of Aitkin v. Wain Hill, State, et al.	Condemnation	
6779	Mary E. V. Hanks et al. v. State of Minnesota et al.	Partition of Real Estate	
6781	State by J. W. Clark v. Sigmond Kohn d.b.a. Sig's Food Fair—Supermarket	Dairy violation—Injunctive relief	
6784	State, ex rel. Robert S. Ellison v. Douglas C. Rigg	Habeas Corpus	
6785	State v. Lillian E. Fleming, et al.	Condemnation	
6786	State ex rel. James E. Burns v. Douglas C. Rigg	Habeas Corpus	
6788	State ex rel. Horace Shelby v. Douglas C. Rigg	Habeas Corpus	
6789	Standard American Life Ins. Co. v. Cyril C. Sheehan, Commissioner of Insurance	Injunction	
6791	State ex rel. Harold A. Creagan v. Douglas C. Rigg	Habeas Corpus	
6792	State ex rel. George Alvin Severson v. Douglas C. Rigg	Habeas Corpus	
6794	State ex rel. Edward Willis Johnston v. Douglas C. Rigg	Habeas Corpus	
6795	State ex rel. Lloyd Littlefield v. Douglas C. Rigg	Habeas Corpus	
6797	State v. Francisca S. Clark, et al.	Condemnation	
6798	State v. Myrtle M. Polley, et al.	Condemnation of certain lands in Winona County for enlargement of campus for Winona State College	
6799	State ex rel. Paul William Collins v. Carl J. Jackson	Habeas Corpus	
6800	Abbott E. Wolf v. Andy C. Anderson, et al. (State)	Mortgage foreclosure	
6801	Inex Fjoseide v. Harold Windingstad, Sr., et al. (State)	Partition and Accounting	
6802	State v. Clement W. Scheurer	Condemnation—Mankato State College	
6803	State v. Gerald F. Wilmes, et al.	Condemnation—Mankato State College	

MINNESOTA DISTRICT COURTS, CIVIL—Continued

DOCKET	TITLE	ACTION	DECISION OR STATUS
6804	Mora A. Mattill v. The Public Employees Retirement Board, et al. (State)	Declaratory Judgment	
6805	City of Columbia Heights v. Carl A. Dietz et al.	Condemnation—Mineral interest	
6806	State ex rel. Bruno Sydow v. Douglas C. Rigg	Habeas Corpus	
6807	County of Koochiching, by the Board of County Commissioners v. John Driher et al. (State)	Condemnation	
6808	Central Lumber Co., a corporation v. Roy E. Copeland, et al. (State)	Personal Property Tax Judgment Lien	
6810	State ex rel. Russel Jahn v. Douglas C. Rigg	Habeas Corpus	
6811	State ex rel. Robert Lee Breeding v. Miles Lord, et al.	Writ of Coram Nobis	
6812	Seaway Port Authority of Duluth		
6813	State of Minnesota ex rel. Henry Hussman v. Morris Hursh, et al.	Habeas Corpus	
6817	State v. Cedar Apartments, Inc., et al.	Condemnation	
6818	Josephine Sauro v. Public Employees Retirement Board and the Public Employees Retirement Association		
6821	William P. and Josephine A. Shutte v. Kaarlo Otava, Commissioner of Iron Range Resources and Rehabilitation, et al.		
6824	State ex rel. Fred A. Wolters, Jr. v. Douglas C. Rigg	Habeas Corpus	
6826	State ex rel. Ralph Wesley Crippen v. Douglas C. Rigg	Habeas Corpus	
6827	State ex rel. Francis Sharlow a.k.a. Francis Martineau v. Douglas Rigg	Habeas Corpus	
6829	State ex rel. Irvin G. Patton v. Douglas C. Rigg	Habeas Corpus	
6830	State ex rel. Darrell Eugene Suchla v. Douglas C. Rigg	Habeas Corpus	
6831	Hans Hanson v. Chicago Great Western Railway Co., et al.	Constitutionality of M.S.A. 303.13, Subd. 3	
6834	State ex rel. Edward K. Huisinga v. Douglas C. Rigg	Habeas Corpus	
6835	State ex rel. Orvil A. Handeland v. Douglas C. Rigg	Habeas Corpus	
	Pervin v. Commissioner of Employment Security	Employer Liability	
	In the Matter of the Determination of Employer Liability of G. F. & J. H. Varnum dba Varnum Lumber & Fuel	Employer Liability	
	State v. Sam Brown Plumbing Co., Inc.	Delinquent Employment Taxes	

MINNESOTA DISTRICT COURT, CRIMINAL

DOCKET	TITLE	ACTION	DECISION OR STATUS
949-A	State v. Lloyd Laverne Knutson	Murder—1st	
951-A	State v. Gerald P. Connelly		
960-A	State v. James O'Kasick	Murder—1st	
961-A	State v. Roy Erb	Grand Larceny—1st	
962-A	State v. Howard Norquist	Criminal Negligence	
963-A	State v. James O'Kasick		
964-A	State v. Clarence Wesley Gillespie	Writ of Error Coram Nobis	
965-A	State v. Leo A. Kampa	Writ of Error Coram Nobis	
973-A	State v. Fred W. Mussehl	Appeal	
974-A	State v. Paul La Coursiere	Coram Nobis	
975-A	State v. Herbert C. Denzer	Forgery—3rd	
979-A	State v. Le Roy Elkins	Writ of Error—Coram Nobis	

PROBATE COURT

6714	Estate of Agnes Fillion	Public Welfare Claim	
6718	Estate of Sadye Demarest	Escheated Estate	
6722	Estate of Ralph Palermo	Escheated Estate—Objection to Claim	

See also resumé of escheated estates Schedule A.

MUNICIPAL COURT—CIVIL

6704	State v. Marion Hayes d.b.a. as Sportsmen's Bar and Cafe	Failure to Carry Workmen's Compensation	
6717	State v. Holverson Company Incorporated and D. M. Holverson	Workmen's Compensation Failure to carry	
6796	State v. Robert H. and Eloise M. Burrill	Unlawful Detainer	

CIVIL AERONAUTICS BOARD

Duluth-Chicago Service Investigation Case

Suspension of Northwest Airlines at Duluth and authorization for North Central Airlines for a permanent certificate to serve between Minneapolis and Duluth and also Duluth-Chicago nonstop. This case was so decided. (7122)

Quad Cities-Twin Cities Case

North Central Airlines and Ozark Air Lines applied for new service between the Twin Cities and the Quad Cities of Rockford, Moline, East Moline and Davenport. The state supported North Central's application. Final decision of the Board granted the route to Ozark Air Lines. (7192)

Seven States Area Investigation Case

This case had been in progress since 1955 and dealt with local service to several cities in Minnesota. Worthington, Mankato, Fairmont and Austin/Albert Lea all received new scheduled service as a result of this case. (7454)

Great Lakes-Southeast Case

Application of the majority of trunk carriers for service from the Great Lakes area to Miami. Because of the benefit to Minnesota the state supported Northwest's application. Northwest Airlines granted the authority advocated by the state. (2396)

Chicago-Milwaukee-Twin Cities Case

There were two major issues in this case: (1) additional carriers serving between Chicago and the Twin Cities; and (2) nonstop service between the Twin Cities and Miami. Delta Air Lines, Inc., Eastern Air Lines, Inc., Western Air Lines, Inc., Northwest Airlines, Inc., Capital Airlines, Inc., North Central Airlines, Inc., and United Air Lines, Inc., all had made application under this docket. The state took no position on the question of additional Chicago-Twin Cities service, but stressed the need for nonstop Twin Cities-Miami service. The Board decided that Eastern Air Lines and Capital Airlines in addition to Northwest Airlines should service the Chicago-Minneapolis market and authorized Northwest the service requested by the state to Miami. (3207)

Pacific Northwest-Hawaii Renewal Case

Renewal of Northwest's certificate for service to Hawaii. The state has taken the position of favoring renewal and permanent certification. Pending—determination expected in 1959. (8960)

North Central's Renewal of Temporary Certificate Case

Continuance of service at Thief River Falls, Bemidji, Brainerd, and Winona. The state has intervened and taken the position of favoring renewal at all points. Pending—determination expected in 1959. (9848)

FEDERAL POWER COMMISSION

DOCKET	TITLE	ACTION
6711	Federal Power Commission Natural Gas Matter	Certificate—Public Convenience and Necessity
6729	Northern Natural Gas Sixth Rate Increase	Rate Increase
6730	In Re. Phillips Petroleum Company	Rate Increase
6782	Northern Natural Gas Seventh Rate Increase	Rate Increase

Staff Activities by State Departments

CONSERVATION DEPARTMENT

District Court Activity

Car confiscations	11
Condemnations	17
Conversion of state property	1
Deer shining and wild rice violation (assisting county attorneys)	5
Illegal fill and drainage of lakes—drainage matters	6
Land registrations and quiet title actions	29
Legality of establishing game refuge	1
Non-payment of leased land	1
Rough fish contract	1
Timber trespass	1

HIGHWAY DEPARTMENT

District Court — Condemnation

Petitions filed	481
Hearings attended	464
Reports of commissioners filed	496
Proceedings pending	193
Appeals pending July 1, 1956	150
Appeals settled out of court	868
Appeals tried by a jury	187
Appeals dismissed	118
Appeals pending June 30, 1956	373

1182 workmen's compensation cases	7 contested 6 settled 1 pending
Drainage ditch assessments	93 new cases 89 closed 62 pending
Employees injured through negligence other than by fellow employees	6 cases — $8,011 recovered 12 cases pending
Damage to bridges, guard rails and other Highway Department property	208 cases — $35,738 recovered 86 cases pending
Contracts examined and approved as to form and legality	809 construction contracts 87 maintenance contracts

Period covered — biennium July 1, 1956 — June 30, 1958

TAXATION DEPARTMENT

District Court Activity

	Actions Commenced	Judgments Taken
July 1, 1957 — January 1, 1958	1,058	444*
January to June 1958	1,918	106
July to December 1958	582	52

*Some of the judgments taken were on actions commenced prior to this biennium.

Many of the accounts were settled, making the taking of judgment unnecessary.

	Issues Joined	Favorable Decision	Adverse Decision	Pending	Settled by Abatement or Payment
District Court	181	18	4	104	55
Probate Court	7	1	2	3	1*
Board of Tax Appeals	121	17	6	41	57

*Dismissed

Income Tax Collections — See Schedule B.

LEGAL ACTIVITIES

Schedule A

Abandoned Bank Deposits
73 actions commenced in Ramsey County District Court—escheat to state $83,609.21
15 refunds made through Executive Council 4,789.35

Total resulting escheat $78,819.86

Charitable Trusts—District Court (contested cases)

Park Doughtery, Trustee v. Hormel, et al.
Austin Community Chest Endowment Fund—Judgment for petitioner

Anne Watkins Wilder Trust—Trust construed and terminated after hearing

William Hood Dunwoody Industrial Institute Trust—Trust construed after hearing

Minnesota Annual Conference of Methodist Church and Brandvold, Ring, et al. (construction of trust) settled

Duluth lighthouse for the Blind Trust—construed after hearing—pending

Claims—Before Claims Commission 129

Escheated Estates—30 actions in Probate Court $49,790.36

		County	Amount Escheated
1957 —	James Smith	Ramsey	$ 211.89
	Lawrence Wright	Ramsey	329.75
	John J. Lynch	Hennepin	369.32
	Helen I. Connoy	Hennepin	710.42
	Sophia Larson	Todd	7,842.28
	Mary W. Peterson	Ramsey	2,277.29
	James McNally	Carver	77.85
	Peter F. Hagen	St. Louis	3,357.27
	Carl A. Johnson	Koochiching	437.63
	Charles M. Shannon	Hennepin	1,289.34
	Nellie Wathington	Ramsey	2,446.85
	Maxede Greshkevick	Hennepin	1,666.15
	Ethel Vaughan	Hennepin	1,202.36
	Ralph Palmero	Ramsey	504.84
	(Claim of $1,896.77 reduced to $400)		
			$22,723.24
1958 —	George Dugitski	Stearns	391.67
	Chester Kulik	Hennepin	16,595.26
	James G. Gospodinoff	Dakota	1,367.50
	Nels Christenson	Nicollet	1,289.07
	Dorothy A. Bagnell	Ramsey	5,334.80
	Peter Pronz	Hennepin	5,585.18
	(Funeral bill of $1,970 reduced to $1,370)		
	Frank J. Lloyd	Sherburne	632.35
	Albert Johnson	Hennepin	816.00
	Matt Tamoschowski	Hennepin	2,777.28
	Charles F. Montague	Hennepin	3,817.18
	Vincent Ronizke	Lake	365.10
	Frank Miller	Hennepin	3,477.01
	Alexander Opshusala	Hennepin	6,984.53
	John Martin	Dakota	1,715.71
	Edwin William Smith	Hennepin	873.46
	William E. Daniels	Hennepin	826.54
			$52,848.64
Refunds — heirs found			
	Sadye Demarest	Hennepin	$ 9,186.26
	Chester Kulik	Hennepin	16,595.26
			$25,781.52

Fire Marshal Condemnations 29

Land Registration and Quiet Title Actions 680

Schedule B

SUMMARY OF INCOME TAX COLLECTION ACCOUNTS

	Fiscal Year July 1, 1957 to July 1, 1958				Fiscal Year July 1, 1958 to July 1, 1959			
Balance of accounts to July 1	35,862		$2,493,934.87		47,343		$3,305,431.96	
OPEN ACCOUNTS								
Accounts certified	30,502		1,861,208.48		33,237		2,697,176.68	
Additions			95,933.68				106,768.41	
Collected and adjusted		15,259		$997,334.76		17,504		$1,221,370.80
Abated						231		70,386.80
Charge-offs—uncollectibles		3,522		115,365.81		4,155		118,082.37
Transferred to judgments		550		60,640.07		140		25,437.35
Inventory of open accounts	47,033		3,277,736.39		58,550		4,674,099.73	
JUDGMENT ACCOUNTS								
Transferred from open accounts	550		60,640.07		140		25,437.35	
Costs, fees, interest, additionals			4,416.47				24,761.54	
Collected and adjusted		116		15,784.71		62		128,825.61
Charge-offs—uncollectibles		123		10,461.92		37		2,287.11
Balance of accounts to July 1	47,344		$3,316,546.30		58,591		$4,593,185.90	
B.T.A. ACCOUNTS								
Certified	21		$ 31,763.62		18		$ 102,833.79	
Additions			2,458.24				4,573.66	
Collected and adjusted		22		$ 45,336.20		14		$102,677.73
Balance of accounts to July 1	47,343		$3,305,431.96		58,595		$4,597,915.62	

TABLE
OF
STATUTES

CONSTITUTION OF MINNESOTA

LAWS OF MINNESOTA

MINNESOTA STATUTES 1957

MINNESOTA STATUTES 1957—Continued

MINNESOTA STATUTES 1957—Continued

MINNESOTA STATUTES 1957—Continued

TABLE NO. 1

PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1957—1958

COUNTY AND COUNTY ATTORNEY	IN DISTRICT COURT								IN MUNICIPAL AND JUSTICE COURTS							
	Pleaded Guilty		Found Guilty		Acquitted		Dismissed		Pleaded Guilty		Found Guilty		Acquitted		Dismissed	
	1957	1958	1957	1958	1957	1958	1957	1958	1957	1958	1957	1958	1957	1958	1957	1958
Aitkin—Thomas B. Cline	6	11	.....	.....	1	.....	14	4	565	481	10	12	4	.....	31	52
Anoka—Robert W. Johnson	8	*	.....	*	.....	*	3	*	288	*	146	*	1	.....	22	*
Becker—Robert W. Irvine	28	25	2	.....	.....	1	9	9	783	862	13	7	.....	.....	20	8
Beltrami—Herbert Olson	26	*	5	*	1	*	.....	*	763	*	9	*	.....	.....	11	*
Benton—J. Arthur Bensen	12	2	.....	.....	1	.....	.....	.....	85	78	15	5	.....	.....	30	25
Big Stone—R. D. Schreiner	2	1	.....	5	.....	.....	1	.....	94	261	1	4	.....	.....	.....	16
Blue Earth—Charles C. Johnson	27	25	.....	.....	.....	.....	.....	1	1919	2126	22	29	5	4	19	26
Brown—Robert J. Berens	24	30	.....	1	.....	1	5	4	385	445	4	20	.....	2	10	21
Carlton—Thomas M. Bambery	35	19	1	4	.....	.....	5	6	722	1025	9	25	1	.....	11	9
Carver—Martin O. Stahlke	.....	.....	.....	.....	.....	.....	.....	2	312	367	1	2	.....	.....	1	4
Cass—Edward L. Rogers	13	33	1	6	2	3	7	9	135	222	76	17	.....	2	.....	4
Chippewa—W. D. Prindle	6	14	10	6	.....	.....	3	1	.....	135	135	2	3	.....	1	11
Chisago—Howard F. Johnson	5	8	.....	.....	.....	1	2	.....	446	334	11	8	1	1	3	13
Clay—Vance N. Thysell	30	37	1	.....	.....	1	1	1	993	563	13	15	2	2	27	6
Clearwater—Aurel L. Ekvall	7	11	.....	1	1	.....	.....	4	431	498	.....	.....	.....	.....	2	6
Cook—J. Henry Eliasen	3	6	2	.....	1	1	.....	.....	362	367	3	5	.....	.....	5	6
Cottonwood—Walter H. Mann	10	2	.....	.....	.....	.....	.....	1	363	332	8	23	3	2	6	.....
Crow Wing—Carl E. Erickson	24	38	3	1	1	.....	5	7	909	600	16	24	3	7	29	24
Dakota—R. C. Nelsen	28	38	1	2	.....	4	9	6	1405	992	46	33	4	9	13	15
Dodge—Bruce A. Erickson	7	13	1	1	.....	.....	1	1	333	334	.....	.....	2	2	4	3
Douglas—John J. McCarten	5	7	2	1	.....	1	13	5	521	529	137	140	2	8	10	11
Faribault—Ralph C. Streater	20	11	.....	.....	.....	1	.....	3	282	264	.....	.....	.....	.....	6	3
Fillmore—J. F. Herrick	8	4	.....	1	.....	.....	3	2	357	260	3	11	3	3	1	3
Freeborn—Russell Olson	23	20	5	3	2	.....	8	3	1240	1293	28	20	8	8	16	22
Goodhue—Francis H. Watson	45	47	2	1	1	2	1	3	767	804	30	20	5	2	5	12
Grant—I. L. Swanson	8	.....	.....	.....	.....	.....	.....	.....	.....	18	.....	.....	.....	.....	.....	.....
Hennepin—George M. Scott	580	781	27	44	15	14	36	71	3082	2593	88	103	13	24	130	120
Houston—L. L. Roerkohl	11	9	.....	.....	.....	.....	.....	2	522	349	7	7	.....	1	.....	.....
Hubbard—James A. Wilson	16	11	.....	.....	.....	.....	1	4	417	362	.....	.....	1	.....	2	7
Isanti—Robert S. Parker	1	4	.....	.....	.....	.....	.....	.....	323	389	6	11	1	.....	5	4
Itasca—Ben Grussendorf	43	45	.....	1	1	.....	1	1	940	849	.....	.....	.....	.....	.....	.....
Jackson—Harvey A. Holtan	10	11	.....	.....	.....	.....	.....	3	128	82	.....	2	1	.....	3	1
Kanabec—Robert W. Nyquist	3	*	.....	*	.....	*	.....	*	342	*	.....	*	1	*	5	*
Kandiyohi—V. W. Lundquist	6	11	.....	.....	.....	.....	.....	.....	322	412	6	1	2	.....	15	18
Kittson—Lyman A. Brink	.....	1	1	.....	.....	.....	.....	.....	379	279	3	1	.....	.....	7	5
Koochiching—L. P. Blomholm	27	*	1	*	.....	*	.....	*	387	*	.....	*	3	*	3	*

Lac qui Parle—Wallace Jackson	*	7	*		*		*		*	197	*		*	3	*			
Lake—Emmett Jones	9	12					2		549	431					1	1		
Lake of the Woods—W. B. Sherwood	4	2		2			2		137	132					11			
Le Sueur—William L. Heinen	8	9				2			318	532	7	22	2	4		3		
Lincoln—Durward L. Pederson	2	5							80	111	1							
Lyon—C. J. Donnelly	17	18	1	3			3	2	505		3				1			
McLeod—Arnold W. Beneke		*	1	*		*	1	*	458	*		*		*		*		
Mahnomen—A. J. Powers	13	*		*	1	*	2	*	332	*	11	*	4	*	1	*		
Marshall—Warren A. Saetre	10	15	1						552	536			2	2				
Martin—Arthur T. Edman	17	18		2		1		2	575	696	4	5	1		2	1		
Meeker—Leland A. Olson	7	6							394	480								
Mille Lacs—John S. Nyquist, Jr.	3	*		*		*		*	788	*	1	*		*	29	*		
Morrison—Attell P. Felix	13	13	3	3	1		6	1	1380	1314	8	3			21	4		
Mower—Wallace C. Sieh	16	38	1	3	2	1	5	6	704	890	45	68	10	21	16	25		
Murray—John D. Holt	1	4					1		149	332		1	1	1		4		
Nicollet—Malcolm K. MacKenzie	9	2						1	242	399	4	6	1	1		2		
Nobles—Raymond E. Mork	7	13							437	521	6	5			18	11		
Norman—O. E. Austinson		7					1		230	278						2		
Olmsted—D. P. Mattson	42	43		2		1	3	6	1816	2945	58	60	13	9	61	99		
Otter Tail—Owen V. Thompson	20	14					1	5	592	715	1				7	9		
Pennington—L. W. Rulien	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*		
Pine—V. L. Vanstrom	7	13		1	1	2	1	3	1134	847	1							
Pipestone—J. H. Manion	3	*		*		*		*		*		*		*		*		
Polk—F. H. Stadsvold	16	17		1	1		2	4	110	98	5	12	5	4	13	21		
Pope—Howard N. Groven					1			2	281	611	3			1	4	3		
Ramsey—James F. Lynch	232	236	9	14	3	8	5	7	2387	2247	101	151	12	14	20	41		
Red Lake—Chas. E. Boughton, Jr.	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*		
Redwood—Bob B. Ebbesen	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*		
Renville—Russell L. Frazee	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*		
Rice—Urban L. Steimann	19	10					1	5	679	895	48	53	8	10	19	17		
Rock—Mort B. Skewes	6	9							244	247	3	9			1	2		
Roseau—Bert Hanson	4	10						4	262	232								
St. Louis—Thomas J. Naylor	201	180	10	8	6	3	18	27	937	1174	52	25	3	1	33	52		
Scott—M. J. Daly	1				1		21		315	265	2							
Sherburne—John E. MacGibbon	15	*		*	1	*	1	*	443	*	15	*	5	*		*		
Sibley—R. G. Williamson		3		1					211	287	6	12			13	13		
Stearns—David T. Shay	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*		
Steele—Loren Barta	6	12						1	1242	1374	24	29	7	14	19	44		
Stevens—Thomas J. Stahler	2	2	1						224	330	23	33	8	6	13	19		
Swift—Roy W. Holmquist	16	*		*		*	2	*	403	*	5	*	1	*	1	*		
Todd—Frank L. King	16	20	6	3	8			1	254	371	16	25	1	1				
Traverse—Keith C. Davison	2	5							212	323		9			1			
Wabasha—Martin J. Healy	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*		
Wadena—Hugh G. Parker	5	2					1	2	542	599	22	17	1	6				
Waseca—Einer C. Iversen	6	9			1				559	690	31	10		11	2	12		

*No report received.

TABLE NO. 1

PROSECUTIONS REPORTED BY COUNTY ATTORNEYS FOR 1957—1958

COUNTY AND COUNTY ATTORNEY	IN DISTRICT COURT								IN MUNICIPAL AND JUSTICE COURTS							
	Pleaded Guilty		Found Guilty		Acquitted		Dismissed		Pleaded Guilty		Found Guilty		Acquitted		Dismissed	
	1957	1958	1957	1958	1957	1958	1957	1958	1957	1958	1957	1958	1957	1958	1957	1958
Washington—Wm. T. Johnson	18	*	.....	*	.....	*	4	*	939	*	68	*	3	*	43	*
Watonwan—Paul V. Fling	7	4	.....	.....	.....	1	.....	1	229	164	.....	.....	.....	.....	.....	.....
Wilkin—F. J. Clemmensen	2	4	1	2	.....	.....	.....	.....	270	257	.....	9	.....	.....	.....	.....
Winona—S. A. Sawyer	24	16	.....	.....	1	.....	4	3	1107	4432	2	.....	1	.....	18	25
Wright—Walter S. Johnson	15	.....	.....	.....	.....	.....	1	.....	351	564	2	.....	.....	1	1	3
Yellow Medicine—R. M. Baker	13	*	2	*	.....	*	.....	*	56	*	6	*	.....	*	.....	*
Totals	1941	2053	101	123	55	50	216	236	44931	45021	1430	1111	158	187	822	868

*No report received.

TABLE 2

DISPOSITION OF CASES REPORTED BY COUNTY ATTORNEYS FOR YEARS 1957 AND 1958.

NATURE OF ACCUSATION	DISTRICT—MUNICIPAL—JUSTICE COURTS							
	Pleaded Guilty		Found Guilty		Acquitted		Dismissed	
	1957	1958	1957	1958	1957	1958	1957	1958
I. Crimes Against the Person (Ch. 619)								
Murder—1st degree	.....	1	.....	.....	.....	.....	.....	.....
2nd degree	2	1	1	.....	.....	1	.....	.....
3rd degree	5	1	1	2	2	.....	.....	.....
Manslaughter—1st degree	3	2	1	3	1	.....	.....	.....
2nd degree	2	3	.....	.....	.....	1	.....	.....
Assault—1st degree	17	16	2	6	.....	.....	12	9
2nd degree	29	38	2	5	1	6	14	13
3rd degree	267	211	50	32	9	7	51	46
Robbery—1st degree	46	54	5	4	2	.....	4	4
2nd degree	21	26	.....	.....	.....	.....	.....	2
3rd degree	6	29	1	2	.....	.....	3	5
Kidnaping	2	1	.....	.....	.....	.....	1	.....
Slander	1	.....	.....	.....	.....	.....	.....	2
*Miscellaneous	8	3	1	1	.....	.....	.....	.....
II. Crimes Against Morality, etc. (Ch. 617)								
(a) Sex Crimes, Indecency, etc.								
Rape	2	6	1	.....	.....	3	1	4
Carnal knowledge—								
Female under 10	22	.....	.....	.....	2	.....	1	.....
Female 10 to 13	6	8	1	1	.....	.....	3	2
Female 14 to 17	57	54	3	2	2	.....	9	9
Indecent assault	57	48	3	3	2	3	5	15
Adultery	.....	.....	.....	.....	.....	.....	5	3
Abortion	7	3	.....	1	.....	.....	1	.....
Bigamy	3	4	.....	.....	.....	.....	.....	1
Fornication	7	4	1	.....	.....	.....	1	.....
Incest	5	3	.....	.....	.....	1	.....	4
Sodomy	15	6	1	.....	.....	.....	1	1
House of ill fame	.....	1	.....	.....	.....	.....	.....	.....
Indecent exposure	33	27	4	2	.....	1	2	1
Abduction	4	3	.....	.....	.....	.....	2	.....
Miscellaneous	13	29	.....	1	.....	.....	1	.....
(b) Crimes against Children, etc.								
Paternity, illegitimate child (Ch. 257)	286	255	22	12	6	9	51	37
Absconding to evade paternity proceedings	.....	.....	.....	.....	.....	.....	.....	.....
Abandonment, wife or child	85	60	3	3	3	.....	48	56
Non-support, wife or child	245	239	49	35	9	7	50	64
Neglect of minor	2	1	.....	.....	.....	.....	.....	.....
Contributing to minor's delinquency	62	97	14	4	2	.....	11	5
Cruelty to child	.....	.....	.....	.....	.....	.....	.....	.....
*Miscellaneous	65	213	9	21	1	3	2	33
(c) Miscellaneous Crimes against Morality, etc.								
Public dance laws, violations	1	1	.....	.....	.....	.....	1	.....
Gambling and lottery laws, violations	6	1	.....	.....	.....	.....	.....	.....
III. Crimes Against Property (Ch. 620-622)								
Arson—1st degree	4	5	.....	2	.....	.....	.....	.....
2nd degree	3	5	.....	.....	.....	.....	.....	.....
3rd degree	5	3	1	.....	.....	.....	1	1
4th degree	1	.....	.....	.....	.....	.....	.....	.....
Burglary—1st degree	5	4	.....	1	.....	.....	.....	1
2nd degree	7	3	.....	.....	1	.....	.....	.....
3rd degree	219	254	14	12	4	1	12	22
Unlawful entry	51	18	4	.....	.....	.....	4	2
Forgery—1st degree	.....	1	1	.....	1	.....	1	.....
2nd degree	147	130	4	1	.....	.....	11	11
3rd degree	10	8	3	.....	.....	.....	.....	3

TABLE NO. 2

DISPOSITION OF CASES REPORTED BY COUNTY ATTORNEYS FOR YEARS 1957 AND 1958.

NATURE OF ACCUSATION	DISTRICT—MUNICIPAL—JUSTICE COURTS							
	Pleaded Guilty		Found Guilty		Acquitted		Dismissed	
	1957	1958	1957	1958	1957	1958	1957	1958
Larceny, grand—1st degree	91	60	4	1	2	3	16	15
2nd degree	206	236	14	6	8	3	24	37
Larceny, petit	705	686	43	24	6	3	40	44
Giving check without funds	548	602	47	7	1	4	97	124
Receiving stolen property	19	31	1	.....	.....	1	2	6
Mortgaged chattels, sale, removal, etc.	25	24	1	2	2	.....	20	13
Malicious mischief	101	102	13	1	4	1	7	6
Extortion	1	1	.....	.....	.....	.....	.....	.....
Trespass	23	27	1	4	1	.....	4	7
Fraud	14	12	3	1	.....	.....	2	7
Fraud on inkeeper (Ch. 327)	11	8	1	.....	1	.....	4	.....
*Miscellaneous	72	98	3	5	2	2	10	16
IV. Crimes Against Sovereignty (Ch. 612), **Public Justice** (Ch. 613), **Safety** (Ch. 616), **Peace** (Ch. 615), **etc.**								
Bribery (giving or receiving)	.....	1	.....	.....	.....	.....	.....	2
Perjury	4	6	.....	.....	.....	.....	.....	.....
Resisting or interfering with officer	90	73	11	8	1	1	3	2
Concealed weapons, carrying, etc.	50	16	.....	1	.....	2	3	1
Language provocative of assault	18	9	9	1	1	.....	1	2
Contempt of court	24	34	13	.....	.....	.....	5	1
Escape	37	21	.....	1	.....	.....	.....	.....
Breach of peace	53	63	4	1	.....	.....	2	2
Disorderly conduct	391	349	17	29	5	2	8	17
Public Nuisance	126	130	3	2	1	.....	3	1
*Miscellaneous	112	86	6	8	3	2	5	1
V. Miscellaneous Crimes (and various special statutes)								
Cruelty to animals (Ch. 614)	2	3	.....	1	.....	.....	1	.....
Vagrancy	58	47	1	.....	.....	.....	1	.....
Violations of laws re:								
Compulsory education	12	14	3	1	1	.....	1	3
Forestry	6	15	.....	.....	.....	.....	.....	.....
Wild animals (game and fish) (Chaps. 97-102)	1997	1808	54	14	3	8	38	16
Health	25	17	8	2	.....	.....	2	2
Food	5	17	6	.....	.....	.....	.....	1
Motor vehicles—License	3495	2772	71	63	14	13	91	102
Traffic	31077	33205	764	744	83	110	258	202
Tampering	17	31	1	.....	1	.....	1	1
Intoxicated driver	2105	1694	115	73	6	19	25	37
Criminal negligence causing death	17	18	2	4	4	2	.....	.....
Unauthorized use	263	237	9	8	1	2	8	18
Drunkenness	1901	1399	64	29	2	3	12	20
Intoxicating liquor	420	353	14	16	3	4	13	14
Non-intoxicating liquor	530	512	11	14	4	1	13	18
Narcotics	11	12	.....	2	1	1	.....	.....
Aeronautics	6	2	.....	.....	.....	.....	.....	.....
Gax tax	60	59	.....	.....	.....	.....	.....	.....
Abatements	.....	.....	.....	.....	.....	.....	.....	.....
Confiscations	1	4	.....	.....	.....	.....	6	1
Miscellaneous	299	300	12	5	4	7	3	9
TOTALS	46872	47074	1531	1234	213	237	1038	1104

SELECTED OPINIONS

AGRICULTURE

1

Sales made by vendor of seeds to state or any department or agency thereof are subject to stamp and tag requirements.

Commissioner of Agriculture.

July 9, 1958. 833-f

2

Insect Pest Control—Expenditure from general revenue not limited by Section 18.14, Subd. 2—expenditures can be made for work outside geographical limits of governmental unit if necessary. No authority for interstate agreements.

Facts

"In the Attorney General's opinion dated May 13, 1957, concerning the expenditure of general funds by the City of Canby for the purposes of mosquito control, he indicated that general revenue funds could legally be expended for such purposes under M.S.A. 18.14, but not under M.S.A. 18.31-18.43. M.S.A. 18.14 in Subdivision 2, provides for a special tax not to exceed 50c per capita."

Question

"If a governmental unit wishes to use general revenue funds for mosquito control, is the governmental unit limited to a total expenditure equal to 50c per capita?"

Opinion

The opinion of May 13, 1957 held that general revenue funds may be expended under M. S. 18.14. Said opinion cited O. A. G. 933-p, which ruled that general revenue funds could not be used to finance mosquito abatement under M. S. 18.31 through 18.43.

The provision in Section 18.14, Subd. 2, as follows:

"In order to defray the cost of such activities, the governing body of any such political subdivision may levy a special tax of not to exceed two mills in any year in excess of charter or statutory millage limitations, but not in any event more than 50 cents per capita, and may make such a levy, where necessary, separate from the general levy and at any time of the year." (Emphasis supplied)

is not a limitation upon the municipality as to the expenditure of money from the general revenue fund but is a limitation upon the amount of the tax levy. Your first question is answered in the negative.

Facts

"Mosquito **larvae** live only in free water such as in swamps, potholes, etc. **Adult** mosquitoes emerging from such sources can migrate for some distance and become a nuisance within cities and villages and thus nullify **adult** mosquito control efforts within city or village limits. Municipal mosquito control in Minnesota for the most part involves the application of insecticides to vegetation in home yards in order to kill **adult** mosquitoes in their resting places. The commissioner of agriculture, dairy and food, as provided for in M.S.A. 18.14, Subdivision 1, makes recommendations for mosquito control to municipalities. Such recommendations always specify that control of mosquito larvae shall be practiced on breeding areas without the municipal limits."

Question

"Can governmental units (cities and villages) practice **larval** mosquito control outside the unit limits if so directed by the commissioner of agriculture, dairy and food?"

Opinion

M.S. 18.14, Subd. 1, provides:

"When recommended so to do by the commissioner of agriculture, dairy, and food, the governing body of any county, city, village, borough, or town of this state is hereby authorized and empowered to appropriate money for the control of insect pests, plant diseases, bee diseases, or rodents. Such **money** shall be **expended according to** technical and expert **opinions and plans** as shall be **designated by the commissioner** and the **work** shall be carried on **under** the **direction** of the commissioner." (Emphasis supplied)

If the governing body of a governmental unit acting in its legislative capacity, using the technical and expert opinions and plans designated by the commissioner of agriculture in carrying on work under his direction, determines that money should be expended for larval control outside the geographical limits of the municipality because this is vital to the control of insect pests and pursuant to M.S. 18.14, money can be so expended. The expenditure, of course, is for control of insect pests in the governmental unit but money is spent on work outside the area as the only practical way to control these pests inside the area. The above involves the expenditure of money. It is suggested that such activity be part of a joint exercise of powers agreement pursuant to M.S. 471.59.

Facts

"The municipalities of Moorhead and Dilworth, Minnesota, and Fargo and Southwest Fargo in North Dakota, are exploring the possibility of a joint mosquito control program. These municipalities are more or less contiguous, but divided by the Red River. Emphasis probably will be on **larval** control; therefore, it may be necessary to

control breeding some four to five miles beyond the limits of Moorhead and Dilworth."

Question

"Can the Minnesota municipalities indicated above enter into an agreement with the North Dakota municipalities in order to operate a joint program of mosquito control? Can funds of various municipalities be pooled for the purposes of mosquito control?"

Opinion

While M.S. 471.59 provides an adequate authority for a joint agreement between governmental units which include "every city, village, borough, county, town, and school district, and other political subdivision", it does not provide authority for joint agreements with governmental units outside the State of Minnesota. Your third question is answered in the negative.

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.,
Spec. Asst. Attorney General.

Commissioner of Agriculture.

August 18, 1958. 933-p

BANKS AND BANKING

3

Operation of a check cashing business does not constitute banking or the operation of a bank.

Facts

In your letter to the Attorney General requesting an opinion, you have attached certain correspondence which details the operation of the University Check Cashing Bureau, located in Minneapolis, Minnesota. That operation is described by the attached memorandum of the Federal Reserve Bank of Minneapolis as follows:

"The business conducted by the bureau is known to include check cashing, issuing money orders drawn on the bureau's account at Fidelity State Bank, accepting payments of utility bills, taking applications for automobile licenses, and furnishing notary public services. Scheduled fees are charged for all services. We have no informa-

tion that the bureau accepts deposits or transacts other business for Fidelity State Bank.

"* * *

"For the six months' period preceding March 29, 1957, bureau gross earnings were $5,858.06, of which $4,289.10 was check cashing fees; $1,020.65 was money order fees; $273.66 was utility bill fees; and $188.00 auto license fees. Expenses for that six months' period totaled $2,516.38, and principal expense items were office expenses $715.80; bank charges (including exchange on nonpar checks) $665.35; rent $350.00; interest $340.00; and insurance $301.73."

Question

"Whether the above described operation constitutes the business of banking."

Opinion

We turn first to the applicable Minnesota Statutes:

"47.01, Subd. 2. A bank is a corporation under public control, having a place of business where credits are opened by the deposit or collection of money and currency, subject to be paid or remitted upon draft, check, or order, **and where money is advanced, loaned on** stocks, bonds, bullion, **bills of exchange,** and promissory notes, and where the same are received for discount or sale; and all persons and copartnerships, respectively, so operating, **are bankers."**

"47.02. A 'bank' is a corporation having a place of business in this state, where credits are opened by the deposit of money or currency, or the collection of the same, subject to be paid or remitted on draft, check, or order; **and where money is loaned or advanced on** stocks, bonds, bullion, **bills of exchange,** or promissory notes, and where the same are received for discount or sale. * * * Every 'bank' or 'savings bank' in this state shall at all times be under the supervision and subject to the control of the commissioner of banks, and when so conducted the business shall be known as 'Banking.' "

Assuming that check cashing comes within the meaning of the underlined portions of statutes above quoted, but see **State v. Currency Service,** 358 Mo. 983, 218 S.W. 2d 600, nevertheless check cashing would only be a part of one operation in several operations which constitute banking. The form of both of the above quoted statutes is conjunctive, but the conjunctive form did not control its meaning in O.A.G. 29-a, May 8, 1951, which found that a retailer accepting payments, paying interest on them, and permitting withdrawal of cash was engaged in a banking business although such retailer was not also engaged in the other banking functions described in the statutes above quoted. While that opinion regarded the deposit function alone as sufficient to describe the retailers' operation as banking, we do not believe that the check cashing business is so nearly

peculiar to the operation of a bank, and therefore the check cashing business alone cannot be said to constitute the business of banking.

The check cashing business is undoubtedly effected with the public interest and Currency Exchange Acts, regulating persons engaged in the check cashing and money order business, have been enacted by Illinois and Wisconsin and perhaps some other states. On the constitutionality of such acts, see **Gadlin v. Auditor of Public Accounts**, 414 Ill. 89, 110 N.E. 2nd 234. Since, however, your question is not whether the check cashing business can be regulated but whether it is regulated under existing law, the following statement of that Court distinguishing this type of business from the business of banking is of particular interest here:

> "There is a distinct difference between currency exchanges on the one hand and banks on the other. They are members of different classes of financial institutions." 110 N. E. 2nd 234 at 238.

In this opinion we have assumed that check cashing is included in the loan or advance of money on bills of exchange, i. e. the purchase of bills of exchange. Even on that assumption we hold that the check cashing business does not alone constitute the business of banking. For a decision that the issuance of money orders, i. e. the sale of bills of exchange, does not alone constitute the business of banking, see **State v. Currency Services**, 358 Mo. 983, 218 S. W. 2d 600.

Your question is, therefore, answered in the negative.

MILES LORD,
Attorney General

HAROLD J. SODERBERG,
Spec. Asst. Attorney General

Commissioner of Banks.

June 27, 1957. 29a-5

4

Real estate purchased by a bank under Sec. 48.21 (1) must be "such as shall be necessary for the convenient transaction of its business". This requires an administrative determination by the Commissioner of Banks.

Facts

"On June 14, 1956 the State Banking Department granted its approval for the above bank to invest not to exceed $58,000 for the construction of a new bank building. This cost was to include $8,000 for

a lot on which was an old hotel building which, we were informed, was to be torn down. This letter of approval contained the following paragraph:

"By referring to Sec. 48.21 M. S. A. you will find that our banking statutes prohibit a bank from investing funds to improve real estate other than banking premises, and accordingly your proposal to improve the hotel building will have to be worked out in some other manner and along the lines which were discussed at our office during a recent meeting with your President, Mr. Hubmer."

"* * *

"The reasons for reminding the bank of this statutory provision were as follows:

"5-18-56 Letter from bank mentioned the desirability of developing old hotel property into apartments for school teachers.

"6-5-56 Memorandum from Chas. F. Alden notes that in a conference with President G. H. Hubmer the latter stated that his Board planned on changing plan to tear down hotel and move it to the rear part of the lot (some distance away from the bank building) and remodel it into apartments to produce income.

"6-7-56 Letter from G. H. Hubmer suggested that it was almost a must for bank to improve hotel for appearance and background.

"We also had other indications of the intentions of the bank in this respect.

"The Examiners for the Federal Deposit Insurance Corporation examined this bank as of the close of business February 23, 1957 and in analyzing the investment of $48,471.14 in Banking House discovered that $18,364.17 of this amount represented an investment to remodel old hotel into apartments. We were contacted by the Federal Deposit Insurance Corporation as to the legality of this portion of the investment, and we informed them of our interpretation of the law and on the basis of this information their Examiner set it up in his examination report as an Illegal Investment in Other Real Estate."

Concerning which you ask substantially this

Question

Whether the investment of funds to remodel the hotel was a violation of M. S. 48.21?

Subsequently, you forwarded a letter from the attorneys for the bank wherein the following are stated as facts:

"The St. Clair State Bank purchased a lot about a year ago just East of its old bank building. This was purchased in anticipation of remodeling their bank facilities and to provide room for drive-in services to its customers and additional parking area. On the lot the bank

purchased there was an old hotel building of modest size. When they started to tear down the old building on the newly purchased lot with the intention of wrecking it, they discovered that the building, itself, was in a remarkably well preserved condition. It was going to cost them approximately $3,000.00 to wreck the building. When they discovered the fact that it was in good condition, the bank decided to try to salvage the building rather than to waste the $3,000.00 it would take to wreck it. If they were to move the building to another lot, it would require the additional expenditure of funds for a lot. Having in mind that they could always use additional storage space in the operation of the bank and in an effort to approach the problem in the most practical way, they moved the building to the rear end of the bank premises and made a four-plex apartment house out of it, available for rent. It also gave the bank a large storage space in the building with private access thereto for bank employees. This new construction occupies some fourteen feet of the lot that was purchased. The entire lot purchased is now in use partly by location of the new bank premises thereon, the drive-in teller service, and parking area. For the purposes of this statement of facts, we will assume that with permissable charge-offs, the investment in the new building or four-plex would be in the neighborhood of $13,000.00. You have in your possession up-to-date figures of the capital accounts of this bank and it would serve no good purpose to set them forth herein."

It is apparent from that letter that the bank relies only upon clause (1) of M. S. A. 48.21. The gist of the bank's contention is stated as follows:

"Everyone is familiar with the fact that most banks, over the past many years, have had buildings larger than needed for actual banking practices and are renting out office and business space throughout the entire state.

"It would appear that had the bank invested the same amount of money in a vertical construction of its new building and that such investment had resulted in four living quarters above the banking premises plus additional storage for the bank, it would clearly not have been speculation nor in violation of said Section 48.21."

You have also attached a memorandum detailing the background of this investment. While it is not necessary to set forth that information here, you will, of course, be properly concerned with those matters in making your determination in accordance with this opinion.

Opinion

The applicable portion of M. S. A. 48.21 is as follows:

"Such bank may purchase, carry as an asset, and convey real estate for the following purposes:

"(1) Such as shall be necessary for the convenient transaction of its business, including with its banking office other apartments to rent as a source of income, which investment less normal depreciation shall

not exceed 40 percent of its paid-in capital stock and permanent surplus, and upon written approval of the commissioner of banks, not to exceed 60 percent of its paid-in capital stock and permanent surplus.

"* * *

"It shall not purchase, carry as an asset, or convey real estate in any case or for any other purpose whatever.

* * *"

In O. A. G. 29-A-26, December 18, 1956, the following was stated in reference to M. S. A. 48.21 (1):

"Notwithstanding all of the foregoing there is an obvious legislative policy of restricting investments by banks in real estate. The statute prescribes only four circumstances in which banks may invest in real estate and provides that they shall not invest in real estate for any other purpose. * * *

"In view of the basic policy of this statute, we wish to point out that any purchase whatsoever of real estate by a bank under the permission given in 48.21 (1) must be based upon 'Such as shall be necessary for the convenient transaction of its business.' * * *"

We stated there that it was for the determination of the Commissioner of Banks whether the proposal therein was a necessary measure on the part of the bank for the convenient transaction of its business, and we referred you to O. A. G. 253-A-5, March 8, 1949, for your assistance in making that determination. Here, also, we must say that the determination is one which must be made by your office, based upon all the facts and circumstances as you find them to be.

Statements of the courts construing the corresponding provision in the National Banking Act may be of some assistance to you.

In **Brown v. Schleier,** 118 Fed. 981, the Court stated at 983:

"We entertain no doubt that the power conferred on national banks by section 5137 of the Revised Statutes to purchase such real estate as is needed for their accommodation in the transaction of their business includes the power to lease property whereon to erect buildings suitable to their wants. The power to purchase land is larger than the power to lease by as much as a fee simple estate is larger than a term for years, and the greater power includes the less. In the larger towns and cities of the United States, national banks usually find it necessary to locate themselves in the business centers, where property is most in demand and likewise most valuable. In the large cities it will doubtless sometimes happen that a bank cannot locate itself in a quarter where its business interests demand that it should be located, unless it leases property for a term of years and agrees with the owner to erect a building thereon suitable to its wants. That a national bank may purchase a lot of land and erect such a building thereon as it needs for the accommodation of its business admits of no controversy under the

language of the statute, and we perceive no reason why it may not likewise lease property for a term of years and agree with the lessor to construct such a building as it desires, provided, always, that it acts in good faith, solely with a view of obtaining an eligible location, and not with a view of investing its funds in real property or embarking them in speculations in real estate. Nor do we perceive any reason why a national bank, when it purchases or leases property for the erection of a banking house, should be compelled to use it exclusively for banking purposes. If the land which it purchases or leases for the accommodation of its business is very valuable, it should be accorded the same rights that belong to other landowners of improving it in a way that will yield the largest income, lessen its own rent, and render that part of its funds which are invested in realty most productive. There is nothing, we think, in the national bank act, when rightly construed, which precludes national banks, so long as they act in good faith, from pursuing the policy above outlined. The act was framed with a view of preventing such associations from investing their funds in real property, except when it becomes necessary to do so, either for the purpose of securing an eligible business location, or to secure debts previously contracted, or to prevent a loss at execution sales under judgments or decrees that have been rendered in their favor. When an occasion arises for an investment in real property for either of the purposes specified in the statute, the national bank act permits banking associations to act as any prudent person would act in making an investment in real estate, and to exercise the same measure of judgment and discretion. The act ought not to be construed in such a way as to compel a national bank, when in acquires real property for a legitimate purpose, to deal with it otherwise than a prudent landowner would ordinarily deal with such property."

In **Wingert v. First National Bank**, 175 Fed. 739, the Court at page 741 quoted with approval the opinion of the District Court as follows:

"The other ground urged by the complainant is that the proposed action is violative of the restriction which permits a national bank to hold only such real estate as shall be necessary for its immediate accommodation in the transaction of its business, and that, therefore, the erection of a building which will contain offices not necessary for the business of the bank is not permitted by the law, although that method of improving the lot may be the most beneficial use that can be made of it. It is matter of common knowledge that the actual practice of national banks is to the contrary. Where ground is valuable, it may probably be truly said that the majority of national bank buildings are built with accommodations in exceed of the needs of the bank for the purpose of lessening the bank's expense by renting out the unused portion. If that were not allowable, many smaller banks in cities would be driven to become tenants as the great cost of the lot would be prohibitive of using it exclusively for the banking accommodation of a single bank. As indicative of the interpretation of the law commonly received and acted upon, reference may be made to the reply of the Comptroller of the Currency to the inquiry by the bank in this case

asking whether the law forbids the bank constructing such a building as was contemplated.

"The reply was as follows: 'Your letter of the 9th instant received, stating that the directors contemplate making improvements in the bank building and inquiring if there is anything in the national banking laws prohibiting the construction of a building which will contain floors for offices to be rented out by the bank as well as the banking room. Your attention is called to the case of Brown v. Schleier, 118 Fed. 981 (55 C.C.A. 475), in which the court held that: "If the land which a national bank purchases or leases for the accommodation of its business is very valuable it may exercise the same rights that belong to other landowners of improving it in a way that will yield the largest income, lessen its own rent, and render that part of its funds which are invested in realty most productive." ' This seems to be the common sense interpretation of the act of Congress and is the one which prevails."

On the other hand, in **Houston v. Drake**, 97 Fed. 2d, 863, the Court stated as follows:

"Although it has been held that a national bank, under the provisions of 12 U.S.C.A. Section 29, supra, may acquire a ninety-nine year lease (Brown v. Schleier, C. C., 112 F. 577; Id., 8 Cir., 118 F. 981; Id., 194 U.S. 18, 24 S. Ct. 558, 48 L. Ed. 857), the difficulty with these propositions is that there is no showing that the Consolidated Bank intended to use this property for the transaction of its business. On the contrary, the evidence shows that the Consolidated Bank owned the premises in which it was conducting its business and occupied them except for a period of nine months when it moved temporarily to the leased premises in order to permit the construction of a new building on its property. It appears that the lease was acquired because it was considered 'good business' and because it was thought that a profit could be made by sub-leasing the premises. * * * It is clear that the leased property was not taken over by the Consolidated Bank to house its banking activities, and it had no intention of so using it."

A more recent statement appears in **Exchange Bank of Commerce v. Meadors**, 184 Pac. 2d, 458, wherein the Court stated at page 463:

"The purpose of the provisions of Title 12 U.S.C.A. Section 29 is to prevent speculation in real estate by banks. To permit a bank to deal indiscriminately in real estate as investments, tying up the capital of the bank, might prevent the meeting by the bank of its primary duty to its depositors. Yet transactions which are reasonably necessary to carry on business legitimately under the provisions of the statute are within the power of the bank. In First Presbyterian Church v. National State Bank, 57 N. J. L. 27, 29 A. 320, aff'd., 58 N. J. L. 406, 36 A. 1129, it was held that a national bank, under the first provision of section 29, above, may make a contract to prevent the erection of buildings on adjacent land so as to secure light and air for its banking house. It must be recognized that reasonable use of the actual banking premises

may under proper circumstances require the bank to deal in adjacent properties so as to derive a benefit or prevent an injury. The test, it seems, is to examine each transaction to determine whether it is an attempt to speculate in real estate or is reasonably necessary in the use and enjoyment of the business premises of the bank. We think the situation here is within the provision of the banking act; that the acquisition of the East 40 feet of the two lots upon which the bank stands, previously owned by the bank, and the building of an extension of the bank building thereon enable the bank to preserve the character of building, occupancy, and business in its immediate neighborhood and receive benefit therefrom and prevent possible injury if this might not be done."

It is clear from the foregoing cases that the Courts liberally construe this section to avoid the imposition of undue hardships upon banks in situations where good business practice requires an investment beyond that which is necessary for actual banking premises. But is is also clear that every transaction must be made in good faith and reasonably necessary for the convenient transaction of its business. In conformity with those principles, your office authorized the incidental acquisition of the hotel building located on the lot adjacent to the bank when the bank desired to acquire the lot for the establishment of a drive-in service and additional parking area. For that purpose your department authorized $8,000 out of the total authorization of $58,000.

It is the expenditure of $18,364.17 (out of the total "Banking House" investment of $48,471.14) for remodeling of the hotel into apartments, to which your department has taken exception. Approval of expenditures for that purpose was expressly withheld. The fact that the bank has acted contrary to your approval, making the expenditure of $18,364.17 an accomplished fact, does not preclude your examination into the propriety of such an expenditure. On the contrary, you may consider this in determining the bank's good faith in making this expenditure. In any event, however, the question for your determination is whether the expenditure was reasonably necessary for the convenient transaction of the bank's business.

MILES LORD,
Attorney General.

HAROLD J. SODERBERG,
Spec. Asst. Attorney General.

Commissioner of Banks.

August 5, 1957. 29a 26

5

Banking—Savings Certificate may be used by State banks.

Facts

"Enclosed is a copy of a Savings Certificate which is being used by the X National Bank of Minneapolis instead of a Savings Pass Book. This savings Certificate has been called to the attention of our state banks who also would like to issue this type certificate for deposit purposes.

"I am also enclosing letter received from Mr. M. H. Strothman, Jr., Vice President and Legal Advisor for the Federal Reserve Bank of Minneapolis, dated November 22, 1957, copy of letter dated March 6, 1957 written by S. R. Carpenter, Secretary, Federal Reserve System, Washington, to H. G. McConnell, Vice President, Federal Reserve Bank of Minneapolis and copy of interpretation, also letter received from Charles F. Alden, Supervising Examiner, Ninth District, Federal Deposit Insurance Corporation, dated November 21, 1957 and copies of memos he received from G. J. Oppegard, Assistant General Counsel of the FDIC in Washington, approving this type of Certificate under the Federal Deposit Insurance Corporation, Federal Reserve and National Regulations. Believe this is contained in Regulation Q as of May 5, 1956."

Concerning which you ask, in substance, this

Question

Whether the use of such savings certificate would be lawful for state banks.

Opinion

In the letter you have referred to from the Federal Reserve System, this savings certificate is described as follows:

"The certificate, which 'is not assignable or transferable', recites that the bank has received a 'savings deposit' payable to a named depositor in a certain amount which may be withdrawn 'only by the depositor' at any time upon surrender of the certificate, but that 'the bank at its option may require written notice of intended withdrawal 60 days before the withdrawal is made'. The certificate form also recites that interest at a certain rate per annum will be paid on the deposit semi-annually from the date of the certificate, except that no interest will be paid if the deposit is withdrawn during the first six months; that if the deposit is withdrawn between semi-annual interest dates, interest from the last such date to the time of withdrawal will be paid only if the depositor has given 60 days' written notice of intended withdrawal; and that after six months from date of the certif-

icate the bank may change the rate or terminate the accrual of interest by giving 60 days' written notice to the depositor."

In that letter the Board states that it considers the deposit evidenced by such a certificate as a savings deposit for the purposes of their Regulation Q.

It does not appear to be necessary for us to determine whether this would be a certificate of deposit or a savings account deposit for the reason that either device is permissible as such under the state banking law. M. S. A. 48.25 (relating to the maximum rate of interest on deposits, see O. A. G. 30, June 7, 1929) distinguishes between savings accounts and certificates of deposit only when the interest to be paid on either is 4% per annum. You have advised that a lesser rate of interest is contemplated for these savings certificates.

You advise that the provision in the savings certificate, "the bank at its option may require written notice of intended withdrawal sixty days before the withdrawal is made", is substantially the same as the provision generally made by state banks for withdrawals of regular savings accounts, and that this right of the bank to require written notice, as a matter of long standing administrative construction of M. S. A. 48.50 and 48.51 in the banking division, removes such accounts from the category of demand deposits.

The savings certificate, if it bears a rate of interest less than 4% per annum, would be valid under the banking laws of this State as presently drafted.

MILES LORD,
Attorney General.

HAROLD J. SODERBERG,
Assistant Attorney General.

Commissioner of Banks.

January 3, 1958. 29a-12

CONSERVATION

6

Game and Fish—"Set line" means any line, with one or more hooks attached, which is placed in the water for the purpose of taking fish and is left unattended.

Facts

"A fisherman owning an angling license, as described in Section 98.46, Subd. 2 (4), using a conventional rod and reel with a single baited hook on his line casts the baited hook into meandered water

with a bobber fixed to the line. He leaves the equipment unattended and is not within sight of the line."

Question

"Does the use of a line with a single baited hook left unattended constitute the use of a 'set line' as prohibited under Section 101.42, Subd. 11?"

Opinion

M. S. 101.42, Subd. 11, reads in part:

"Except as otherwise specifically permitted, it shall be unlawful to take fish by means of * * * set lines * * * ; provided, a line with a single hook, used for angling through the ice, shall not be deemed a set line if the owner of the line is within sight of the line".

(Other provisions of the statutes, not material here, authorize licensing set lines for taking of rough fish in certain areas.)

The statutes contain no definition of the term "set line". The term has been defined a "line laid out in the water in contradistinction to a handline" (Knight's New Mechanical Dictionary, page 797) and as a "line with baited hooks fastened to it set or anchored for taking fish" (Funk and Wagnall's New Standard Dictionary of the English Language, page 2238).

It has been held in Vermont that a line with one hook attached, placed in the water for the purpose of taking fish, and tied to an object on the shore, was not a "set line". **State vs. Stevens** (1897) 69 V. 411, 38 A. 80. Vermont statutes made it illegal to "furnish" any person with a "set line" for the purpose of taking fish. The court infered that "set line" meant a line of a certain type regardless of manner of use. In addition, the defendant in the Vermont case had not left his lines unattended.

M. S. 97. 43, provides that no person may take, buy, sell, transport or possess any protected wild animals, which includes fish, **except as permitted** by law. The holder of the ordinary Minnesota fishing license is authorized only to "take fish by angling". M. S. 98.46, Subd. 2. "Angling" is defined as the "taking of fish by hook and line in hand, or rod in hand, with not to exceed more than one bait attached thereto, nor with more than one line or rod". M. S. 97.40, Subd. 32.

It is apparent that not every line which may be temporarily released from the hand of the fisherman can be classified as a "set line". Other statutes authorize fishing with more than one line in certain instances. M. S. 101.41, Subd. 2, and 101.42, Subd. 2. Strict adherence to the statutory definition of the term "angling" would require that both lines be held in the hand at all times. While this practice might cause no hardship in some states, it is obvious to all fishermen that landing a Minnesota fish while clutching to one's second line would be a physical impossibility in most cases even though two line fishing is generally restricted to our smaller species. It will not be assumed that the legislature intended such an absurd result. M. S. 645.17.

We are advised that the Department of Conservation has for many years administratively interpreted "set line" to mean any line, to which one or more hooks are attached, which is placed in the water for the purpose of taking fish and is left unattended. The legislature has apparently acquiesced in this interpretation in view of the language of M. S. 101.42, Subd. 11, which limits the definition of a "set line" to exclude "a line with a single hook, used for angling through the ice, * * * if the owner of the line is within sight of the line". It appears clear that this language was intended to provide the ice fisherman with additional privileges to which the summer fisherman was not entitled.

We conclude that any line, with one or more hooks attached, which is placed in the water for the purpose of taking fish and is left unattended constitutes a "set line" within the provisions of M. S. 101.42, Subd. 11. Your question is answered in the affirmative.

MILES LORD,
Attorney General.

WAYNE H. OLSON,
Deputy Attorney General.

Douglas County Attorney.

July 5, 1958. 211a-7

7

Tax-Forfeited Land—County Boards may transfer tax-forfeited lands pursuant to M. S. 89.034 which have been dedicated as Memorial Forests under M. S. 459.06. Under present statutes the commissioner of conservation may not "return to the county" or release for sale any such Memorial Forest lands which he has accepted as state forest lands.

Facts

"The County of Cass is considering the transfer of a considerable amount of tax-forfeited land to the State of Minnesota under the provisions of M. S. A. 89.034. A large portion of these tax-forfeited lands have been set aside as 'Foothills Memorial Forest' under the provisions of M. S. A. 459.06."

Questions

1. "Does the Cass County Board have authority to transfer the dedicated tax-forfeited lands in 'Foothills Memorial Forest' to the State under the provisions of M. S. A. 89.034. This is the so-called 50-50 law.

2. If the County does have the authority to transfer dedicated memorial forest lands to the State, and if in the future the County would request the State to return the lands to the County, would the State have authority under present statutes to transfer these lands back to the County? The same question also pertains to the tax-forfeited lands not set aside as memorial forest.

3. The Cass County Board transferred 960 acres of dedicated 'Foothills Memorial Forest' lands to the State under M. S. A. 89.034 during the years 1956 and 1958. If this was not a valid transfer what is the present status of these lands"?

Opinion

1. M. S. 89.034, reads as follows:

"Whenever the board of county commissioners, by resolution duly adopted, resolves that any lands, forfeited for non-payment of taxes, lying within the boundaries of any of the forests hereinabove designated, or that certain tax-forfeited land lying outside of such boundaries and classified as conservation lands are suitable primarily for the growing of timber and timber products and said lands outside of the above state forests comprise 50 percent or more of the lands within any given area, it may submit such resolution to the commissioner of conservation for the purpose of establishing a state forest or of adding said lands to any of the state forests designated in section 89.021. If, upon investigation, the commissioner of conservation determines that the lands covered by such resolution can best be managed and developed as state forest lands or as a portion of an existing state forest, he shall make a certificate describing the lands and reciting the acceptance thereof on behalf of the state as state forest lands. The commissioner shall transmit the certificate to the county auditor, who shall note the same upon his records and record the same with the register of deeds. The title to all lands so accepted shall be held by the state free from any trust in favor of any and all taxing districts, and such lands shall thereafter be managed and devoted to the purposes of state forest lands in the same manner as lands hereinabove set apart as state forest lands, and subject to all the provisions of Laws 1943, Chapter 171."

The transfer of lands pursuant to this section does not change the status of these lands, only the management thereof. They still remain forest lands. Accordingly, it is our opinion that the county board has authority to transfer control of any tax-forfeited lands to the state.

2. M. S. 89.038, reads as follows:

"Any tract of state land or tax-forfeited land situated in a zoned county in an area not restricted against use for agriculture within any state forest, and withdrawn from sale under the provisions of the law creating such forest, but which is not otherwise restricted as to sale, may, **if found by the commissioner of conservation to be more suitable for agricultural purposes than for forestry or other conservation pur-**

poses, upon recommendation by resolution of the county board, **be released by order of the commissioner from such withdrawal from sale, and shall thereupon be subject to sale** under applicable laws in like manner as if it had not been so withdrawn." (Emphasis supplied)

Tax-forfeited lands which have not been dedicated as a Memorial Forest, but which have been accepted by the commissioner of conservation as state forest lands pursuant to M. S. 89.034, may be released for sale when the conditions imposed by M. S. 89.038 have been met.

When tax-forfeited lands have been dedicated as a Memorial Forest pursuant to M. S. 459.06, such dedication cannot be terminated under present statutes. O. A. G. 425c-10, April 14, 1958. Such lands are not subject to sale and cannot meet the conditions imposed by M. S. 89.038. Under present statutes the commissioner is without authority to "return to the county" or release for sale, any such Memorial Forest lands which he has accepted as state forest lands.

3. Our answer to question number 1, makes an answer to this question unnecessary.

MILES LORD,
Attorney General.

P. C. BETTENDORF,
Spec. Asst. Attorney General.

Cass County Attorney.

September 10, 1958. 700d-21

8

Firearm safety—County funds can be expended to defray the expenses of a deputy director of hunting safety after effective date of L. 1957, C. 537.

Question

"May expenses incurred by the Cass County Deputy Director of Hunting Safety in attending clinics and conferences outside Cass County be paid out of county funds."

Opinion

It appears from the itemized statement attached to your request that a portion of the expenses about which you inquire were incurred before April 20, 1957, the effective date of L. 1957, C. 537. Expenses incurred prior to that date would be governed by L. 1955, C. 704. I enclose an opinion O. A. G. 201-C January 27, 1956, which held that the L. 1955, C. 704 did not authorize the expenditure of county funds to defray the expenses of a

deputy director of hunting safety. Therefore, expenses incurred prior to April 20, 1957, cannot be paid by the county.

As to expenses incurred after April 20, 1957, L. 1957, C. 537, Sec. 5, Subd. 1, coded as M. S. 97.85 provides:

> "97.85 Subdivision 1. **For the purpose of defraying the expense of the program within the county,** the county director may with the approval of the county board collect a sum not to exceed $1.50 from each person who has received the courses of instruction herein provided, and shall deposit the money with the county treasurer. **The county is authorized to pay from the fund thereby created the expenses of the program.** Any county is authorized to pay into said fund out of general revenue up to the sum of $1,000 annually to be used and expended as provided for in this subdivision. In counties having a population in excess of 100,000, the foregoing sum may be increased to the sum of $2,500. The state director may procure materials and supplies for the counties upon the request of the county director and the same shall be sold to the county without profit to the state. Proceeds from such sale shall be deposited in the safety revolving fund." (Emphasis added)

The county is authorized to pay the "expenses of the program". It is not restricted to expenses incurred within Cass County but is, of course, restricted to expenses relating to the Cass County program—the program "within the county".

It follows that if the County Board determines that expenses incurred by the county Deputy Director of Hunting Safety after the effective date of L. 1957, C. 537 in attending clinics and conferences outside the county were incurred to further the hunting safety program within the county, such expenses may be paid by the county from the fund established by M. S. 97.85.

It is the responsibility of the county board to determine whether the expenditures constitute "expenses of the program".

MILES LORD,
Attorney General.

JAMES T. HURLEY,
Spec. Asst. Attorney General

Cass County Attorney.

November 13, 1958. 201c

CORPORATIONS

9

Filing fees—Capital stock of a Development Corporation formed under L. 1957, c. 896 shall be deemed to have a par value of $10 pursuant to M. S. 300.49, Subd. 2 as no par stock, solely for the purpose of determining filing fee under M. S. 300.49, Subd. 1.

Facts

"Under the provisions of Chapter 896, Laws of Minnesota for 1957, an act providing for the formation of development corporations, section 6 provides 'The capital stock of the corporation shall be 20,000 shares of no par value, which shall be issued for $50 per share in cash . . .' ."

Question

"In determining the incorporation fees payable to the state treasurer on authorized capital stock pursuant to Minnesota Statutes, section 300.49, subdivision 1, shall the proposed development corporation when filing its articles of incorporation pay on the evaluation of $50 per share, or on the basis on $10 per share in accordance with subdivision 2, relating to fees on shares without par value?"

Opinion

M. S. 300.49, Subd. 2 provides:

> **"For the purpose of determining the fees prescribed by subdivision 1, but for no other purpose, shares without par value shall be deemed to have a par value of $10 each,** unless such shares are entitled to priority over other shares upon liquidation, in which case the involuntary liquidation price stated in the articles of incorporation shall be deemed to be the par value thereof, or unless the capital stock is reduced pursuant to section 300.39 in which case shares without par value shall be computed at the value, at the time of filing the amendment to the articles of incorporation, as shown by a verified statement of assets and liabilities subscribed by the president and the secretary of the corporation."

The legislature thereby specified that for the purpose of determining by mathematical computation the filing fee prescribed in M. S. 300.49, "but for no other purpose", the value of no par value stock shall be deemed $10 for each share.

The legislature in L. 1957, c. 896, Sec. 6, specified that the capital stock of a development corporation formed under c. 896 is "no par value" stock. Said stock, having been so designated as no par stock by law, must be treated as such. "No par value" stock falls under Subd. 2 of M. S. 300.49 and must be deemed to have a par value of $10 for the purpose of

determining the filing fees prescribed in Subd. 1 of this section. The law, by limiting this mandatory designation solely to the purpose of determining the amount of the filing fee, recognized that said stock may have a different value for other purposes. In determining the amount of the filing fees for development corporations formed under L. 1957, c. 896, each share of capital stock should be treated as having a valuation of $10 per share in accordance with M. S. 300.49, Subd. 2.

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.,
Spec. Asst. Attorney General.

Secretary of State.

January 17, 1958. 92a-12

COURTS AND CRIMINAL LAW

10

District—Judges—Expenses—Railway, traveling and hotel expenses of judges attending meetings of Section of Judicial Administration of American Bar Association as representatives of Minnesota Judges Association are payable under M. S. 484.54.

Facts

"As an integral part of the American Bar Association there is a Section of Judicial Administration of which the Honorable Tom C. Clark, U. S. Supreme Court, is Chairman. There has been recently created a subcommittee of the Section of Judicial Administration, a committee for state trial judges of general jurisdiction. It was further recommended that at the annual meeting of the American Bar Association state trial judges of each state be invited to attend this annual meeting for the purpose of determining what sort of a program would be beneficial to state trial judges. It is my understanding that a budget has been established in this state for travel expenses for Judges of the District Court."

Question

"If at the annual meeting of the State Judges Association a judge (or judges) is authorized to attend meetings of the Section of Judicial Administration of the American Bar Association, could his expense in attending be paid by the State?"

Opinion

M. S. 484.54 provides:

> "The judges of the district court shall be paid, in addition to the amounts now provided by law, all sums they shall hereafter pay out as necessary railway, traveling and hotel expenses **while absent from their places of residence in the discharge of their official duties,** * * *. Each judge shall file quarterly with the state auditor an itemized statement, verified by him, of all such expenses actually paid by him during the preceding quarter, which shall be audited by the state auditor and paid upon his warrant." (Emphasis supplied)

We have previously held that necessary railway, traveling and hotel expenses of district court judges incurred in attending meetings while absent from their places of residence are payable under the above section if such meetings are properly connected with their official duties. O. A. G. 141d-7, January 27, 1953 and July 3, 1950.

M. S. 484.33 requires the judges of district courts in Minnesota to assemble annually for the purpose of considering the revision and amendment of the general rules of practice in their courts. The statute provides that such rules, as amended and revised from time to time, shall govern all the district courts of the state; and provides that "Any other proper business pertaining to the judiciary may also be transacted."

Thus, it is evident that attendance at such meetings constitutes a part of the official duties of a district court judge. We have heretofore indicated that the Association of District Court Judges may appoint committees to facilitate its work and that the traveling and hotel expenses of committee members incurred in carrying out their duties would properly be reimbursed by the state. See O. A. G. 141d-7, July 14, 1928.

Section 484.54, supra, provides for payment of certain expenses of district court judges "while absent from their places of residence in the discharge of their official duties". It is noted that the statute does not limit such expenses to the geographical confines of the State of Minnesota; and what a proper discharge of the official duties of a district court judge might involve is in essence a question of fact which the judges themselves are in the best position to determine. See opinions of January 27, 1953, and July 3, 1950, supra. In that connection, in an opinion O. A. G. 141d-7, dated August 6, 1952, Assistant Attorney General Lowell Grady held that a district court judge handling juvenile cases, who attended a conference of the National Association of Juvenile Court Judges in Chicago, would have his reasonable traveling expenses so incurred payable under Section 484.54. Such opinion stated at page 9:

> "Although you do not ask the question whether the judge may be reimbursed by the state, it is suggested that his claim for reimbursement be presented to the state auditor under Section 484.54. He was acting as a judge of district court in attending the conference. If he had not considered it in the interest of the state that he attend, then surely he would not have gone. It was because of the office held by him that he

attended. It was for him to decide whether his attendance was in the discharge of his official duties. It is my opinion that his reasonable traveling expense so incurred is payable by authority of Section 484.54."

The same reasoning applies in the instant situation. If, at the annual meeting of the State Judges Association, it is reasonably determined that the association's work would be advanced by having representation at the committee meetings mentioned in the submitted facts, and in accordance therewith the association authorizes one or more district judges to attend such meetings of the Section of Judicial Administration of the American Bar Association, the necessary railway, traveling and hotel expenses incurred in so attending would be payable by the state under section 484.54.

MILES LORD,
Attorney General.

O. T. BUNDLIE, Jr.,
Assistant Attorney General.

Hennepin County District Court.

March 18, 1958. 141d-7

11

Justice of the Peace—Term of office of justice of peace not set forth in present constitution.

You have asked on behalf of the Lower Court Study Commission whether justices of the peace are "judges" within the purview of Art. VI, Section 8 of the Minnesota Constitution, as amended by the voters at the general election on November 6, 1956.

Opinion

Art. VI, Section 8 now provides:

"**The term of office of all judges shall be six years** and until their successors are qualified, and they shall be elected in the manner provided by law by the electors of the state, district, county, municipality, or other territory wherein they are to serve."

Former Attorney General J. A. A. Burnquist in an opinion O. A. G. 266-A-12, March 19, 1953, printed in the 1954 Report as No. 19, ruled that a justice of the peace was not a judge within the purview of Art. VI, Section 10, which provides in part:

"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 * * *" (Emphasis supplied)

The present provision in Art. VI, Section 11 is almost identical and now provides:

"Whenever there is a vacancy in the office of judge the governor shall appoint in the manner provided by law a qualified person to fill the vacancy, to hold office until his successor is elected and qualified. * * *"

Said ruling, copy enclosed, stated:

"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 becomes vacant' to fill the same, * * *

"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. * * *

"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. * * *"

Justices of the peace thus have been recognized since the organization of our state as not being judges under Art. VI of our constitution.

The Constitution, Art. VI, prior to the recent amendment, provided in Section 1:

"The judicial power of the State shall be vested in the supreme court, district courts, courts of probate, justices of the peace, and such other courts, inferior to the supreme court, as the legislature may from time to time establish by a two-thirds vote."

and provided in part in Section 8:

"The legislature shall provide for the election of a sufficient number of justices of the peace in each county, whose term of office shall be two years, and whose duties and compensation shall be prescribed by law. * * *"

Art. VI, Section 1 now provides:

"The judicial power of the state is hereby vested in a supreme court, a district court, a probate court, and such other courts, minor judicial officers and commissioners with jurisdiction inferior to the

district court as the legislature may establish."

Schedule (a) following Section 12 of the recent judiciary amendment provides:

> "(a) All justices of the peace shall continue in office each for the remainder of his term which remains unexpired at the time this Article takes effect."

It can be noted that section 2 of the amended Constitution changed the title of the members of the Supreme Court as used in Art. VI from "chief justice" and "associate justice" to "chief judge" and "associate judges".

Among the courts which have determined that justices of the peace are not judges within a constitutional provision are New York in **People v. Mann,** 97 N. Y. 530, and Connecticut in **Alcorn v. Fellows,** 127 Atl. 911, 102 Conn. 22.

We are aware of **Webster v. Boyer,** 159 Pac. 1166, 81 Ore. 485. The dissimilarity between Minnesota's Constitution and Oregon's, along with the judicial approach to the same, can be noted in 7 Oregon Law Review, p. 173 and p. 242.

In Art. VI involved herein is Section 8 providing that—

> "The term of office of all judges shall be six years * * *"

In view of the conclusions stated by former Attorney General Burnquist in his March 19, 1953 opinion, supra, and the language used in the judiciary amendment, we are of the opinion that justices of the peace are not judges within the purview of Art. VI, Section 8 which provides that "the term of office of all judges shall be six years." Under the present Minnesota Constitution, the term of office of justices of the peace is not set forth.

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.,
Spec. Asst. Attorney General.

Lower Court Study Commission.

April 18, 1958. 266a-11

12

Justices of the Peace—Fees and costs. Violations of village ordinances. Justice is entitled to his prescribed fees and such costs as he has paid or incurred whether or not village collects or can collect fines and costs.

Facts

"A Justice of the Peace has submitted a bill to the Council of the Village of Aurora for costs chargeable against the defendant upon conviction under a municipal ordinance in Justice Court and the defendant was unable to pay said costs or fine and was committed to the workfarm."

Questions

"1. Is it permissible for a Village to pay the Justice of the Peace his costs when they are uncollectible from the defendant under violation of a municipal ordinance?

"2. Is it mandatory that the Village Council pay uncollected costs to the Justice of the Peace involving violation of a municipal ordinance?

"3. Is it possible for a Justice of the Peace to collect costs where there has been a violation of a municipal ordinance, from the county?"

Opinion

1-2. The justice of the peace is entitled to his fees in the amounts prescribed by statutes upon conviction of a defendant for violation of a municipal ordinance whether or not the village collects or can collect the fine and costs imposed and assessed upon conviction. He is also entitled to such costs as he has paid or incurred. See 1940 Report of Attorney General, No. 26. By the term "costs", we assume you have reference to those charges fixed by law which have been necessarily incurred in the prosecution of one charged with a public offense, including the fees of such officer. See 1952 Report of Attorney General, No. 15.

It is the duty of the village to pay the justice of the peace such fees and costs as he is rightfully entitled to.

3. The county is under no obligation to pay the justice of the peace his fees and costs where the offense involved a village under a municipal ordinance. M. S. 412.831 provides that all fines, forfeitures and penalties recovered for the violation of village ordinances shall be paid into the village treasury. It therefor becomes the duty of the village and not that of the county, to pay the justice of the peace the fees and costs to which he is entitled. See O. A. G. 266b-9, May 28, 1957 to the Itasca County Attorney.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Aurora Village Attorney.

November 20, 1957. 266b-8

13

Justice of peace fees prescribed by M. S. A. 357.14. Fines, forfeitures and penalties recovered for violations of village ordinance shall be reported and paid to village treasurer.

Questions

"(1) Does a Village Council have any authority to set the fees or costs charged by a Justice of the Peace in criminal matters and can a Village Council require a Justice of the Peace to make a full report of his costs charged to a defendant?

"(2) It is noted that many Justices of the Peace are charging a flat rate of costs in the amount of $5.00 to $10.00 and often $5.00 on each charge made by the arresting officer. Are the flat rate of costs in these amounts contrary to Minnesota statutes?

"(3) Can a Village Council set the retirement age and enforce such retirement of police officer, regardless of veteran's preference, where there is no police commission?

"(4) Is a Chief of Police in a Village considered a head of department and is he entitled to veteran's preference?"

Opinion

1. A justice of the peace of your village is entitled to fees as provided in M. S. 357.14. Such fees being prescribed by statute, it follows that the council lacks authority to fix fees for a justice in a criminal case.

M. S. 633.27 requires every justice within ten days after the trial of a criminal case to prepare an itemized statement of the costs taxed against the state and file the same with the county auditor. No bills for such justice's 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.

With respect to the disposition of fines, forefitures and penalties recovered for violation of any village ordinance, M. S. 412.871 is controlling and reads as follows:

> "All fines, forfeitures, and penalties recovered for the violation of any ordinance shall be paid into the village treasury. Every court or officer receiving such moneys, within 30 days thereafter, shall make return thereof under oath and be entitled to duplicate receipts for the amounts paid. One of the receipts shall be filed with the village clerk."

M. S. 161.03, Subd. 22, provides for the disposition of fines and bail money from traffic and motor vehicle law violations.

I am not aware of any statute authorizing the village council to require a justice of the peace to report costs charged in a criminal case.

2. As above pointed out, a justice of the peace is entitled to receive only the fees prescribed by statute M. S. 357.14. Neither this statute nor any other authorizes a justice to charge a "flat rate of costs" in lieu of such statutory fees.

3. The village council has not created a police civil service commission in accord with the provisions of M. S. c. 419. Consequently, the provisions thereof do not apply to your village council.

The village council under M. S. 412.111 is authorized to "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" and to "prescribe the duties and fix the compensation of all officers, both appointive and elective, employees, and agents, when not otherwise prescribed by law".

Pertinent to the question now considered are the provisions of M. S. 412.161 which reads:

> "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. In any village in which the office of constable has been abolished, the council shall designate one or more of its police officers as a process officer, who shall have all the powers and duties of the constable. The council may require process officers to pay into the village treasury all fees received by them for performing the duties of constables." (Emphasis supplied)

There is no authority in the above cited statute or any other statute, authorizing the council to prescribe a "retirement age" for village constables or police officers. Absence of such statutory authority requires a negative answer to the third question.

4. The question as to whether a "chief of police" is the head of a department and therefore excluded from the Veterans' Preference Act (Section 197.46) has been considered in O. A. G. 85a, December 26, 1947 and O. A. G. 120, October 16, 1951. See also O. A. G. No. 73, 1954 Report, and **State ex rel. McGinnis v. Police Civil Service Comm. of Golden Valley,** 91 N. W. 2d 154, decision filed June 27, 1958. I believe that the conclusions therein reached are dispositive of the question here considered.

MILES LORD,
Attorney General.

VICTOR J. MICHAELSON,
Spec. Asst. Attorney General.

Aurora Village Attorney.

September 11, 1958. 266b-8

14

Justice of the Peace not entitled to mileage from home to office.

Statement

"It is provided by state law that Justices of the Peace may include in their fees 'necessary mileage'.

"It is the practice in our Justice Courts, as it undoubtedly is in many others, to hear a number of cases at one sitting."

You have informed us that the Justice of the Peace in question hears all his cases in the Village Hall in the Village for which he was elected.

Questions

"Is it proper to charge each defendant mileage equal to the distance to and from the place of holding court when there are a number of defendants whose cases are heard at one sitting?

"If it is not proper to charge mileage for each case, in what manner should the mileage incurred be apportioned among the defendants?"

Opinion

M. S. 1957, Section 357.14 provides:

"Justices of the peace shall be entitled to the following fees, and may tax them in cases when applicable:

"* * *

"(35) For necessary travel in the performance of his duty, when not otherwise provided for, ten cents per mile."

M. S. 1957, Section 530.02 provides:

"**Every justice** of the peace **shall keep his office in** the town, **village,** city, or ward **for which** he is **elected;** but he may issue process in any place in the county, and, **in his discretion, for the convenience of parties, may make** any civil or criminal **process** issued by him **returnable, and may hold his court,** at any place which he shall appoint in the town, village, or ward **within his county** adjoining the town or ward in which he resides, or in any village located within his town." (Emphasis supplied)

I enclose a copy of O. A. G. 266a-13, October 23, 1939, recognizing the right of a Justice of the Peace to mileage at ten cents a mile pursuant to M. S. 357.14 (35) for travel to and from the place of holding trial outside of the village for which he is elected. This reasoning does not apply to situations where the Justice of the Peace is holding court in his office in the village for which he is elected. Under the latter circumstance, the Justice of the Peace is not entitled to tax as costs his mileage from his home to

his court in the village for which he is elected. The statute permits mileage only "for necessary travel in performance of his duty".

Corpus Juris Secundum, Vol. 67, Officers, Section 91b, states:

> "Travel from home to business. Unless the legislature has expressly and explicitly included in the expenses to be allowed public officers the cost of travel from their homes to the places where their regular duties are to be performed, such expenses are not a legitimate public charge."

citing **Thompson v. Frohmiller,** 107 P. 2d 375, 56 Ariz. 313. See also **Kauai County v. Shiraishi,** 41 Hawaii Reports 156, which cites the aforementioned general rule and also on p. 160, the well settled rule:

> "Acts relating to the fees and compensation of public officers are strictly construed and such officers are only entitled to what is clearly given by law. (Lewis' Sutherland, Statutory Construction, Section 714, p. 1298, citing cases)."

As the Justice of the Peace is not entitled to mileage in the situation referred to in this question, no further answer is needed.

In situations where the Justice of the Peace is entitled to mileage, M. S. 357.14 (35) permits it only for necessary travel. The Justice of the Peace cannot tax mileage more than once. This is in contrast to Sheriff's rights to mileage for service of writs against different persons for different causes as in **Steenerson v. Board of County Commissioners of Polk County,** 68 Minn. 509, 71 N. W. 687. In the **Steenerson** case, supra, the court dealt with G. S. 1894, Section 5550, which provided:

> "Traveling in making any service upon any writ or summons, $.10 per mile for going and returning, can be computed from the place where the Court is usually held."

The Supreme Court in holding that the sheriff could recover mileage for serving each writ distinguished the aforementioned provision from the following:

> "Summoning grand or petit jurors, fifty cents for each juror summoned, and mileage at fifteen cents per mile for the number of miles necessarily travelled in summoning the panel.
>
> "Serving subpoena, fifty cents for each witness summoned, and mileage as in service of a summons; but when two or more witnesses live in the same direction, mileage shall be charged only for the furthest."

The court recognizes in the latter case that only the actual mileage can be charged. The argument presented is that "mention of one limitation upon the officer's right to mileage should be deemed the exclusion of the other". There exists no such specific limitations in M. S. 1957, Section 357.14.

The Justice of the Peace should be distinguished from a Sheriff as regards mileage, for the Sheriff must go where the party to be served is

present, while the Justice of the Peace can hold court in his own village where he chooses, except as limited by M. S. 530.03.

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.,
Spec. Asst. Attorney General.

Brooklyn Center Village Attorney.

November 25, 1958. 266a-13

15

Justice of Peace—Public records—docket open to public inspection M. S. A. 15.17, except illegitimacy proceedings, M. S. A. 257.31—no duty to notify others of all transactions.

Facts

" 'A' is a duly elected and qualified acting Justice of Peace. The Village Council of the Village in which (he) is Justice of Peace passed a resolution requiring in essence that the Justice of Peace deliver to the local newspaper a transcript of all cases which he hears, for publication in the local newspaper."

Questions

1. "Is such Justice of Peace required to inform the newspaper as to the transaction of business of his office and his disposition of the various cases which appear before him, under any statute of this state, or decision of the Supreme Court?"
2. "Are the records of the Justice of Peace required to be open for inspection by (the) owner of a newspaper or any other person?"

Opinion

M. S. A. 15.17 provides in Subdivision 1:

"All officers and agencies of the state, and all officers and agencies of the counties, cities, villages, and towns, shall make and keep all records necessary to a full and accurate knowledge of their official activities. All such public records shall be made on paper of durable quality and with the use of ink, carbon papers, and typewriter ribbons of such quality as to insure permanent records. Every public officer and agency is empowered to record or copy public records by any photo-

graphic device, approved by the Minnesota historical society, which clearly and accurately records or copies them."

and in Subdivision 4:

"Every custodian of public records shall keep them in such arrangement and condition as to make them easily accessible for convenient use. Except as otherwise expressly provided by law, he shall permit all public records in his custody to be inspected, examined, abstracted, or copied at reasonable times and under his supervision and regulation by any person; and he shall, upon the demand of any person, furnish certified copies therof on payment in advance of fees not to exceed the fees prescribed by law."

The only record the Justice of the Peace is required to keep is his docket as provided in M. S. A. 530.08.

This office has previously ruled on several occasions that the docket of a Justice of the Peace is a public record open to inspection by the public at all reasonable times. See O. A. G. 266b-28, April 10, 1953, August 16, 1926, and O. A. G. 851-i February 8, 1949.

The record of any illegitimacy is not open for public inspection pursuant to M. S. A. 257.31. See O. A. G. 840c-6, July 1, 1935. There is no statutory or judicial requirement that the Justice of the Peace take affirmative action and inform a newspaper of the contents of his docket. Representatives of the press have the same right as any other person to inspect the docket of the Justice of the Peace.

Your first qustion is answered in the negative, and your second question is answered in the affirmative.

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.,
Spec. Asst. Attorney General.

Stearns County Attorney.

June 18, 1957. 851i

16

Salaries of Municipal Judges as provided in Art. VI, Sec. 6 of the Minnesota Constitution must be prescribed by the Legislature and cannot be delegated to the municipality.

Facts

"Under the constitution pertaining to the judiciary before it was amended, it was provided in Article VI that the salaries of the Supreme and District Courts should be prescribed by the Legislature; the old constitution provided that the salaries of Probate Judges be provided by law. The same wording appears as to the salaries of the Justices of the Peace. There does not seem to be any provision with respect to the salaries of the Municipal Courts, and, as far as I know, the salaries of most Municipal Courts, if not all, are fixed by the city.

"However, now under the new constitution, Article VI, Section 7, the following provision appears:

" 'The compensation of all judges shall be prescribed by the Legislature.' "

Question

"Would it be possible, in your opinion, under the new constitutional provisions, to have the Legislature set a minimum and a maximum for cities of certain population and leave some descretion to the municipality as to the amount of the salary?"

Opinion

Minnesota Constitution, prior to the most recent amendment, provided in Art. VI, Sec. 6, that the compensation of supreme court and district court judges shall be "prescribed by the legislature." Art. VI, Sec. 7, provided that the compensation of probate judges shall be "provided by law." There was no provision as to the salaries of municipal judges. The Minnesota State Bar Association's Special Committee on Revision of the Constitution of the State of Minnesota recommended the following proposed amendment to the Judicial Article of the Constitution.

"Sec. 6 . . . The compensation of all judges shall be **prescribed by law** . . ." (Emphasis supplied) 10 Bench and Bar of Minnesota, No. 6, 88 (1953)

Later, this same committee changed their recommendation as follows:

"Sec. 7 . . . The compensation of all judges shall be **prescribed by the legislature** . . ." (Emphasis supplied) 10 Bench and Bar of Minnesota No. 10, 52 (1953)

This was the final recommendation of the committee and was adopted as part of the amendment to Art. VI of the Minnesota Constitution.

It would seem that the change in the committee's recommendation from "prescribed by law" to "prescribed by the legislature" indicates an intent that a uniform system of establishing the salaries of all municipal judges be enacted by the legislature, rather than each municipality setting the salary of its municipal judge.

Article VI, Sec. 7, as amended, of the Constitution of the State of Minnesota, now states:

" . . . The compensation of all judges shall be prescribed by the legislature . . ."

The word "prescribe" has a definite meaning. It is synonymous with "establish". 33 **Words and Phrases** 411. The amendment as passed used only the word "prescribed" and not "provided" as formerly applicable to the probate judges. This indicates an intent to rest with the legislature a power not to be delegated.

In the light of the Supreme Court opinion in the recent case of **State ex rel Gardner v. Holm,** 241 Minn. 125, 62 N.W. (2d) 52 (1954), the answer to your question must be no. In that case the court considered the meaning of the terms "prescribed by law" and "prescribed by the legislature" as used in our constitution with reference to the salary of judges. The Court decided that the two terms meant two entirely different things. The term "prescribed by the legislature" was construed to have reference to an act to be done by the legislature quite aside from its law-making function. The court decided that when the framers of the constitution provided that judicial salaries be prescribed by the legislature they had in mind keeping the judicial branch of government independent to the executive. To hold that under Art. VI, Sec. 7 of our constitution the legislature could delegate its plenary power to prescribe judicial compensation to municipalities, would be in conflict with the **Holm** case.

The **Holm** case was decided on January 29, 1954. The adoption of the amendment to Art. VI, Sec. 7 of our constitution was adopted on November 6, 1956. In speaking of the use of the term "prescribed by the legislature" by the framers of our constitution, the Minnesota Supreme Court said in the **Holm** case at p. 136:

> "In the light of such experience and training it is only reasonable to conclude that they fully understand the meaning of the language they used and intended the legislature alone to determine the compensation of the judges as the language so clearly implies."

This same language may now be used with reference to the understanding of the people in using the term "prescribed by the legislature" when they adopted this constitutional amendment.

Accordingly, your specific inquiry is answered in the negative.

MILES LORD,
Attorney General.

ROBERT W. MATTSON,
Deputy Attorney General.

Lower Court Study Commission.

December 19, 1958. 307i

17

Term of municipal judge is determined by constitutional amendment Art. VI, Sec. 8 adopted by voters Nov. 6, 1956.

"The Village of Edina, at a regular Village election held on November 6, 1956, elected a municipal judge and a special municipal judge.

"In view of the provisions of Minnesota Statutes 488.05 and the provisions of Section 8 of Article VI of the Minnesota Constitution, as approved at the same election, the Edina municipal judge has inquired as to the length of term of office of the judges elected on November 6, 1956."

Opinion

I assume that M. S. 1953, C. 488 applies to the municipal court of the Village of Edina. M. S. 1953, Sec. 488.05 provides in part:

"The judges of such courts shall be elected at the regular city or village elections, **for the term of four years,** beginning on the first Monday of the month next following their election, and until their successors qualify. * * *"

The term of office of the Edina municipal judge elected on November 6, 1956, began December 3, 1956. On the same election date, November 6, 1956, the voters of the state adopted an amendment to Article VI of the Constitution. Article VI, Section 8 now provides:

"The **term of office of all judges shall be six years** and until their successors are qualified, and they shall be elected in the manner provided by law by the electors of the state, district, county, municipality, or other territory wherein they are to serve."

The purposes and effect of said amended section were set forth in the statement furnished the secretary of state by O. A. G. 86a-34, June 12, 1956 at page 11, pursuant to M. S. 3.21, which stated:

"At the present time the judges of the supreme and district courts are elected for a term of 6 years, whereas probate **judges and many** municipal judges are elected for a 4-year term. The purposes and effect of this section of the proposed amendment are (1) **to provide for a 6-year term for all judges** and (2) to provide that all judges shall be elected in the manner provided by law."

You ask whether this amendment enlarged the term of a municipal judge elected on the same date as the amendment was adopted by the voters. Thus the question is whether the term of said judge is six years under the Constitution, as amended, or four years under M. S. 488.05 and the Constitution prior to the effective date of the amendment.

Almost the identical question came before our supreme court in **State ex rel. Mathews v. Houdersheldt,** 151 Minn. 167, 186 N. W. 234. In that case

a probate judge was elected at an election held on the same date, November 2, 1921, that the voters adopted an amendment to the then Article VI, Section 7 of the Constitution, substituting the word "four" for "two" in the following sentence: "It shall be held by one judge who shall be elected by the voters of the county for the term of two **four** years." Our court held that the term of a probate judge elected on the same day that the constitutional amendment was adopted was determined by the Constitution, as amended, and thus the term of the probate judge was for four years. As stated in that case at p. 172:

> "Their (probate judges) election and the adoption of the amendment were coincident. The Governor's proclamation and certificates of election issued merely made a record of what had been done by the electors whose votes gave vitality to the amendment and conferred office upon the successful candidates."

The court also said at p. 171 that this reasoning would apply even more strongly if the amendment had read "term of office", which is the language of the amendment adopted on November 6, 1956.

The term of office of the municipal judge elected on November 6, 1956 at the general election of the Village of Edina is for six years.

MILES LORD,
Attorney General.

Edina Village Attorney

January 3, 1957. 307k

18

Power of appointment of municipal judge, including special municipal judge exclusively in governor. Appointee holds office for at least one year after appointment.

Facts

"The Village of Kasson has established a Municipal Court in conformity with Chapter 488 of Minnesota Statutes of 1957, and enactment amendatory thereof and supplementary thereto. (Section Nine, Village Ordinance) I was appointed Municipal Judge of the Village of Kasson on July 21, by the Governor.

"Section One of the Village Ordinance provides as follows: 'At the next annual Village election there shall be elected one judge, to hold office for a period of four years and until his successor is elected and qualified.' The next Village election shall be held in November, 1958."

Question

"(1) Does Section One of said ordinance remain in effect or does Section Eight and Eleven of Article VI of the Minnesota Constitution supersede, repeal, and invalidate all sections of the Village ordinance inconsistent therewith?"

Facts

"Section Three of said ordinance provides as follows: 'In the event of the absence, disability or death of the Municipal Judge, the Village Council shall designate a competent person to act as Municipal Judge from day to day, and such Special Municipal Judge shall be subject to the same rights, powers and duties as are herein conferred upon the Municipal Judge.' The Village Attorney has issued an opinion in the form of a letter to the Village Council and has thereby suggested that said Council appoint a Special Municipal Judge, apparently as a permanently seated judge."

Questions

"(2) Has the Village Council the power and authority to appoint a Special Municipal Judge, permanently seated, by virtue of Section Three of said Ordinance, which appears to conflict with M. S. 488.03 and 488.05, and Sections Eight and Eleven of Article Six of the Minnesota Constitution?

"(3) Has the Village Council the power and authority to appoint a Special Municipal Judge to act from day to day pursuant to Section Three of said Ordinance, which appears to conflict with M. S. 488.05?

"(4) May proper appointive power appoint a temporary Special Municipal Judge before the need arises, before the absence or disability of the existing permanent Municipal Judges?

"(5) If the answer to (4) is 'Yes', must the temporary Special Municipal Judge be a practicing attorney?"

Opinion

You have informed us that the municipal court of the Village of Kasson was established and organized pursuant to M. S. 1957, C. 488 and you were appointed municipal judge on July 21, 1958 by the governor. Said courts are established by the legislature under Art. VI, Section 1 of the Minn. Const. which provides that the legislature may establish "other courts" with jurisdiction "inferior to the district court". The legislature provided thereunder in M. S. 1957, Section 488.03:

> "A court of record to be known as 'the municipal court of . . . . . ' is hereby established in and for every * * * incorporated village, which has or shall have 1,000 inhabitants or more, * * * in which * * * village no municipal court existed at the time of the taking

effect of Revised Laws 1905, but no court thus established shall be organized until the * * * village council so determines by a resolution adopted by a four-fifths majority of its members, and approved by its mayor or president, providing a suitable place for holding its sessions, prescribing the number of judges and other officials thereof, and fixing their compensation; and, in case two judges shall be prescribed for the court, one thereof may be called the municipal judge and the other the special municipal judge."

The resolution organizing the court should provide "a suitable place for holding its sessions", and prescribe "the number of judges and other officials thereof" and fix "their compensation".

A court so organized is a state court and the municipality has limited powers relating thereto. See **State ex rel. Simpson v. Fleming, 112 Minn.** 136, 127 N.W. 473. Your village has only such control over the court as specifically conferred upon it by the legislature.

The following two principles are important to any discussion of your questions concerning the municipal court of the Village of Kasson. (1) The village is limited to the powers conferred upon it by the legislature. (2) Both the municipality and the legislature are limited by the State Constitution. Thus, once the municipal court is organized, the municipality may not abolish the court. See opinion of the Attorney General No. 178 in the 1930 Report, p. 181, copy enclosed. A municipal court organized pursuant to c. 488 is limited to a maximum of two municipal judges, one to be known as special municipal judge. See O. A. G. 307j, April 22, 1948 and August 14, 1950. This office ruled in O. A. G. 307i, April 17, 1952, that no statutory provision could be found authorizing the council of a municipality which has provided for only one municipal judge in the resolution organizing the court, to provide at a later time for an additional municipal judge to act as the special municipal judge referred to in c. 488.

M. S. 488.05 provides:

"The judges of such courts shall be elected at the regular city or village elections, for the term of four years, beginning on the first Monday of the month next following their election, and until their successors qualify. When a new court is organized more than 90 days prior to a regular election, the governor shall appoint a judge or judges thereof to serve until they are elected and qualify, and vacancies shall be filled by like appointment for the unexpired term. In the absence or disability of the municipal judge and special municipal judge of such court, if there be one, the mayor or president of the council may designate a practicing attorney to sit in place of such municipal judge from day to day. All municipal judges and special municipal judges shall be men learned in the law and residents of the city or village. The salary of each shall be paid monthly by the city or village, fixed by resolution adopted by a majority of the council of such city or village, approved by the mayor or president, and not diminished during his term. Where there shall be a municipal judge and a special municipal judge, the special municipal judge shall act only in the absence or

disability of the municipal judge, and receive as compensation therefor an amount per diem to be fixed and paid by the council of such city or village; provided, that any such special municipal judge shall not be prohibited from practicing in the municipal court or in any other court, but he shall not sit in the trial of any cause or proceeding wherein he may be interested, directly or indirectly, as counsel or attorney, or otherwise. * * *"

Art. VI, Section 11 of the Minnesota Constitution provides:

"Whenever there is a vacancy in the office of judge the governor shall appoint in the manner provided by law a qualified person to fill the vacancy, to hold office until his successor is elected and qualified. The successor shall be elected for a six year term at the next general election occurring more than one year after such appointment."

In O. A. G. 86a-34, June 12, 1956, furnished the Secretary of State pursuant to M. S. Section 3.21 giving the purpose and effect of proposed constitutional amendments subsequently adopted at the election November 6, 1956, the Attorney General stated as to Section 11:

"Under the existing constitutional provision, where a vacancy in the office of any judge is filled by appointment by the governor, the appointee holds until his successor is elected, and his successor 'shall be elected at the first annual election that occurs more than thirty days after the vacancy shall have happened'. The purpose of this section of the proposed amendment is to provide that the successor, in such case, shall be elected at the next general election occuring more than 1 year after such appointment.

"The effect thereof will be that no judge appointed to fill the vacancy will be required to run for election until 1 year after his appointment, instead of 30 days as at present."

This constitutional provision, of course, controls the appointment of judges of the municipal court but even Section 488.05 gives authority **only** to the **governor** to fill a vacancy in the office of municipal judge which includes the office called special municipal judge. Said appointment is controlled exclusively by Art. VI, Section 11, supra.

Art. VI, Section 8 provides "the term of office of all judges shall be six years". These constitutional provisions are controlling and any provision in a charter, statute or ordinance to the contrary is invalid.

Thus, the legislative provision that a municipal judge must be an attorney was held invalid under the Constitution as it read before the recently adopted judiciary amendment of 1956. **State ex rel. Boedigheimer v. Welter,** 208 Minn. 338, 293 N.W. 914. The provision in M. S. 488.05 that "all municipal judges and special municipal judges shall be men learned in the law" was ruled unconstitutional by the Attorney General interpreting the Constitution prior to the amendment. As the legislature has not changed this provision since the amendment, it is still unconstitutional. See O. A. G. 307g, December 9, 1957.

The term of office of a municipal judge elected on November 6, 1956 or thereafter is determined by the provisions in the Constitution, Art. VI, Section 8, a term of six years, and not by the provisions in M. S. 488.05. See O. A. G. 307k, January 30, 1957 and August 12, 1957.

In answer to your first question, the Constitutional provisions control and the governor's appointee, pursuant to Art. VI, Section 11, holds office until the next general election occuring more than one year after July 21, 1958. The person elected at that time would have a term of six years. Your first question is answered in the negative.

The statutory authority under M. S. 488.05 "In the absence or disability of the municipal judge and special municipal judge of such court, if there be one", for the mayor or president of the council to "designate a practicing attorney to sit in place of such municipal judge **from day to day",** is not for the appointment of an additional special municipal judge to fill a vacancy in the office of municipal judge as that is constitutionally restricted to the governor by Art. VI, Section 11. No authority is given the village council in this regard. Your second and third questions are answered in the negative. The power given to the mayor or president of the council becomes operative only in the emergency situation statutorily prscribed. Your fourth question is answered in the negative, and thus no answer was requested for your fifth question. I enclose a copy of O. A. G. 307-j, December 29, 1952, No. 19, 1952 Report, p. 51, discussing the meaning of the term "disability".

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.
Spec. Asst. Attorney General.

Village of Kasson, Municipal Judge.
September 5, 1958. 307j

19

Prosecutions and Ordinances.—Offender may be given jail sentence without option of paying fine; where there is no jail in village or county "jail" as used in M. S. 412.231 can be workhouse in adjoining county. Prosecutions for violations of ordinances must be upon complaint pursuant to M. S. 412.861, Subd. 1.

Statement

"Reference is made to prosecutions of Village Ordinances brought before a Municipal Court established pursuant to M. S. A. 488, et. seq. M. S. A. 412.861 in part provides that the judgment in favor of the

Village in an ordinance prosecution be given for the amount of the fine; and further, that the judgment shall direct that in default of payment the defendant be committed to the County Jail for such time not exceeding 90 days as the Court shall see fit.

"This statute seems to indicate that a village cannot sentence a violator to a jail, without giving him the opportunity to first pay a fine. Yet M. S. A. 412.231 entitled 'penalties' provides that the Village Council can prescribe penalties for violations of ordinances not exceeding $100.00 **or** imprisonment in a Village or County Jail for a period of 90 days.

"In addition the Village of Coon Rapids, like most villages, does not have a Village Jail. Moreover, the County of Anoka does not have a County Jail. The Village of Coon Rapids contracts with the City of Minneapolis for the use of the Minneapolis City Workhouse for incarceration purposes.

"Another problem involves oral complaints. Traffic charges are usually not made by written complaint, but are oral and entered in the Court record."

Questions

"1. Can an ordinance violator be sentenced to the workhouse up to 90 days without being permitted to pay a fine in lieu thereof?

"2. Does a jail used by a village by virtue of contractual relations make this a 'Village Jail' within the meaning of M. S. A. 412.231?

"3. May a defendant be charged with traffic violations on the basis of oral statements entered into the record?"

Opinion

1. We answer this question in the affirmative.

M. S. 412.231 provides:

"The village council shall have the power to declare that the violation of any ordinance shall be a penal offense and to prescribe penalties therefor. No such penalty shall exceed a fine of $100 or imprisonment in a village or county jail for a period of 90 days, but in either case the costs of prosecution may be added."

By virtue of the foregoing section, the village council is empowered to make the violation of village ordinances punishable by fine or imprisonment. See O. A. G. No. 180, 1952 Report at page 321.

Even though the ordinance provides for punishment in the alternative, an offender who violates such an ordinance may be given a jail sentence without the option of paying a fine. **State v. Stevens**, 247 Minn. 67, 71, 75 N.W. 2d, 903.

That portion of M. S. 412.861, Subd. 2 which provides that judgment shall be given, if for the village, for the amount of fine, and that the judg-

ment shall direct that in default of payment, the defendant be committed to the county jail (to which provision you call our attention) does not, in our opinion, conflict with M. S. 412.231. It has application only where a fine rather than imprisonment is prescribed, and gives the court authority to commit a defendant who is in default in payment of the fine. It is a coercive measure to compel its payment.

2. Coon Rapids not having a village lockup and the county of Anoka wherein this village is located not having a county jail, your second question presents an unusual problem. We are not advised with reference to a workhouse within the county nor of any arrangement the county may have for incarceration of offenders sentenced to be punished by imprisonment in the county jail.

It will be observed that M. S. 412.231 specifies "a village or county jail".

M. S. 610.35 provides:

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

Although the question is not wholly free from doubt, we believe that the provisions of these sections are sufficiently broad and elastic to permit the commitment of offenders violating the village ordinances to the Minneapolis workhouse. Accordingly, we likewise answer this question in the affirmative. To hold otherwise, would mean that your municipal court is not now in position to order the commitment of the type of offender under consideration.

3. This question is answered in the negative.

M. S. 412.861, Subd. 1, provides:

> "All prosecutions for violation of ordinances shall be brought in the name of the village upon complaint and warrant as in other criminal cases. If the accused be arrested without a warrant, a written complaint shall thereafter be made, to which he shall be required to plead, and a warrant shall issue thereon. * * *"

State v. Tworuk, 172 Minn. 130, 214 N.W. 778, being the case to which your citation refers, involved the violation of an ordinance of the city of Minneapolis, and held that an oral complaint could be made and entered in the record because the provisions of the municipal court act of that city permitted it. See Note, Offenses Against the City, 36 Minn. Law Rev. 143,

151. But, villages come to grips with Section 412.861. Its provisions are plain and unambiguous. There must be compliance therewith by the village.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Coon Rapids Village Attorney.

September 20, 1957. 477b-28

20

Probate Judges—Compensation reduction—"Term of office" refers to definite period of time set forth in Constitution.

"Laws 1957 Ex. Sess., C. 7, provides, in part, that in counties having a population of 35,000 and less than 50,000, the salary of the Probate Judge shall be $9,500.00.

"On June 11, 1957, your office rendered an opinion that if compensation of Probate Judge, entitled to retain certain fees, would be reduced by the above law which went into effect while he was in office, then such chapter would not be applicable to the Probate Judge in view of provision of Constitution Art. 6, Sec. 7, that compensation of all Judges shall be prescribed by the Legislature and shall not be diminished during their term of office.

"The Judge of Probate in Polk County was re-elected on November 4, 1958. His salary will be diminished on January 1, 1959 if this chapter applies."

Question

"Since re-election of the Probate Judge resulted in his continuance in office, would it be your opinion that his salary could not be reduced so long as he continues in office?"

Opinion

The Minnesota Constitution, Art. VI, Section 7, now provides:

"Judges of the supreme court, the district court, and the probate court shall be learned in the law. The qualifications of all other judges and judicial officers shall be prescribed by law. **The compensation of all**

judges shall be prescribed by the legislature and **shall not be diminished during their term of office.**" (Emphasis supplied)

O. A. G. 347i, June 11, 1957, referred to in your letter, stated that L. Ex. Sess. 1957, C. 7, could not reduce the compensation of probate judges then holding office as Art. VI, Section 7, supra, prohibited diminution of compensation "during their term of office".

Your question turns on the meaning of the following language in the present Constitution: "The compensation of all judges * * * shall not be diminished during their term of office".

The Constitution prior to the amendment adopted by the voters on November 6, 1956, provided in Art. VI, Section 6, that the compensation of "judges of the Supreme and district courts * * * shall not be diminished during their continuance in office". There was no such provision as to judges of probate court.

The present Constitution in Art. VI, Section 7, applies to "all judges" thereunder and states that their compensation "shall not be diminished during their term of office". The "term of office of all judges" elected on or after November 6, 1956, "shall be six years and until their successors are qualified". Art. VI, Section 8. See O. A. G. 347j, January 4, 1957. The term of office of probate judges elected prior thereto is "a term of four years" as was provided in Art. VI, Section 7 of the Constitution prior to the recent judiciary amendment. There appears to be no question but that "term of office" refers to the fixed and definite period of time set forth in the Constitution. W. & P., Vol. 41, pp. 369, 388-392, and Vol. 9, p. 161.

The Missouri Constitution provided in Art. 14, Section 8, as follows:

> "The compensation or fees of no state, county or municipal officer shall be increased **during his term of office.**" (Emphasis supplied)

The Missouri court in construing this provision in **State v. Farmer** (1917), 196 S. W. 1106, 271 Mo. 306, on pp. 1108 and 1109 of the Southwestern Reporter, stated:

> "In passing we note that it seems to be hinted that, relator having already served one full term beginning January 1, 1911, and having been re-elected to a second term, is bound during such second term to content himself with the salary fixed for his office when he was first elected thereto for his first term. It is so plain that this view is wrong that we but pause to state the contention and content us with so characterizing it. Each official term stands by itself. The constitutional provision forbidding an increase or decrease of compensation during a term of office has reference to the period fixed as a term by statute only, and in no wise refers to the individual who may incidentally happen to be the incumbent for more than one term."

The California court in **People v. Burbank** (1859), 12 Cal. Rep. 378, at p. 392, in interpreting the California Constitution, said:

"* * * All the Constitution means by the expression 'during the term,' is, during the time or period for which the officer is elected. When the Constitution says the Judge shall hold his office for six years, it means that this period of six years is the term of his office: it is that quantum of time assigned to him by the Constitution as his period of the enjoyment of the office; and this quantum may not improperly be called a term. * * *"

The Montana court in **State v. Knight** (1926), 245 P. 267, 76 Mont. 71, on p. 268 of the Pacific Reporter, stated:

" 'Term of office' is a phrase used to describe the period of time during which one regularly chosen by election or appointment and inducted into office is entitled to hold the same, perform its functions, and enjoy its privileges and emoluments. The time when a term of office commences is usually fixed by law. 28 Cyc. 423."

A probate judge re-elected on November 4, 1958, will enter a new "term of office" in January, 1959. This will be a new six-year term under the present Constitution rather than the former term of four years. If the legislature prior to this new term has reduced the compensation to be paid for this new term, the constitutional prohibition against diminishing compensation during his term would not be violated, the reduction being made prior to this new term and not during it. Your question is answered in the negative.

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.,
Spec. Asst. Attorney General.

Polk County Attorney.

December 18, 1958. 347j

21

Investment of Guardianship Funds—By virtue of M. S. 51.29, Subd. 2, probate court may authorize investment of guardianship funds in Minnesota savings and loan associations and also in federal savings and loan associations wherever located. O. A. G. 53a, March 1, 1939, superseded.

Question

May a probate judge authorize a guardian to invest guardianship funds in a federal savings and loan association (a) located in Minnesota or (b) located in another state?

Opinion

M. S. 525.56, Subd. 3 (3), provides that a general guardian shall " * * * invest all funds not currently needed for the debts and charges named in clauses (1) and (2) and the management of the estate, in the securities as are authorized by section 50.14 and approved by the court * * * ". Such provision was first enacted by L. 1935, c. 72, Section 135; and the attorney general rendered an opinion O. A. G. 59-A, March 1, 1939, holding thereunder that Section 50.14 did not authorize the investment of guardianship funds in savings and loan associations.

Although Section 50.14 has been subsequently amended several times[1], none of such amendments affect the holding of the 1939 opinion. However, M. S. 51.29, Subd. 2, enacted by L. 1945, c. 290, Section 5, provides:

> "Administrators, executors, **guardians**, trustees and other fiduciaries of every kind and nature, **when authorized by an order of the court having jurisdiction**, and insurance companies, fraternal beneficiary associations, cemetery associations, however organized, charitable, educational, eleemosynary organizations and trustees of governing bodies of public employees' pension, benefit or relief associations **are authorized to invest funds held by them in shares, accounts or certificates of savings, building and loan associations, organized under the laws of this state or the United States** and such investments shall be held to be legal investments for such funds. **The provisions of this subdivision are supplemental to any and all other laws relating to and declaring what shall be legal investments for the persons, corporations, organizations, and officials herein referred to.**" (Emphasis supplied)

Manifestly, this statute does affect the holding of the 1939 opinion. It is significant that a prior provision of Section 51.29 that the law should not be construed as granting additional powers or authority to fiduciaries was omitted by the 1945 enactment, and 32 M. L. R. 371 called attention to the fact that the provisions of said Subd. 2 were **expressly** made supplemental to any and all other laws relating to legal investments for the named investors.

"Supplemental to", as used in Subd. 2, simply means "added to" (40 W. & P. 774); and since such reference in Subd. 2 is to all the laws generally governing legal investments and not to any specific statute, it is well established that the reference pertains to all laws governing the subject as they stand at the time they are sought to be applied. See 82 C. J. S., Section 370, at pp. 847 and 848; cf. O. A. G. 53a, June 24, 1948 (#1, 1948 report). Further, there can be no doubt that the portions of Sections 525.56 and 51.29 referred to herein and Section 50.14 are all in pari materia and are thus to be construed together and effect be given to each. See M. S. A. 645.16 and annotation 25 thereto.

Since it is apparent that the provisions of Section 51.29, Subd. 2, are to be, in effect, added to the provisions of the other two statutes, we have no

[1]See particularly Subds. 13 (b) and 14 (b) thereof, subsequently added by L. 1939, c. 105, and L. 1939, c. 409, respectively, for additional investments authorized for guardianship funds.

hesitancy in holding that this 1945 legislation superseded our March 1, 1939 opinion, supra, and that probate courts in this state may authorize the investment of guardianship funds in savings and loan associations organized under either the laws of Minnesota or the United States.

Insofar as investing in federal savings and loan associations is concerned, Section 51.29, Subd. 2, contains no limitation that investments be made only in associations physically located in Minnesota; nor does Section 525.56 contain any such requirement in regard to investment of guardianship funds in general. It should also be pointed out that Section 50.14 specifically authorizes many investments in organizations physically located outside the state. I have not been informed of any other statute or probate court rule forbidding such out-of-state investment, and hence both parts of your question are answered in the affirmative.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Benton County Probate Judge.

December 30, 1958. 53a

22

Probate Judges—Reimbursement for expense incurred in attending annual meeting of state association. Probate judge deemed county officer for purposes of Section 382.29, which governs as to expenses if there is an additional annual convention of state association of probate judges.

"A question has arisen with regard to the proper expenses to be paid by the county to a probate judge for attendance at a probate judges' annual meeting. According to 382.29 of the Minnesota Statutes Annotated, which was passed in 1951, all county officers who are elected may be reimbursed for expenses in attending one annual convention, such expenses to consist of travel, including 5c a mile for the use of their own car and for other expenses other than mileage in an amount not to exceed $25.00. Section 525.06 of the statutes provides, however, that judges of probate attending their annual assemblies shall be paid reasonable expenses of attending such convention out of their respective counties. This statute was passed in 1935 and does not appear to have ever been changed unless the previous law which I referred to has changed it."

Questions

"1. Does 382.29 or 525.06 apply with regard to the probate judges' expenses?

"2. Does the rate of 5c a mile set forth in 382.29 apply as an absolute maximum for all county officials?"

Opinion

1. The statute now coded as M. S. 525.06 was first enacted by L. 1923, c. 400. The statute was thereafter amended by L. 1935, c. 72, Section 11, to add the last sentence and now provides:

> "The judges of the probate courts shall assemble at the capitol on the second Wednesday after January 1st of each year at ten o'clock in the forenoon or at such other place and time as may have been designated at the preceding assemblage, and any 20 of them shall constitute a quorum. When so assembled such judges shall formulate and adopt rules and make such revision and amendment thereof as they may deem expedient conformably to law, and the same shall take effect from and after the publication thereof as directed by them. Such rules shall govern all the probate courts of this state, but, in furtherance of justice, the court may relax or modify them or relieve a party from the effect thereof on such terms as may be just. **The reasonable expenses of the judges attending such meetings shall be paid by their respective counties.**" (Emphasis supplied)

Thus, ever since 1935 there has been a statutory mandate that the county shall pay the reasonable expenses of probate judges who attend such meetings, which have for their purpose the formulation, adoption, revision and amendment of the Probate Court Rules. The statute, which has not been repealed, prescribes only that such expenses be reasonable, which is a fact question.

M. S. 382.29 was enacted by L. 1951, c. 322, and provides:

> Subdivision 1. "**Any elective county officer** may be reimbursed for expenses incurred in attending one annual convention of the state organization of such officers. Such expenses may include bus or train fare or mileage expense for the use of said officer's own car **at a rate not exceeding five cents per mile.** * * * The maximum amount allowed any officer for all expenses other than mileage during any one year under the provisions of this section shall not exceed $25." (Emphasis supplied)
>
> Subd. 2. "Each county board is hereby authorized to appropriate the necessary amounts for such purpose from county funds upon receipt of verified statements from the officials entitled to reimbursement."

Although probate courts are state courts and the judges thereof are state officers under the Minnesota Constitution, Art. VI, Secs. 1 and 6, this office has held that for certain purposes probate judges are also considered as county officers. For example, O. A. G. 347e, March 6, 1940, held that under Section 382.05 a probate judge is a county officer and as such is required to file written statements of his fees, gratuities and emoluments of

office; and O. A. G. 347, June 13, 1956, held that probate judges are county officers within the meaning and coverage of M. S. 471.61, authorizing group insurance payments to be made by the county as additional compensation.

Section 382.29 relates to payment of certain expenses of elective county officers out of county funds, and in line with the foregoing opinions we hold that a probate judge could be considered a county officer for the purposes of such statute.

Thus we have before us two different statutes relating to payment of expenses of probate judges incurred in attending annual meetings or conventions. It is axiomatic that effect is to be given to all statutes on the same subject if possible. **State v. Babcock,** 175 Minn. 583, 222 N.W. 285; M. S. 645.26, Subd. 1. Further, all statutes are presumed to have been passed with deliberation and with full knowledge of all existing statutes on the same subject. **County of Hennepin v. County of Houston,** 229 Minn. 418, 39 N.W. (2d) 858. It is evident that M. S. 382.29, relating to county officers generally, in no manner purports to repeal M. S. 525.06 which applies solely to probate judges, and thus the latter statute still stands as before. See analogous O. A. G. 121a-8, August 6, 1957.

We therefore hold that when a probate court judge attends the annual January meeting for the purpose of formulating, adopting, revising and amending the Probate Court Rules, the payment of his expenses is governed by M. S. 525.06. If there should be an annual convention of the state organization of probate judges in addition to the meeting prescribed by M. S. 525.06, then M. S. 382.29 will apply in regard to payment of the expenses of a probate judge attending such convention.

2. We have heretofore ruled that payment to county attorneys of their expenses in attending conventions is governed by M. S. 388.14 rather than by M. S. 382.29. See O. A. G. 121a-8, August 6, 1957, May 17, 1951, and July 27, 1951. Attention is also directed to M. S. 375.163, enacted by L. 1955, c. 364, in regard to payment of dues and expenses of county commissioners in attending meetings of the state association of county commissioners, as well as to M. S. 525.06, supra, relating to probate judges. We have not been advised of any other statute relating to reimbursement of expenses of specified county officers in attending meetings of their respective state organizations. An elected county officer to whom M. S. 382.29 applies in regard to reimbursement of expenses for attending conventions of his state organization, and who uses his own car for such purpose, may only be reimbursed for his mileage expense "at a rate not exceeding five cents per mile".

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Wilkin County Attorney.

March 5, 1958. 347d

23

The term of office of probate judges elected on or after November 6, 1956, the date of adoption of the judiciary amendment to Art. VI, is six years as set forth in said amendment.

Questions

"What effect has the passing of amendment No. 1, in the past general election, relative to the length of term of Probate Judge, especially those that were elected in 1956?

"Will the six year term begin in January 1957, or will there need be some enabling act of the next session of the legislature necessary?"

Opinion

Prior to the constitutional amendment of Art. VI, adopted by the voters at the November 6, 1956 election, Sec. 7 thereof provided in part material:

"There shall be established in each organized county in the State a probate court, which shall be a court of record, and be held at such time and place as may be prescribed by law. It shall be held by one judge, whose qualifications may be established by law. The judge shall be elected by the voters of the county for a term of four years. * * *"

At the general election on November 6, 1956, the voters of the state adopted an amendment to Art. VI of the Constitution known on the ballot as Amendment No. 1. Art. VI, Section 8 now provides:

"**The term of office of all judges shall be six years** and until their successors are qualified, and they shall be elected in the manner provided by law by the electors of the state, district, county, municipality, or other territory wherein they are to serve." (Emphasis supplied)

The purposes and effect of said amended section were set forth in the statement furnished the secretary of state by O. A. G. 86a-34, June 12, 1956, page 11, pursuant to M. S. Section 3.21, which stated:

"**At the present time** the judges of the supreme and district courts are elected for a term of 6 years, whereas probate judges and many municipal judges **are elected for a 4-year term. The purposes and effect** of this section of the proposed **amendment** are (1) **to provide for a 6-year term for all judges** and (2) to provide that all judges shall be elected in the manner provided by law." (Emphasis supplied)

You ask whether this amendment automatically enlarged the term of probate judges elected at the same time or after the amendment was adopted by the voters.

Thus, the question is whether the term of said judges is six years under the Constitution as amended by the recent judiciary amendment, or four years under Art. VI, Sec. 7 of the Constitution prior to said amendment.

Almost the identical question came before our Supreme Court in **State ex rel. Mathews v. Houdersheldt,** 151 Minn. 167, 186 N. W. 234. In that case a probate judge was elected at an election held on the same date, November 2, 1921, that the voters adopted an amendment to the then Art. VI, Sec. 7 of the Constitution, substituting the word "four" for "two" in the following sentence: "It shall be held by one judge who shall be elected by the voters of the county for the term of two **four** years." Our court held that the term of a probate judge elected on the same day that the constitutional amendment was adopted was determined by the Constitution, as amended, and thus the term of the probate judge was for four years. As stated in that case at p. 172:

> "* * * Their (probate judges) election and the adoption of the amendment were coincident. The Governor's proclamation and certificates of election issued merely made a record of what had been done by the electors whose votes gave vitality to the amendment and conferred office upon the successful candidates."

The effect of the adoption of the constitutional amendment of Art. VI, adopted by the voters at the November 6, 1956 election, is that the term of office of all probate judges elected on or after November 6, 1956, is six years as provided by said amendment.

MILES LORD,
Attorney General.

Minnesota Probate Judges Association.

January 4, 1957. 347j

24

State has concurrent jurisdiction on all boundary waters. Enabling Act February 26, 1857; USCA 166; Minn. Const., Art. II, Sec. 2.

Your letter requests an opinion concerning the jurisdiction of our courts in regard to crimes committed upon boundary waters and the authority of the sheriff to make arrests for criminal offenses committed upon such boundary waters.

Opinion

Sec. 2 of the Enabling Act of February 26, 1857, authorizing the people of the Territory of Minnesota to form a constitution and state government, in its portion here material reads:

> "**And be it further enacted,** That the State of Minnesota shall have concurrent jurisdiction on the Mississippi and all other rivers and

waters bordering on the said State of Minnesota, so far as the same shall form a common boundary to said state and any state or states now or hereafter to be formed or bounded by the same; * * *."

This provision is a part of the Constitution of the State of Minnesota. See Minn. Const., Art. II, Sec. 2.

In construing the above constitutional provision and reviewing its origin the court in **State v. George,** 60 Minn. 503, 63 N. W. 100, in part said:

"It is certified that the offense was committed on a bridge which, at Winona, in this state, spans the Mississippi river from the Minnesota side to the Wisconsin side of that river, and was so committed on the part of said bridge which is built upon an island in the river. This island is on the Wisconsin side of the main channel of the river, and the waters between the island and the Wisconsin bank of the river are not used for navigation. * * *

"It is contended by counsel for defendant that the courts of Minnesota have no jurisdiction over this offense. It is urged that the offense was not committed on the waters of the river, but on a permanent structure built on an island, and which is a part of the island, and above high-water mark; that the state of Wisconsin has exclusive jurisdiction of this permanent structure, * * *

"* * * Some of the purposes of this concurrent jurisdiction are to enforce proper police regulations on the river, and to regulate and protect interstate traffic on and across the river, and the persons engaged in the same. If public travel across the river at this point was carried on by means of a ferryboat, there is no question but that this concurrent jurisdiction would attach during the transit across the river. The fact that the appliance by means of which the travel is carried on is a bridge instead of a ferryboat does not change this rule. The question here involved is not whether the courts of Minnesota have jurisdiction over this permanent structure on this island considered as real estate, but whether Minnesota and her courts have jurisdiction over the persons and moving or movable vehicles and things on this bridge. In our opinion, it is not material whether, at the time of the occurance, such persons happen to be over the water of the river, or over an island in the river, or at one side of the main channel or the other. One of the reasons for establishing this concurrent jurisdiction was to prevent the escape of criminals on account of the uncertainty that so frequently arises as to whether the act was committed on one side of the middle of the main channel or the other side of it. This uncertainty exists just as well when the act is committed on a bridge as when committed on a water craft. A traveler on such bridge is usually not likely to know whether he is over an island or over the water, or on one side of the main channel or the other. In our opinion, the court below had jurisdiction."

From these constitutional provisions and the language of our court above quoted, we conclude that the state has concurrent jurisdiction over

boundary waters irrespective of the navigable character thereof and that acts committed thereon which constitute a crime under our statutes may be prosecuted in the courts of this state.

The authority of the sheriff to make arrests under the provisions of M. S. 629.40, for crimes committed within his county, is applicable to boundary waters the limits of which are prescribed in Sec. 484.02.

Question

"Are there any Federal Statutes giving the State the right to exercise criminal jurisdiction over such boundary waters which are Federal water ways?"

Opinion

Sec. 2 of the Enabling Act and Art. II, Sec. 2, of the state Constitution, grants to the state concurrent jurisdiction over all boundary waters, which concurrent jurisdiction is not dependent upon the question whether such waters are navigable waters of the United States. The power of the federal government under Art. I, Sec. 8, of the United States Constitution to regulate commerce in no manner impairs the sovereign rights of the state to enforce its laws within its geographical bounds, as well as upon boundary waters.

MILES LORD,
Attorney General.

VICTOR J. MICHAELSON
Spec. Asst. Attorney General.

Washington County Attorney.

May 5, 1958. 370i

25

Duties of county attorney.

Facts

"During the past twelve months an increasing number of appeals to the District Court from convictions of ordinance violations and misdemeanors have been filed. There has been a question raised as to who is responsible for the prosecution of these cases in the Justice or Municipal Courts and for the trials de novo in the District Court on appeal and for appeals to the Supreme Court.

"We have at the present time approximately a dozen such cases where appeals have been filed with our District Court. The municipal attorneys have questioned their responsibility in this matter."

Question

"Who has the responsibility to prosecute misdemeanor cases in Justice of Peace courts, on appeal in the trial de novo in District Court and on appeal to the Supreme Court?

"Because of the wide variety of questions coming up on a practical everyday basis covering all ordinance violations and misdemeanors both originating in the Justice of Peace courts as well as the Municipal Courts, we ask for a review on all these matters in addition to our specific question.

"This includes the trial and appeal of ordinance violations originating in a Municipal Court, the trial and appeal of ordinance violations originating in a Justice of Peace Court; the trial and appeal of misdemeanors originating in a Municipal Court; and the trial and appeal of misdemeanors originating in a Justice of Peace court.

"We call your attention in particular to Sec. 488.22 of the Minnesota Statutes which provides in part:

" ' . . . misdemeanors and violations of ordinances or by-laws shall be prosecuted by a city or village attorney and all other offenses by the county attorney . .' "

Opinion

The answer to your specific question is that the county attorney has no duty to prosecute violations of misdemeanors in justice court except where a statute specifically imposes that duty upon the county attorney. When a misdemeanor violation is tried in municipal court M. S. 488.22 applies and the prosecution of the case, including the conduct of any appeal to the district court, is the duty of the attorney of the municipality wherein the violation occurs. If a municipality has no attorney, it may hire one for this purpose. If the violation occurs outside the limits of any municipality, then no one has the duty to prosecute the case or represent the state on an appeal taken to the district court. The county attorney has no duties in such cases but he may in his discretion conduct such prosecutions and if he does, he should represent the interests of the state on an appeal taken to the district court. Further appeals are governed by M. S. 8.01. See **State v. Sexton**, 42 Minn. 154. 43 N. W. 845.

The duties of the county attorney are not specified in the constitution. They are therefore entirely statutory. It has been held in other jurisdictions that the county attorneys have no common law duties. See 26 C. J. S., District and Prosecuting Attorneys, Section 10. The duties of the county attorneys in this state are set out generally in Minnesota Statutes, c. 388,

which chapter has been in our law since 1860. M. S. A. 388.05 makes it the duty of the county attorney to

> " . . . attend upon all terms of the district court for (his) . . . county, and upon all other courts having criminal jurisdiction for the preliminary examination of persons charged with crime, when such court shall request his attendance and furnish him a copy of the complaint; . . . He shall draw all indictments and presentments found by the grand jury and prosecute the same to a final determination in the district court; . . ."

Prior to the constitutional amendment of November 8, 1904, this last clause was a general delineation of the duty of the county attorney in criminal cases. Before the amendment, the constitution provided that no person should be held to answer for a criminal offense "unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace." Since with the exceptions noted, no person could be prosecuted for a criminal offense except by way of presentment or indictment, and since the statute provided that it was the duty of the county attorney to prosecute all presentments and indictments, a reading of the statute in connection with a reading of the constitution made the duty of the county attorney clear. Unless an offense was cognizable by a justice of the peace, no person could be held to answer therefor unless by presentment or indictment. If an offense was made punishable so as not to be cognizable by a justice of the pease, the prosecution for a violation thereof must be by presentment or indictment and the statute made the prosecution thereof the duty of the county attorney. **State ex rel. Erickson v. West,** 42 Minn. 147, 43 N. W. 845.

Then on November 8, 1904, our constitution was amended to provide that "No person shall be held to answer for a criminal offense without due process of law . . ." Minn. Constitution, Art. I, Section 7. In 1905 the provisions in our law with respect to informations were enacted. L. 1905, c. 231. Under that act the district courts were given jurisdiction to try prosecutions upon informations for the crimes, misdemeanors and offenses specified in Section 4 thereof. Section 4 specified criminal offenses where an accused had been held by a court or magistrate for trial in district court. Persons accused of crime at that time, as at present, were held to district court only where the offense was punishable in such fashion as to exceed the jurisdiction of other courts. Any crime punishable by a fine of more than $100 or imprisonment in excess of three months was and is in excess of the jurisdiction of a justice of the peace court and a municipal court and was and is in the original jurisdiction of the district courts. Minn. Const., Art. VI, Sections 5 and 8, prior to the 1956 amendment, R. L., Section 128 (M. S. 488.06); R. L. Section 4000 (M. S. 633.02). M. S. 610.01 defines and classifies crimes. It defines a misdemeanor as a crime, not a felony, the punishment for which is a fine not to exceed $100 or imprisonment not to exceed 90 days. Other crimes are either felonies or gross misdemeanors.

So, from a consideration of the foregoing, it is our opinion that the language of M. S. 388.05

". . . He shall draw all indictments and presentments found by the grand jury and prosecutes the same to a final determination in the district court; . . ."

must now be taken to mean that it is the duty of the county attorney to prosecute in the district court all felonies and all gross misdemeanors.

All that has been said in this opinion up to this point has considered the duty imposed upon the county attorney by M. S. 388.05 and not otherwise. There are other statutes which impose the duty on county attorneys to prosecute certain misdemeanor cases. If a statute creating a misdemeanor makes it the duty of the county attorney to prosecute violations thereof, then it is his duty to so prosecute. If the statute creating the misdemeanor does not expressly provide that it is the duty to prosecute violations thereof, then he has no duty to so prosecute. Many of our previous opinions have dealt with such statutes and this opinion in no way detracts therefrom.[1]

In this connection, however, your attention is invited to the fact that there are some crimes created by the legislature and termed misdemeanors which are actually gross misdemeanors because the punishment provided therefor exceeds that which may be given for a misdemeanor. **State v. Kelly**, 218 Minn. 247, 15 N. W. (2d) 554. It is the duty of the county attorney to prosecute such crimes. O. A. G. 494-b-23, January 24, 1957.

There is nothing in the language of c. 388 which gives the county attorney the duty to represent the interests of the state on the appeal of criminal cases prosecuted by others in justice or municipal courts unless it be the language in M. S. 388.05 that he shall "attend upon all terms of the district court". We have not previously interpreted that language to mean that the county attorney has such an appellate duty.[2]

The language used in O. A. G. No. 28, 1948 Report, is convincing.

"M. S. A. 488.22 reads: 'Misdemeanors . . . shall be prosecuted by the city . . . attorney . . .'

"Inasmuch as it is the duty of the city attorney in such a case to prosecute the case in the court where it arises, it would seem to follow that his duty extended to the handling of the case in all courts to which it may be appealed. It could hardly have been intended that as it was made the duty of the city attorney to prosecute the case in the Municipal Court, the prosecution thereof should thereafter be abandoned by the city attorney in the District Court on appeal and the state be without representation.

"I think the statute means that where the duty is imposed upon the city attorney to prosecute the case, that duty continues and remains with the city attorney in all courts to which the case may be appealed.

---

[1]O. A. G. 59a-5, May 3, 1949, February 23, 1939, May 8, 1935, July 17, 1934, December 21, 1933, August 30, 1932, August 6, 1925, December 7, 1923; O. A. G. 121-b, November 13, 1942, August 27, 1937, December 21, 1933, May 19, 1921, July 28, 1916, May 27, 1915 (No. 410, 1916 Report); O. A. G. 208g-2, December 28, 1923; O. A. G. 217b-7, October 13, 1933 (No. 603, 1934 Report); O. A. G. 153, 1950 Report; O. A. G. 189, 1942 Report.

[2]O. A. G. 59a-5, September 15, 1948 (No. 28, 1948 Report); August 5, 1925; O. A. G. 121b, September 14, 1920; O. A. G. 779a-5, November 20, 1935.

"There is no provision for the county attorney to step into such a case when it reaches the appellate court, and it would seem better that the attorney who represented the state in the lower court should continue to do so.

"It is my belief that the courts would hold that the duty of the city attorney to prosecute the case in the Municipal Court follows through to the District Court, and that the city attorney should handle the prosecution of the case."

Ordinarily to prosecute a criminal case means to carry the case through all legal steps necessary to its final determination. See 34 W. & P., Prosecute, Prosecution.

We rule, therefore, in the absence of a contrary statutory direction, that the prosecuting attorney whose duty it is to prosecute an offense has also the duty to prosecute any appeal necessary until the case is finally determined.[3]

We have seen what are the duties of the county attorney in connection with criminal cases. In the interests of clarity and for the purpose of gathering together other of our previous opinions we will treat now with the duties of other prosecuting attorneys.

Cases involving violations of ordinances are prosecuted by the attorney employed for that purpose by the municipality which made the ordinance. **State v. Sexton**, supra; O. A. G. 469-b-1, October 14, 1911. If a municipality has no attorney it may and should hire one for the purpose of conducting the prosecution. O. A. G. 159-a-5, May 26, 1931; O. A. G. 469-b-1, May 23, 1929.

M. S. 488.22 provides:

". . . Misdemeanors and violations of ordinances or by-laws shall be prosecuted by the city or village attorney, . . ."

We have previously held that this statute means that the city or village attorney has a duty to prosecute in municipal court violations of ordinances or by-laws and of misdemeanors when committed within the limits of his municipality. If a misdemeanor is committed outside the limits of the municipality, the city or village attorney has no duty to prosecute.[4]

A city or village attorney has no duty to prosecute violations of misdemeanors in justice of the peace courts regardless of where the misdemeanor was committed.[5]

Our law does not impose a duty upon any one to prosecute violations of misdemeanors occurring outside the limits of a municipality[6] in a

[3]M. S. 8.01; **State v. Sexton**, supra.

[4]O. A. G. 50a-5, April 28, 1949, September 15, 1948 (No. 28, 1948 Report); August 4, 1944, February 17, 1944 (No. 70, 1944 Report), February 23, 1939, May 8, 1935, July 17, 1934; O. A. G. 121b, July 28, 1916.

[5]O. A. G. 59a-5, August 1, 1946, September 26, 1932, February 18, 1931, August 6, 1925.

[6]O. A. G. 59-a-5, May 8, 1935.

municipal court or misdemeanors committed in a municipality in a justice court. Several of our opinions have suggested that in order to maintain public peace and order that the county attorney and the municipal attorneys work out some mutually satisfactory arrangement as to prosecution of such cases.[7] In order to prevent a failure of justice we here reiterate that suggestion.

As to those violations where the law imposes no duty upon any officer to prosecute, we think that the county attorney or a city or village attorney may in his discretion assume that duty.[8] And we have previously held that when one does assume that duty he also assumes the duty to prosecute the case through all stages of the proceedings.[9]

MILES LORD,
Attorney General.

Hennepin County Attorney.

March 8, 1957. 121-B

26

Prosecution of maker of written instrument in form of check but bearing the words "hold until February 3, 1957", a date subsequent to the delivery thereof to the payee, was not a check because not payable on demand and prosecution under M. S. 335.73 not warranted.

Facts

" 'A' issued a check to 'B' January 25, 1957. 'B' agreed to hold this check until February 3, 1957. The words 'hold until February 3, 1957' appear on the check. Ten days notice was given pursuant to 620.41 Minnesota Statutes Annotated."

Questions

1. "Is the above check a check dated subsequent to the date of issue, as provided in Section 620.41 Minnesota Statutes Annotated?
2. "In the event your answer is 'yes' would a verbal agreement to hold said check constitute a defense to this crime under Section 620.41 Minnesota Statutes Annotated?"

Opinion

This section of the statutes defines two crimes. The first crime mentioned is defined in the first sentence. Your facts do not come within

---

[7]O. A. G. 59-a-5, August 6, 1925, November 2, 1943, December 27, 1923; O. A. G. 121-b, December 21, 1933.

[8]O. A. G. 59-a-5, August 6, 1925.

[9]O. A. G. 59-a-5, September 17, 1948.

that definition. I therefore assume that you have for consideration that portion of this section after the first sentence which appears to be intended to define a second or independent crime.

The language significant to your first question is in the second paragraph which reads:

> "The provisions of this section shall not apply to a check, draft, or order dated subsequent to the date of issue."

That language refers to the check. In my opinion, the words "dated subsequent to the date of issue" mean that the date written on the check is subsequent in point of time to the day on which the check passes from the maker to the payee. The word "dated" refers to the date written on the check.

You refer to the instrument as a check. Is it a check? M. S. 335.73 defines a check thus: "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check."

Was this instrument which on its face said "hold until February 3, 1957" payable on demand? What do those words mean? It was a direction to the payee or to the bank on which it was drawn. The words appear to indicate an intention on the part of the maker that the instrument should not be paid by the bank before February 3, 1957. If his conclusion is true, then it was not a check because not payable on demand. It might more properly be described as a bill of exchange.

I fail to recognize a crime committed by the maker of the instrument.

Enclosed find copy of O. A. G. 494-b-7, February 10, 1956, which may be of interest.

MILES LORD,
Attorney General.

CHARLES E. HOUSTON,
Solicitor General.

Pope County Attorney

November 8, 1957. 494b-7

27

Bad Check given in payment of wages. Sheriff, in attempt to collect execution on a judgment based upon wages, who receives a bad check to satisfy the execution, cannot claim crime committed which is defined in M. S. 620.41, first sentence thereof.

Facts

"On August 16, 1958, a judgment debtor issued a check to the Sheriff of this County in payment of an execution under a judgment that the Sheriff was then levying on the said judgment debtor. The check was returned for want of funds. The check was not post-dated."

Question

"Has an offense been committed under the terms of Section 620.41? In other words is the existence of an employer-employee relationship between the drawer and payee necessary in order to come within the purview of the statutes?"

Opinion

M. S. 620.41 defines a crime in the first sentence thereof. The second sentence describes conduct which attempts to define a second crime unrelated to your statement of facts. O. A. G. 494b-7, February 10, 1956 deals with the second sentence.

The elements of the crime defined in the first sentence are:

(1) The person accused must have issued a check in payment of money upon a bank.

(2) The check must have been in payment of wages to a laborer or employee.

(3) When the check was issued the accused must have had to his credit in such a bank a sum insufficient to pay the check in full upon presentation.

But, the facts stated do not show such situation. The check was given to the sheriff to satisfy an execution upon a judgment. A judgment is a final determination of the rights of parties to an action. Dunnell's Dig. Section 4963. It is a contract. Section 4964. If the judgment was based upon the wages earned, the cause of action for wages merged in the judgment. Section 5170. So, after the judgment was entered, the judgment creditor no longer had a cause of action for wages earned.

The drawer of the check did not owe wages to the sheriff. The sheriff was not an employee of the drawer of the check. The execution which the sheriff held was issued by a court. It was a writ. Undoubtedly, the writ commanded the sheriff to levy on and sell the property of the judgment debtor. But he did something else. He took a no good check. The sheriff gave up nothing for the check. He gave nothing and received nothing.

In my opinion, the facts stated show no crime committed.

MILES LORD,
Attorney General

CHARLES E. HOUSTON,
Solicitor General

Kanabec County Attorney

September 18, 1958. 494-b-7

28

Bad Check Laws—M.S. 622.04 and 620.41 define different crimes and elements thereof.

You have called attention to M.S. 622.04 and 620.41.

Questions

1. When a check upon a bank is issued without funds therein to the credit of the drawer to pay the same, which of such sections applies?

2. If Section 620.41 governs, must the complaint show that the 10 days' notice has been given to the issuer of the check dishonored?

Opinion

I do not know precisely how the questions arise. I presume that it is upon the problem of drawing a criminal complaint.

First consider M. S. 622.04. This section defines a "gross misdemeanor" and states the elements thereof. Such elements are that

1. The drawer has an intent to defraud another.

2. He makes or utters or draws the check for the payment of money upon a bank.

3. He does not have sufficient funds in or credit with such bank for payment of the check in full upon its presentation.

If these three elements are present, he has committed the crime defined.

But M. S. 620.41 defines two different crimes. The first sentence thereof defines a misdemeanor. The second sentence defines another misdemeanor.

The first sentence is confined to checks upon a bank **in payment of wages to a laborer or employee** without having sufficient funds or credit in the bank for its payment in full upon presentation. No intent to defraud is required. Therein it differs from M. S. 622.04. It applies only to a check issued in payment of wages. To illustrate: It does not apply to a check given in payment for the purchase of merchandise.

The second sentence defines another crime. The elements are

1. The check was not issued in payment of wages.

2. It is issued upon a bank for the payment of money.

3. The issuer does not have sufficient money or credit in the bank for the payment of the check in full upon presentation.

4. After the issuer shall have received notice of dishonor and 10 days have elapsed, he fails to deposit with the bank or pay to the party in possession of the check sufficient money to constitute payment in full.

Lacking any of the four elements there is no crime under this definition.

No intent is stated as an element. It is observed that this does not prohibit the making of a bad check. It merely punishes failure to make a bad check good after written notice.

If the conduct shows the first three elements but does not show the fourth, it shows no crime. Accordingly the complaint must charge that written notice of dishonor of the check was given and that the offender within 10 days after such notice failed to deposit with the bank on which the check was drawn and failed to pay or tender to the party in possession of the check sufficient money to constitute payment in full.

It is observed that the one section wherein fraud is an element is a gross misdemeanor, while the other two crimes are misdemeanors.

MILES LORD
Attorney General

CHARLES E. HOUSTON,
Solicitor General

Cass County Attorney

December 8, 1957

494b-7

29

Where statute described offense as a misdemeanor but punishment provided for is in excess of a fine exceeding $100.00 or by imprisonment not to exceed one year, or both, the offense is a gross misdemeanor.

Railroad & Warehouse Commission—Warehouses—Attorney General has no duty to prosecute under M. S. 231.38 and 231.39.

Facts

"The Commission has been informed that a certain transfer company is accepting property for storage and advertising in a number of publications since June, 1956.

"This transfer company has not complied with the various provisions required of warehousemen pursuant to Chapter 231, Minnesota Statutes 1953, as amended.

"A Commission inspector was about to file a complaint with the St. Louis County Attorney and was informed that the City Attorney of Duluth handled misdemeanor cases.

"There appears to be a contradictory penalty provision in Chapter 231, in that Sections 231.36—231.39 calls a violation a misdemeanor but

provides that upon conviction a fine in various sums from not less than $100.00 nor more than $1,000.00 may be imposed by the court.

"If the violation is a misdemeanor, then the City Attorney could try the case providing the fine is not more than $100.00. If the fine is greater than $100.00, then it would appear that the violation should be a gross misdemeanor.

"The complaint against the transfer company, herein referred to, is being held in abeyance pending receipt of an opinion from your office.

"Section 231.32 also provides that all proceedings shall be instituted by the Commission and shall be brought in the name of the state and be prosecuted by the Attorney General. Therefore, the Commission is in doubt as to whether such action should be prosecuted by the Attorney General or a City or County Attorney."

Questions

"1. Are the violations herein referred to as misdemeanors but providing for penalties for gross misdemeanors to be tried by the City or the County Attorney?

"2. Does Section 231.32 prohibit anyone but the Attorney General to institute proceedings under Chapter 231?"

Opinion

1. The offenses described in M. S. 231.38 and 231.39 are characterized as misdemeanors but the punishment provided for therein constitutes the offenses gross misdemeanors. **State v. Kelly,** 218 Minn. 247, 15 NW 2d 554, O. A. G. 494-B-23, May 6, 1940. The City Attorney of the City of Duluth has no duty to prosecute gross misdemeanors. Duluth City Charter, Chapter IV, Section 26. It is the duty of the County Attorney to prosecute gross misdemeanors. Jones, Minnesota Criminal Procedure, Section 3.

2. M.S. Section 231.32 provides:

> "All acts or proceedings instituted by the commission under this chapter shall be brought in the name of the state and be prosecuted by the attorney general."

A criminal prosecution is not an "act or proceeding instituted by the commission" within the meaning of this statute.

MILES LORD,
Attorney General

JOHN R. MURPHY,
Assistant Attorney General

Railroad & Warehouse Commission.

January 24, 1957. 494b-23

30

Procedure for appointment of counsel by Juvenile Court for indigent child.

Questions

"1. Upon the presentation of a petition to the juvenile court alleging that a child may be an independent [a dependent], negligent [neglected] or delinquent child, is it mandatory on the judge to appoint an attorney to represent the interests of the child at every hearing held on the petition?

"2. If the answer to question No. 1 is yes, can the child, its parents, or guardian waive representation in the juvenile court by an attorney?

"3. Assuming that it is the duty of the juvenile court to appoint an attorney and assuming that the child has no funds, but his parents or guardian have funds to pay the attorney, can the juvenile court, after appointing an attorney to represent the child, charge the attorney's fees to this county?"

Opinion

1. M. S. 260.08 contains a specification of procedure to be observed upon the presentation of a petition alleging that a child is dependent, neglected or delinquent. The second paragraph of the section reads:

"In all such proceedings in counties having less than 150,000 population the county attorney shall appear for the petitioner. The child shall have the right to appear and be represented by counsel and, if unable to provide counsel, the court may appoint counsel for him. The counsel shall receive from the general revenue fund of the county reasonable compensation for each day actually employed, in court or actually consumed in preparing for the hearing as is allowed by the court."

So we see that the child has the right to be represented by counsel. If he is unable to provide counsel (and how many children are?), it is my opinion that the court should appoint counsel in appropriate cases. The power of the court to appoint counsel involves the duty to do so in all appropriate cases. When a child is brought before the court and his custody, future welfare and perhaps his liberty is involved, who should say that he needs no lawyer to see that due process of law is observed, and that he enjoys the rights guaranteed to him by the constitution and laws?

The requirements of this section are jurisdictional. **State ex rel. Knutson v. Jackson,** 249 Minn. 246, 86 N.W. (2d) 234.

Depending upon the facts in the particular case, the court may be called upon to make a decision of great importance. In the **Knutson** case, supra, the court said that "The whole tenor of the Juvenile Court Act indicates that the sole purpose is the welfare of the delinquent as well as the de-

pendent or neglected child." Can we suppose that his welfare will be guarded equally well without as with counsel? The court in considering the **Knutson** case appears to have thought not.

2. In **Martin v. Wolfson**, 218 Minn. 557, 16 N. W. (2d) 884, our Supreme Court, following United States decisions, said: "Except as limited by public policy, a person may waive any legal right, constitutional or statutory." But in that case a minor was not involved. Having in mind what the court said in the **Knutson** case, supra, on the subject of waiver, I should hesitate to advise that the right to be represented by counsel could be waived by a juvenile or by anyone acting in his behalf.

3. The problem which is presented to the court when the child has no counsel is whether the court should appoint counsel. When the court appoints counsel because the child is unable to provide counsel, the statute quoted says that counsel shall receive reasonable compensation from the general revenue fund of the county. No contingency is stated. There is no ambiguity. All that is required is that the law be administered as written.

Before the judge appoints counsel for a child when his parents are able to pay the lawyer, I see no objection to the court instructing the parents to hire a lawyer of their choice to appear for the child. An adjournment could be taken for the purpose. It is the obligation of the parents to provide the child with food, clothing and shelter. They must send him to school. How much greater then is their obligation to see that his rights under the constitution and the laws are observed? But we did not write the law. We seek only to administer it.

MILES LORD,
Attorney General.

CHARLES E. HOUSTON,
Solicitor General.

Clay County Attorney.

April 1, 1958. 268h

31

Contributing to the Delinquency of a Minor—Formal adjudication of delinquency is not required for a prosecution for contributing to the delinquency of a minor. Such prosecutions may not be had in Probate Court.

Facts

"Minnesota Statutes 260.27 as amended by Laws 1953, Chapter 436, Section 1, makes the offense of contributing to the delinquency of a minor child a misdemeanor. Minnesota Statutes 260.28 appears to give the Juvenile Court of a county having a population of more than

thirty-three thousand (33,000) jurisdiction over offenses described in 260.27.

"The opinion of the Attorney General, 133 B-66, November 17, 1944, seems to indicate that before a prosecution will lie under Minnesota Statutes 260.27, there must first be a formal adjudication by the Juvenile Court that the child is neglected or delinquent."

Questions

1. "Does the 1953 amendment remove the necessity of such a formal adjudication before a misdemeanor can be charged against a contributing adult?

2. "Opinion of the Attorney General 268-I, March 31, 1932, seems to indicate that such prosecution of an adult cannot be conducted in Juvenile Court before a Probate Judge acting as Judge of Juvenile Court.

3. "Is the jurisdiction conferred under Minnesota Statutes 260.28 exclusive with the Juvenile Court of a county having over thirty-three thousand (33,000) population, or is there concurrent jurisdiction with the municipal court or justice of the peace courts?"

Opinion

1. Under a former statute this office has ruled on various occasions that before a prosecution for contributing to the delinquency of a minor will lie, there must be a formal adjudication that the child is neglected or delinquent.[1] These rulings were based upon a statute which read:

"In all cases where a child shall be found to be neglected or delinquent * * *" any person who contributes to the neglected or delinquent condition shall be guilty. M. S. 1949, 260.27.

In 1953, this section was amended so as to read:

"Any person who * * * contributes to the neglect or delinquency of a child * * * shall be guilty." M. S. A. 260.27.

This amendment has eliminated the requirement that a formal adjudication of neglect or delinquency is required for a prosecution under M. S. 260.27.

2. Yes. Since writing the opinion of March 31, 1932, we have reaffirmed what we said there. See O. A. G. 268f, October 3, 1945.

3. In so far as M. S. 260.28 gives jurisdiction to judges of probate to try violations of M. S. 260.27, it is without effect. That is the result of our opinion of March 31, 1932. We held there that such prosecutions must be in a court of competent criminal jurisdiction. At the time that opinion was

[1]O. A. G. 133-B-66, December 17, 1952, November 17, 1944, March 19, 1940, #36, 1940 Report, May 16, 1936.

written, Mason's Minnesota Statutes, Section 8663 (now M. S. 260.28) could be given effect where it placed jurisdiction in cases of contributing to the delinquency of a minor in the juvenile courts of counties having a population of over 33,000 because Section 8637 provided that the district courts in such counties were the juvenile courts. Probate courts had jurisdiction of juvenile matters only in counties having a population of less than 33,000. Section 8641. Since then, the statutes dealing with juvenile courts have been amended, but M. S. 260.28 has not been amended so as to keep pace with the others. M. S. 260.02 gives the district courts in counties having a population of over 100,000 exclusive jurisdiction of all cases coming under M. S. 260.01 to 260.34 and to probate courts in counties having a population of not more than 100,000 jurisdiction over the appointment of guardians of dependent, neglected or delinquent children for the purpose of these sections. Itasca County has a population of 33,321, so its probate court has jurisdiction in juvenile matters, but since our opinion of March 31, 1932 held that an adult may not be prosecuted in probate court for a violation of M. S. 260.27, the prosecution must be had in a municipal or justice court.

MILES LORD,
Attorney General.

JOHN R. MURPHY,
Assistant Attorney General.

Itasca County Attorney.

January 25, 1957. 268f

32

Junk Dealers, Pawnbrokers and Second Hand Dealers—Statute makes it (1) unlawful to purchase from a minor (2) unlawful to receive from a minor on deposit or pledge anything of value as security for a loan of money.

Your letter calls attention to M. S. 614.18, Subd. 1, which provides:

> "It shall be unlawful for any junk dealer, pawnbroker, or second-hand dealer to purchase or to receive on deposit or pledge anything of value as security for a loan of money from any person under lawful age."

M. S. 614.19 then provides that any person violating such provisions shall be guilty of a gross misdemeanor.

Question

> "Does Section 614.18, subd. 1 prohibit a second hand dealer from purchasing for cash personal property from a minor, or does it apply only in the case of a pledge or loan?"

Opinion

Chapter 614 of Minnesota Statutes is entitled "Offenses Against Public Policy" and there can be no doubt that M. S. 614.18, Subd. 1, was originally enacted pursuant to the general rule, founded in public policy, that by reason of immaturity and inexperience a minor is incompentent and unfit to judge the nature of a contract and the propriety and expediency of entering into it, and that hence a minor is to be protected from the danger of an imprudent contract. See Dunnell's Minn. Digest, 3rd ed., Section 4435; **Conrad v. Lane,** 26 Minn. 389, 4 N. W. 695; **Folds v. Allardt,** 35 Minn. 488, 29 N. W. 201; **Miller v. Smith,** 26 Minn. 248, 2 N. W. 942; and M. S. 512.02 which gives recognition to the general rule.

There assuredly is as much reason in public policy for the legislature to protect a minor from making an outright sale for cash to a junk dealer, secondhand dealer, or pawnbroker as to protect him from borrowing money from such persons and depositing or pledging property as security therefor. Furthermore, if the statute prohibited only a pledge or loan there would be little reason to include junk dealers or secondhand dealers therein, for such persons deal largely in cash transactions and are not in the loaning business.

The legislature did use the precise word "purchase" and it would seem clear that the phrase "as security for a loan of money" could not have been intended to modify the word "purchase" but could only have been intended to modify the words "deposit or pledge".

The title of an act, although not decisive, is properly to be considered in determining legislative intention. **Hennepin County v. City of Hopkins,** 239 Minn. 357, 58 N. W. (2nd) 851; **Cleveland v. Rice County,** 238 Minn. 180, 56 N .W. (2nd) 641; **Bricelyn School District No. 132 v. Faribault County Commissioners,** 238 Minn. 53, 55 N. W. (2nd) 597; and **LaBere v. Palmer,** 232 Minn. 203, 44 N. W. (2nd) 827. Section 614.18, Subd. 1, was originally enacted as L. 1907, c. 228, and the pertinent language thereof remains unchanged. The title of said c. 228 states that it is

> "An Act to prohibit any junk dealer or any second hand dealer or any pawnbroker or any other person from purchasing or receiving on deposit or pledge any goods or anything of value from a minor, and providing a punishment for a violation thereof."

Therefore, having in mind the canons of statutory construction as found in c. 645 of Minnesota Statutes, and particularly M. S. 645.08 (1), 645.16, 645.17 (1) (2) and (5), and 645.18 thereof, it is clear that M. S. 614.18, Subd. 1, makes it unlawful for any junk dealer, pawnbroker or secondhand dealer to either (1) purchase from a minor or (2) to receive on deposit or pledge from a minor anything of value as security for a loan of money.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.
Assistant Attorney General.

Mower County Attorney.
November 21, 1958.

605b-35

33

Fines and imprisonment for failure to pay—Suspension of sentence.

Facts

In 1942 R. was convicted of the crime of having in possession an unsealed raw beaver pelt. Sentence was imposed by the court as follows:

> "It is considered and adjudged by this court that you, Foster Root, as punishment for the crime of having in your possession an unsealed raw beaver pelt in closed season, of which you have been duly convicted on your plea of guilty, pay a fine of $50, or if such fine be not paid you be imprisoned at hard labor in the county jail of Itasca County, Minnesota, for a period of sixty (60) days. Provided, however, the execution and operation of this sentence are and shall be suspended until the 20th day of August, 1943, on condition that in the meantime you be and remain of good behavior, refrain from further violation of any game law or any other laws of the State of Minnesota; pay the fine in instalments of at least $5 a month commencing on or before the first day of October, 1942; report to the county attorney of this county or to the court from time to time if and when you are so directed, and report to this court on the 20th day of August, 1943, at 10:00 in the morning, then and there to abide by such further disposition as the court shall make in the matter.
>
> "It will be understood the fine instalments are to be paid to the Clerk of this Court, at the courthouse in this county."

The defendant paid $15 to the clerk and no more.

Questions

> "Can the alternative sixty day jail sentence still be imposed at this late date, or is there an applicable statute of limitations which our study has not disclosed?
>
> "If there is an applicable statute, which procedure should be followed to remove these cases from the record?
>
> "What procedure could you suggest to obtain such results?"

Opinion

In such sentence a stay of execution follows the word "Provided". The execution of the sentence was suspended until August 20, 1943. The condition of the stay was that the defendant (1) should obey the law, (2) pay the fine and (3) report to the county attorney or to the court (no time for the reports being stated) and report back on August 20, 1943.

The facts stated fail to show that the matter came before the court the second time on August 20, 1943, and I assume that the case was not then considered by the court.

M. S. 1941, 610.37 was the law relating to suspension of sentence in force when the sentence was imposed. Within the limitations there stated, the court had power to stay execution of sentence. The intent of this section appears to be not the collection of a fine but the reformation of the accused. The defendant was not placed under the supervision of a probation officer. He was not placed under the supervision of the state board of parole (M. S. 1941, 610.38). The period of suspension exceeded the term of imprisonment imposed and the court having failed to execute the sentence it would appear that the sentence has been treated by the court as indefinitely suspended.

The statement of facts makes no complaint of the conduct of the defendant since conviction except that he did not pay his fine. So the problem appears to be one of revenue only. If the court had acted in due time, the fine could have been collected forthwith or the defendant immediately imprisoned, but to wait 16 years and then seek to imprison a man who has not since misbehaved seems to me not in the best interest of good government and I doubt that the court has the power to act in the matter now.

During the life of a judgment an execution thereon may issue. M. S. 550.02, but not after the lapse of more than 10 years. M. S. 550.04.

In my opinion your first question requires a negative answer.

My answer to the second question is that nothing is to be done. The case is as dead as you can make it.

A suspended sentence contemplates a follow-up. There comes a time when litigation ends.

MILES LORD,
Attorney General.

CHARLES E. HOUSTON,
Solicitor General.

Itasca County Attorney.

June 26, 1958. 199b-3

34

Plea of nolo contendere does not exist under our statute. State v. Kiewell, 166 Minn. 302, 207 N. W. 646.

In your letter you state that you desire an opinion relative to the type of plea that may be made by a defendant when charged with having committed a misdemeanor.

Question

May a defendant plead nolo contendere or must he plead either guilty or not guilty?

Opinion

M. S. 630.11 specifies the procedure for arraignment and the pleas which may be entered which are either guilty or not guilty. Of course, in addition to these, if the facts warrant, he may plead former conviction or acquittal. If he refuses to plead, a plea of not guilty shall be entered. M. S. 630.34. The statute relating to record of a plea, M. S. 630.38, makes no mention of a plea nolo contendere.

Our Supreme Court held in State v. Kiewell, 166 Minn. 302, 207 N. W. 646, that under our statute there is no plea of nolo contendere.

The procedure on the matter of plea is the same on a charge of felony or misdemeanor, since a person may be accused by indictment of the commission of a misdemeanor.

MILES LORD,
Attorney General.

CHARLES E. HOUSTON,
Solicitor General.

Granite Falls Municipal Court.
January 17, 1958. 307c

EDUCATION

35

School Districts—Change from common district to independent district. If vote is affirmative on question to change from common to independent district, officers of new independent district shall be elected at same meeting. This meeting may be adjourned to a time and day certain, if impossible to conduct election of officers on same day, to conclude the business for which meeting was called.

Facts

You state that District No. 587 Hennepin County(the Earle Brown School) is contemplating a change from a Common School District to an Independent School District. You point out that a number of questions have arisen under the statute involved, L. 1957, c. 947, Art. III, Section 5, because there are from 1,500 to 2,000 voters in this district and the polls will be open an "overlapping" time for the day and night shifts.

Questions

1. "If the people of the district cast an affirmative vote favoring the conversion of the Common School District to an Independent School

District at the annual meeting, must they at this same meeting elect their school board members who 'shall serve for terms expiring on the third Tuesday in May next following the election on which date a regular annual election shall be held in the manner provided by law'?

2. "Is it mandatory that the school board be elected at the meeting at which the voters decide they want to convert from a Common to an Independent District or may the people of the district postpone the election of the school board and call a special meeting for that purpose?

3. "If a special meeting cannot be called for the purpose of electing the Board after the people have decided that they want to convert from a Common to an Independent District, what is the remedy?"

Opinion

Laws of 1957, c. 947, Article III, Section 5 provides the procedure for the conversion of a common school district to an independent school district. The provisions of the statute applicable to your inquiry are as follows:

"Sec. 5. Subdivision 1. If six or more resident freeholders of a common district desire to change the organization of their district to an independent district, they may call for a vote upon the question **at the next annual meeting** by filing a petition therefor with the clerk. In the notice for the meeting, the clerk shall include a statement that the question **will be voted upon at the meeting.**"

"Subd. 2. **At the annual meeting,** if a majority of the votes cast on the question favor the conversion to an independent district, **a board of six members shall be elected.** Nominations may be made from the floor of the meeting and election shall be by secret ballot . . ."

"Subd. 3. If the organization of the district is changed from common to independent at the meeting, the clerk shall forthwith notify the auditor and the commissioner.

"Subd. 4. As of the date of election, if a majority of votes cast on the question favor the conversion to an independent district, the classification of the district is changed from common to independent. Title to all the property, real and personal, of the common district passes to the independent district and all current outstanding contractual obligations, including the bonded indebtedness, if any, of the common district, together with any legally valid and enforceable claims against the common district are imposed on the independent district." (Emphasis supplied.)

The Education Laws Commission in its Report to the Legislature commented on the foregoing statute as follows:

"This section provides for the election of a new board at the same meeting. This changes the present idea of requiring another meeting to elect officers. Present law is in 122.30, Subdivision 4." (Emphasis supplied.)

In view of the foregoing, your first question is answered—Yes. The statute requires an election of district officers at the same meeting at which the people vote on the question of conversion if a majority of the votes cast on the question favor the conversion to an independent district.

2. Clearly, no special election is provided for. The new officers of the independent district are to be elected **at this same meeting.** Cfr. statute and Committee Comment quoted above as well as difference in prior statute, Section 122.30, M. S. A., Subd. 4, repealed July 1, 1957.

3. In your third question you ask what is the remedy if a special meeting cannot be called for electing the board of the new district.

In the event that it should become impossible to conduct the election for the officers of the independent district on the same day and following the vote changing the district to an independent district from a common district, the meeting may be adjourned to a time and day certain to conclude the business for which the meeting was called. See McQuillin, Municipal Corporations, (3rd Ed.) Sections 13.38, 13.39; 78 C. J. C. 730; **State v. Smith,** 22 Minn. 218, 223 on adjournment.

MILES LORD,
Attorney General.

FRANK J. MURRAY,
Spec. Asst. Attorney General.

Commissioner of Education.
December 12, 1957 166D-1a

36

School Districts—Consolidation—"Electors resident in whole land area" refers to and includes only those electors resident in land area contained in approved plat.

You refer to M. S. A. 122.018, Subd. 10 (L. 1957 c. 947, Article III, Section 3, Subd. 10).

Question

"Does the term 'electors resident in the whole land area' include all of the voters in the district affected, or only the voters who reside on the land included in the plat?"

Opinion

M. S. A. Section 122.018 sets forth the procedure for the consolidation of school districts. Among other provisions the statute provides for the adoption or rejection of a plan of consolidation as proposed in the plat approved by the commissioner and by the boards concerned, see Subdivi-

sions 7, 8, and 9 of Section 122.018, and if the plat contains land area in any district not entitled to act on approval or rejection of the plat by action of its board, residents of such land area may approve or reject the plat by an election, see Subd. 10.

It is clear from the first paragraph of Subd. 10 which reads as follows:

> "If an approved plat contains land area in any district not entitled to act on approval or rejection of the plat by action of its board, the plat may be approved by the residents of such land area within 60 days of approval of plat by commissioner in the following manner: . . ."

that the election shall be conducted only in the land area contained in the plat in any district not entitled to act on the plat by action of its board. The provision in Subd. 10 that the county superintendent shall call an election "in the whole land area", is a requirement that an election shall be conducted at one time in all parts of the land area contained in the plat approved by the commissioner where a board is not entitled to act in order that such land area will vote as a single unit.

Consequently, we are of the opinion that the term "electors resident in the whole land area" as used in this statute, Subd. 10, refers to and includes only electors resident on land included in the plat.

MILES LORD,
Attorney General.

FRANK J. MURRAY,
Spec. Asst. Attorney General.

Winona County School Boards Attorneys.
March 5, 1958. 166-F3

37

County board may proceed by resolution to institute dissolution proceedings only when a school district has held no school within the district for two years and has made no provision for the education of its pupils for two years.

You refer to Minnesota Statutes 1957, Section 122.017 and state the following

Facts

> "A small rural school district composed of five or six sections of land sold their school house a number of years ago and there has been no school held within the district for more than two years. The school district maintains its identity and has the usual school board which has made arrangements with adjoining district to take their children to

their school for which the district pays tuition rates in accordance with the agreement reached. These arrangements are made by the school board and the funds are school funds raised by usual taxation methods within the district."

Questions

"Whether the actions of the school board are such that it can be said that they have 'made no provision for the education of its pupils for two years', and whether under the facts as stated here the county board can proceed by resolution as provided under (A) of subdivision 2 of the above quoted subject.

"The Act apparently makes no specific provision for notice to be given if the proceedings are under (A) subdivision 2. Subdivision 6 of the law provides for notice of proposed hearing for such meetings as may be called pursuant to a certification by the clerk under (C) subdivision 2. Can it be inferred that similar notice should be given if proceedings are undertaken under (A) subdivision 2?"

Opinion

The pertinent parts of Section 122.017 here involved are as follows:

"Subdivision 1. Any district, whether part of an associated district or not, may be dissolved and the territory be attached to other districts or become unorganized territory by proceeding in accordance with this section.

"Subd. 2. Proceedings under this action may be instituted by:

"(a) Resolution of the county board of the county containing the greatest land area of the district proposed for dissolution when such district has held no school within the district for two years and has made no provision for the education of its pupils for two years.

"(b) Petition executed by a majority of the resident freeholders of the district proposed for dissolution addressed to the county board of the county containing the greatest land area of the district.

"(c) Certification by the clerk of the district proposed for dissolution to the county board of the county containing the greatest land area of the district to the effect that a majority of votes cast at an election were in favor of dissolving the district."

Under Subd. 2 (a) of this statute, before a county board may proceed by its own resolution to institute dissolution proceedings:

(A) A district must not have held school within it for two years, and

(B) The district must have made no provision for the education of its pupils for two years.

Unless both (A) and (B) are present, the county board may not proceed upon its own resolution under Subd. 2 (a). Here only (A) is present. Under the facts stated above, provision has been made for the education of the

pupils of the district. Consequently, your first question is answered in the negative.

Enclosed is a copy of a prior opinion, O. A. G. 166E, January 30, 1950. In view of the foregoing, your second question requires no answer.

MILES LORD,
Attorney General.

FRANK J. MURRAY,
Spec. Asst. Attorney General.

Grant County Attorney.
November 18, 1958. 166-E

38

Where dissolution and attachment are subject to rejection or appeal, districts proposed to be dissolved should hold annual meeting and make tax levy.

You request an Attorney General's opinion regarding the annual meeting in common school districts which are in the process of dissolution or subject to interlocutory orders which have been issued by county boards and become effective July 1 or later.

In your letter you refer to an opinion O. A. G. 166E-3, June 26, 1957 and note that it was stated there that a school district continues to exist until the effective date of the order of dissolution.

Questions

"1. Shall the annual meeting be held on June 24 in school districts which will go out of existence on July 1 or perhaps at a later date?

"2. Shall the people at these annual meetings vote a tax levy for the next school year? (The district may not be in existence for the next school year and there may be no school maintained within such former district.)"

Opinion

Your letter does not set forth facts pertaining to a particular school district and is in the nature of a general inquiry.

M. S. A. Section 122.017 provides for the dissolution and attachment of school districts. Subd. 8 of the statute authorizes a county board to make an interlocutory order which under clause (e) of the statute must have

"a proposed effective date of the order not later than July 1 next following its issuance and not less than 45 days from the date of the order."

However, this order can be rendered non-effective, see Subd. 16 of the statute, depending upon the facts in an individual case. You are also advised that under Section 122.051, an appeal lies from an order of the county board.

In the event of an appeal a status quo would be maintained until the appeal could be determined (**In re Dissolution of School District No. 33,** 239 Minn. 439, 60 N. W. (2d) 60), and until such determination, the districts intended to be dissolved would continue in existence.

Consequently, in any case where the effects of Subd. 16 might apply or where the time for appeal has not expired under Section 122.051, your questions require an affirmative answer.

We refer any district in which notice of election required under Section 122.023 has not been given as of the date of this opinion to Subd. 1 of such section as to the effect of the failure by the clerk to give notice as the statute provides.

MILES LORD,
Attorney General.

FRANK J. MURRAY,
Spec. Asst. Attorney General.

Commissioner of Education.
June 24, 1958. 166E-3

39

Joint Exercise of Powers by counties, cities and villages—creation of joint library and joint library board pursuant to Section 471.59 authorized for counties and municipalities that do not already have perpetual library board. M. S. 134.07, 134.09-134.15, and 375.33 discussed.

Facts

"In an area where two counties (or perhaps more) are planning to organize joint library services under an agreement as provided for under M. S. 471.59 (Joint Exercise of Powers) there are two sizable cities already supporting public libraries, and two smaller villages also supporting libraries."

Questions

1. May the counties proceed under Section 471.59 and may the cities and villages, as well as the counties, be parties to the agreement

and tax themselves separately for the library service, and pay their library funds into the general treasury of the joint library service?

2. Can the agreement creating such joint library service create the library board to govern the service in such a way that the members of the board consist of appointed representatives from the various contracting counties and the cities; such as three representatives from each county and one representative each from the two cities?

3. Can such joint board, containing members from both cities and counties, be delegated in the agreement those powers which are common to city and county library boards? If so, how should this provision be phrased?

4. Could the agreement creating the joint library designate that certain joint library board members be drawn from certain cities in the counties signing the agreement even if the cities are not separate contracting parties?

Opinion

By virtue of M. S. 120.07, the State Board of Education administers all laws relating to libraries; and under Section 120.11, all functions, powers and duties formerly vested in the State Library Commission and its appointees are vested in, and exercised by, the State Board of Education. Section 120.19 specifically provides:

> "The state department of education shall give advice and instruction to the managers of any public library and to the trustees or agents of any **village, town, or community** entitled to borrow from the collection of books **upon any matter pertaining to the organization, maintenance, or administration of libraries. It shall assist, by counsel and encouragement, in the formation of libraries where no library exists** and may send its members to aid in organizing the same or in improving those already established."

The submitted facts being general in nature, your questions are susceptible of answer only in a general way.

1. M. S. A. 471.59, Subd. 1, provides:

> "**Two or more governmental units**, by agreement entered into **through action of their governing bodies**, may **jointly or cooperatively exercise any power common to the contracting parties or any similar powers**, including those which are the same except for the territorial limits within which they may be exercised. The term 'governmental unit' as used in this section includes every city, village, borough, county, town, and school district, and other political subdivision." (Emphasis supplied)

What powers, then, do counties, cities and villages, acting singly and through their governing bodies, possess in regard to public libraries? That is the key to determining the availability of Section 471.59.

In so far as cities and villages are concerned, M. S. A. 134.07, Subd. 1, provides that "The governing body of any city or village may establish and maintain **a public library** *** for the use of its inhabitants" and (except in cities of the first class which are restricted to a one mill levy) may levy an annual tax of not more than five mills for its library fund. Section 134.09, Subd. 1, then provides:

> **"When any such library or reading room is established,** except in any city of the first class operating under a home rule charter, **the mayor of the city or president of the village, with the approval of the council, shall appoint a board of five, seven or nine directors,** but not more than one of whom shall at any time be a member of such governing body, such appointments to be made prior to the first meeting of such library board after the end of the fiscal year. If nine are appointed, three shall hold office for one year, three for two years and three for three years. If seven members be appointed, three shall hold office for one year, two for two years, and two for three years; if five be appointed, two shall hold office for one year, two for two years, and one for three years. The number of directors on the board shall be determined by resolution or ordinance adopted by the council. All terms shall end with the fiscal year. **Annually thereafter such mayor or president shall appoint for the term of three years and until their successors qualify a sufficient number of directors to fill the places of those whose term or terms expire."**

Section 134.09 applies to all villages except those which have adopted Optional Plan B or C. In such villages the council itself administers the public library. See M. S. A. 412.621 and 412.791.

Thus, pursuant to Section 471.59, Subd. 1, any two or more cities and/or villages which have not already established a free public library **and** appointed a library board, may by agreement of their governing bodies establish a joint library and appoint a joint library board, the members of which are divided among the contracting parties **as** they may agree. Where a municipal governing body has, however, **already exercised its power** of establishing a public library and has appointed a library board pursuant to either Section 134.09 or a comparable charter provision, then it has no power to thereafter establish another public library. The power has been exercised and is gone except in the case of villages adopting Optional Plans B or C pursuant to M. S. A. 412.551. I am aware of no other provision in Minnesota Statutes authorizing a governing body or the voters to dissolve an existing public library or its board and to thereafter participate in the establishment of a joint library. See third part of our opinion O. A. G. 285-B, March 6, 1942 and our opinion O. A. G. 285-A, June 6, 1947, copies enclosed. The 1942 opinion suggests that this would be a proper subject for legislative consideration. It should also be noted that by virtue of Section 134.11, an existing library board, rather than the governing body of the municipality, has exclusive control over all moneys in the library fund and over the conduct of library business, and thus the existing library board may do what **is** necessary and proper in administering such powers.

In so far as counties are concerned, M. S. A. 375.33 provides:

"Subdivision 1. The county board of any county **may establish and maintain,** at a location determined by the board, **a public library** for the free use of residents of the county, and may levy an annual tax of **not more than two mills** on the dollar of all taxable property which is not already taxed for the support of any free public library and all taxable property which is situated outside of any city or village in which is situated a free public library. The proceeds of this tax shall be placed in the county library fund.

"Subd. 2. If such county library be not otherwise established, upon petition of not less than 100 freeholders of the county, the county board shall submit the question of the establishment and maintenance of a free public library to the voters at the next county election. If a majority of the votes cast on such question be in the affirmative, the county board shall establish the library and shall levy annually a tax for its support, within the limits fixed by subdivision 1.

"Subd. 3. If there be a free public library in the county, **the county board** may contract with the **board of directors of such library** for the use of such library by residents of the county, and may place the county library fund under the supervision of such library board, to be spent by such board for the extension of the free use of the library to residents of the county. If there be more than one such free public library in the county the county board may contract with one or all of such library boards for such free service if in its judgment advisable.

"Subd. 4. If no free public library in the county is available for use as a central library of the county system, the county board shall appoint a library board of five directors. The term of office of these directors is three years, and each director shall hold office until his successor is appointed and qualifies. Of the directors first appointed, two shall hold office for three years, two for two years, and one for one **year from the third Saturday of July following their appointment,** as specified by the county board; and thereafter the directors shall be appointed for a term of three years. 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." (Emphasis supplied)

And M. S. A. 134.12 provides:

"Subdivision 1. Any board of directors may admit to **the benefits** of its library persons not residing within the municipality under regulations and upon conditions as to payment and security prescribed by it.

"Subd. 2. **The board** may contract with the **county board** of the county in which the library is situated or the county board of any adjacent county, or with the **governing body** of any neighboring town, city, **or village,** to loan books of the library, either singly or in traveling libraries, to residents of the county, town, city, or village.

"Subd. 3. Any such county board or governing body may contract with the board of directors of any free public library for the use of the library by the residents of the county, town, city, or village **who do not have the use of a free library** upon the terms and conditions as those granted residents of the city or village where the library is located, and to pay such board of directors an annual amount therefor. Any such county board or governing body may establish a library fund by levying an annual tax of not more than two mills on the dollar of all taxable property which is not already taxed for the support of any free public library and all taxable property which is situated outside of any city or village in which is situated a free public library." (Emphasis supplied)

Both statutes were last amended by L. 1951, c. 217, and are complementary. Subd. 3 of Section 375.33, relating to a contract between the county board and the library board of an existing free public library in the county, was mandatory until 1943. L. 1943, c. 94, then substituted "may" for "shall", making such contracts thereafter permissive. These contracts, as well as similar contracts authorized by Section 134.12 and entered into between the board of an existing free public library and the governing body of a county, town, city or village to provide books for, or the use of such library by the residents of, the county, town, city or village not having the use of a free library, are service contracts (see opinion O. A. G. 285-B, February 26, 1952, copy enclosed) and do not amount to a joint exercise of powers. The contracting parties are the existing library board on the one side, and the governing body of a county, town or municipality which does not have the use of a free library on the other side.

In view of the permissive character of such service contracts, we construe subdivisions 1, 3 and 4 of Section 375.33 as follows:

(a) Subdivision 1 authorizes, but does not require, the county board of any county to establish and maintain, at a location determined by said board, a public library for the free use of the residents of the county whether or not there are existing free public libraries in the county, and to levy an annual two mill tax for such purpose against all property in the county which is not already taxed for free public library purposes. Such subdivision is silent about appointing a county library board, but the county board, of course, may do what is necessary and proper to effectuate the powers given therein.

(b) Pursuant to Subd. 3, the county board may choose, but is not so required, to enter into service contracts with one or more existing library boards, whereby the existing library board, acting in the nature of a county library board, would control the county library fund for the extension of the free use of the existing library to county residents for the duration of the contract. Even though there be existing free public libraries in the county, the county board may still choose to appoint its own library board and maintain its own county public library.

(c) If the county board establishes a library pursuant to Subd. 1 and there is no existing free public library in the county available as a central

library of the county system, then Subd. 4 provides that county boards **must** appoint their own library boards. The legislature then specifically provided in Subd. 4 that a county library board shall have the powers and duties of city and village library boards and that they shall be governed by the provisions of Sections 134.09 and 134.11—134.15.

We conceive this construction of Section 375.33 to be in accord with our opinion O. A. G. 285-A, May 18, 1951, copy enclosed.

In the light of the foregoing analysis of Section 375.33, it is apparent that Section 471.59 is available to all county boards that have not yet exercised their power to establish and maintain a county library. Thus, two or more of such counties may by agreement of their county boards establish and maintain a multiple county library and may create a joint library board, the members to be divided among the contracting parties as they may agree.

A county board which has previously entered into a service contract with an existing library board is, of course, bound by such contract for its duration unless sooner released therefrom by mutual agreement of the existing library board and the county board. When such service contract is terminated, then, since the county board has not appointed a library board of its own, I see no reason why it could not likewise enter into a joint agreement pursuant to Section 471.59.

If a county board has, however, already unequivocably appointed its own library board, then the situation is otherwise, for it has already exercised its county library powers and created a library board having the same powers and duties and perpetual existence as municipal library boards, and thus has no remaining power to enter into a joint library agreement.

Thus far we have said that the governing bodies of cities and villages which have not established a free public library and appointed a library board with perpetual existence pursuant to M. S. c.134 or similar charter provision may enter into a joint agreement pursuant to Section 471.59, and that county boards in a similar position may do likewise. There is nothing to prevent one or more of such cities and villages (including villages operating under Optional Plan B or C, and cities operating under a charter provision permitting same) and one or more of such counties from all contracting together through their respective governing bodies for joint library services, since each has a common or similar power to establish a public library and appoint a library board.

In making the joint agreement, such counties and municipalities are to be guided by all the provisions of Section 471.59. See particularly Subds. 2 and 3 thereof. Under the agreement the counties may each levy taxes to the extent authorized by Section 375.33, Subd. 1, and the cities and villages may each levy taxes to the extent authorized by Section 134.07 or their charters, to support the joint library. When collected, these funds may then by such agreement be turned over to the joint board as a joint library fund to be administered by such board pursuant to the agreement.

2. Pursuant to Section 471.59, Subd. 2, your second question is answered in the affirmative.

3. Such joint library board could in the agreement be granted the powers and duties enumerated in, and be governed by, the provisions of Sections 134.09 and 134.11—134.15. Such powers and duties, as has been indicated, are common to city, village and county library boards, and the agreement may contain a provision following the language of such statutes.

4. If you inquire in your fourth question whether the agreement may provide authority for a contracting party to appoint as a library board member one who resides in a particular locality outside the limits of the appointing municipality, the answer is in the affirmative. See Section 471.59, Subdivisions 2 and 6.

But if your inquiry is whether the agreement may provide that a designated non-contracting municipality shall have the power to appoint one or more library board members, the answer is in the negative. Section 471.59, Subdivision 1, provides that the **contracting parties** may jointly exercise any power common to the contracting parties.

MILES LORD,
Attorney General

O. T. BUNDLIE, JR.,
Assistant Attorney General

Commissioner of Education.
October 23, 1957. 285-B

40

School Districts—School taxes paid by owner in adjoining school district cannot be credited on tuition paid by resident district under Section 132.02. Under same statute such taxes cannot be credited on transportation paid by owner or tenant.

Facts

"M. B. resides on a farm located and situate in Common School District No. 1845 (formerly 24) in Rock County, Minnesota. He has two children of elementary school age (grades 1 and 4) and during the 1957-58 school term, both attended the Ashcreek unit of Independent School District No. 670, Rock County, Minnesota. His place of residence is approximately 2¾ miles (more than 2 miles) from the schoolhouse of Common School District No. 1845, being the district in which he resides. No transportation to any pupils is furnished by Common School District No. 1845.

"His place of residence is so located in District No. 1845 that it is less than 1½ miles from the Ashcreek unit of Independent School District No. 670, Rock County, Minnesota, which is a consolidated school

district furnishing transportation to all its pupils. M. B. is the tenant on 320 acres of land all owned by the same person, and adjoining, but located in the two different districts. 160 acres on which he resides is located in District No. 1845, and the other 160 acres on which he is a tenant is located in District No. 670. The owner of the land tenanted by M. B. and located in Independent School District No. 670 paid $158.02 in school taxes (exclusive of other taxes) in 1957. While attending School District No. 670, the two children of M. B. were transported by District No. 670 the same as all children of residents of the district. Independent School District No. 670 is about to bill Common School District No. 1845 for the tuition and to bill M. B. for the transportation. It is understood by Independent School District No. 670 that District No. 1845 is entitled to a credit against the tuition for state aids paid to District No. 670. The question arises in the billing as to who is entitled to the credit provided in Minnesota Statutes, Section 122.044 for school taxes paid."

In your letter you refer to M. S. 1957, Sections 132.02 and 122.044, Subdivisions 4 and 5.

Question

"Is School District No. 1845 entitled to the credit for school taxes paid in the computation of the tuition to be paid by School District No. 1845, or is M. B. entitled to have the school taxes paid as a credit against transportation to be paid by him?"

Opinion

You have referred to M. S. 1957, Sections 132.02 and 122.044, Subdivisions 4 and 5. These statutes are separate and distinct and each contemplates a different set of circumstances.

Under Section 132.02, the district of residence must pay the tuition for a child who elects to attend a school located in an adjoining district but closer to his home than the school provided by his district of residence, if the district of his residence provides no transportation for him to its own school. The tuition payment to the adjoining district by the district of residence is made a flat obligation and therefore there is no provision for any reimbursement whatsoever. It is simply as if the child were attending the school of his own district.

Section 122.044, Subd. 4 covers a discretionary rather than an obligatory payment of tuition and transportation to another school district by the district of a child's residence where certain facts as set out in the statute are present. It appearing that none of the facts are present here, this section is not relevant to your inquiry.

Section 122.044, Subd. 5 refers to the right of an individual rather than to the rights or obligations of a school district. Under this section an owner or tenant of land lying in a school district other than the one in which he resides may send his child to school in the district in which the land is.

In such case the owner or the tenant must arrange for the tuition and transportation personally and upon such reasonable terms and conditions as are required by the district where the land lies. He then pays such tuition and transportation charges as are required by the terms of the agreement he entered into and against such payment a credit is allowed to the extent of his school district taxes paid in the non-resident district.

If, as it appears from your facts, the children of M. B. residing in District No. 1845 attended the school in District No. 670 because it was closer to their home, then, under Section 132.02 District No. 1845 had the obligation to pay the tuition, as we understand it did, and no reimbursement to the district is in such case provided for. That being so and M. B. not having personally undertaken the arrangements for both tuition and transportation as provided in Section 122.044, Subd. 5, there is no clear authority for any credit to him by reason of taxes paid on the land in the non-resident district since the statute uses the words "tuition and transportation" and not tuition or transportation. To determine otherwise requires a broadening of the statute to include, in our opinion, a situation that was not contemplated by this section.

I am enclosing copies of the following opinions in which the above statutes have been discussed: O. A. G. 180-D, February 24, 1956, June 18, 1953, May 25, 1950, September 12, 1949, December 17, 1947 and O. A. G. 180-J, August 28, 1947.

MILES LORD,
Attorney General

FRANK J. MURRAY,
Spec. Asst. Attorney General

Rock County Attorney.
November 25, 1958. **180-D**

41

School Districts—Contracts—School board cannot rescind assigned contract for construction of addition to school to relieve assignor and its surety of liabilities under the contract and substitute new contractor (assignee) under separate agreement.

Facts

Independent School District No. 243, of Emmons, Minnesota, entered into a contract for the construction of an addition to its school and later consented to an assignment of the contract. It now desires to rescind the assigned contract and enter into a new agreement with the assignee upon the same terms and conditions as contained in the assigned contract. "Under such procedure, there might be some advantage in that the architect

would be dealing with only one company and that the companies would not both have to be bonded."

Question

"May the school board legally enter into an agreement with the assignee, identical in terms with the original contract, and enter into an agreement by which both parties would be released from the obligations of the original contract and such contract cancelled?"

Opinion

The object of a school district is to control and manage the schools within a certain territory. They are governmental agencies with limited powers organized for educational purposes and not for the benefit or protection of property or business interests. **Bank v. Brainerd School District,** 49 Minn. 106, 51 N. W. 814; **Mokovich v. Independent School District No. 22,** 177 Minn. 446, 225 N. W. 292.

Construction contracts made by an independent school district are governed by C. 947, L. 1957, Article V, Section 6 (tentatively coded as 122.461) and the procedure outlined therein must be complied with. The statute contains a provision that

"Every contract made without compliance with the provisions of this section shall be void; . . . "

In view of the foregoing, the language contained in the case of **Seim v. District,** 70 S. D. 315, 17 N. W. (2d) 342 is applicable. The court said:

"It is well settled that when by statute the mode and manner in which contracts of a school district or other local subdivision may be entered into is limited and any other manner of entering into a contract or obligation is expressly or impliedly forbidden, a contract not made in compliance therewith is invalid, and cannot ordinarily be ratified."

See also cases cited therein.

Sections 574.26 and 574.28 M. S. A. must also be considered. Under the former a bond is required before any contract for the doing of any public work is valid. The provisions of this statute apply to school districts; see opinion O. A. G. 622-J-8, June 22, 1953, copy enclosed, and Section 574.28 M. S. A. provides in part:

" . . . **No assignment,** modification, or change of the contract, or change in the work covered thereby, nor any extension of time for completion of the contract **shall release the sureties on the bond.**" (Emphasis supplied)

By virtue of the latter statute, the sureties on the bond of the first contractor in the case outlined by you are not released from their obligations under the bond nor can they be released while the contract for construction remains unperformed and in force. The effect of the assignment, therefore, consented to by the school board, is solely to delegate the per-

formance of the contract to another, the assignor, however, remaining liable to the district for the proper performance by the assignee.

In event the contract presently existing is rescinded, the provisions of Article V, Section 6 are applicable and must be complied with by the school board before entering into another contract in the case.

It is our opinion, therefore, that your question must be answered—No.

MILES LORD,
Attorney General

FRANK J. MURRAY,
Spec. Asst. Attorney General

Independent School District No. 243 Attorney.
November 20, 1957. 166-B

42

School Districts—Obligation of county to furnish items and records for school districts.

Question

"Are the following reports and materials a part of the bills that must be paid by the board of County Commissioners for the County Superintendent's office:

Report cards	Census blanks
Attendance awards	Testing material
Pupil record cards	Daily program blanks and others"

Opinion

Section 121.10 provides as follows:

"The board of county commissioners of each county shall pay itemized and verified bills for postage used in official correspondence and in forwarding official documents; express, telegraph, and telephone charges in official business; necessary bills for printing notices, circulars, examination questions, and annual reports required in the proper grading of schools; and necessary and proper expenditures in connection with county graduation exercises or such reports and classification records as may be required by the commissioner of education, together with necessary stationery in the examination of pupils and for official correspondence; also the local expense in connection with teachers institutes."

We also call your attention to Section 375.14 M. S. A. which pertains to county officers. The county superintendent of schools is a public official. The pertinent part of that statute reads as follows:

> ". . . The board shall furnish all county officers with all books, stationery, letterheads, envelopes, postage, telephone service, office equipment, and supplies necessary to the discharge of their respective duties . . ."

A number of opinions have previously been issued on questions arising under the aforesaid provisions of sections 121.10 and 375.14 as previously coded. See opinions O. A. G. 125-B-27, November 17, 1939, October 6, 1939, March 28, 1950, copies enclosed.

It appears that under 375.14 the authorization goes to the items necessary to the orderly operation of the office of the county superintendent, whereas Section 121.10 is broader in scope and refers to the actual administration of the schools affected as indicated in opinions O. A. G. 166-B-6, July 13, 1942; O. A. G. 125-B-27, May 31, 1933; and August 10, 1939, printed in the 1940 Report of the Attorney General as No. 192, copies enclosed.

The specific items that you refer to in your question would seem to fall within the provisions of Section 121.10 in that they pertain to the administration of the schools and do not appear to be merely office supplies. Hence, your question requires an affirmative answer.

MILES LORD,
Attorney General.

FRANK J. MURRAY,
Spec. Asst. Attorney General

Commissioner of Education.
January 3, 1958. 125B-27

43

School Districts—Taxation—Annexation and Attachment. Lands annexed or attached become part of district to which annexed or attached and taxable therein as part of district to which annexed or attached. They are not relieved of levy made for maintenance funds prior to annexation and attachment, but if prior levy made, district to which lands annexed or attached shall not levy a duplicate tax in year of annexation or attachment.

Facts

1. "We had four petitioners set off from District No. 40 to District No. 45 in September and October. These transfers were made prior to the time that either District made its levy."

Question

"Where should these people be taxed?"

Facts

2. "Several of our Common School Districts made no levy at the annual meeting last spring. They have now been dissolved and attached to an independent district."

Question

Are they to be taxed in the new district?

Facts

3. "On the third of September four petitions were granted setting farms from a Common School District into the Wykoff School District. The Common District made no levy in June . . . The Wykoff levy was made after the petitions were granted."

Question

"Are these farms taxable in Wykoff at the present time?"

Comment

"Formerly we used to tax individual petitioners in the district where they were assessed on May 1 even though later in the year they had been transferred to another district . . .

"Now we get information that the land should be taxed in the district where it was located at the time the levy was made."

You also state that you are citing the aforementioned situations, 1, 2 and 3, as specific cases.

Opinion

Your letter indicates that no bonded indebtedness is involved in any of the fact situations outlined by you and that the tax levy which you refer to in each case is one that when made will be solely for funds necessary for the conduct of the schools and to meet the proper expenses of the districts. In none of the cases mentioned was a levy made for the above purposes prior to the annexation and attachment. In one instance (Question No. 3) a levy has been made subsequent to the detachment and annexation by the district to which the land was annexed.

Upon an annexation and upon an attachment, the annexed or attached land becomes a part of the district to which it is annexed or attached and thereafter taxable as part of the latter district as the case may be and subject to any proper tax levy when afterwards made therein as a part of

the district. See opinion O. A. G. 166C, September 5, 1957. This rule, that the annexed or attached land is subject to a proper tax levy in the district to which the land is attached or annexed, is limited in the following instance: In event a valid tax levy has been made for the above purposes in the district from which the land was detached or in the district dissolved prior to the detachment and annexation or prior to the dissolution and attachment, the dissolved or detached land is not relieved of such taxes previously and validly levied.

L. 1957, c. 947, Art. III, Section 1, Subd. 6 specifically provides that in the case of detachment and annexation:

> ". . . Such property is not by virtue of the order relieved from the payment of any tax levy theretofore made by the district from which it is detached, . . ."

and in the case of dissolution and attachment, an opinion O. A. G. 519M, November 15, 1956, copy enclosed, states:

> "The tax levies apply to property in the district on the day of the levy."

and

> ". . . that the auditor must extend the taxes on all taxable property which was within the district at the time of the levy."

These taxes shall be collected as the law provides. However, in such event and in the year in which the annexation or attachment is made, the district to which the land is later annexed or attached shall not levy a duplicate tax covering the annexed or attached land. **State v. Republic Steel Corporation,** 199 Minn. 107, 271 N. W. 119. We are enclosing copies of opinions O. A. G. 519M, August 13, 1948, October 13, 1950, September 5, 1950 and November 15, 1956, on the subject of the effect of a prior valid levy in such instances.

Upon applying the foregoing to your specific questions, they are answered as follows:

1. In District No. 45.

2. Yes.

3. Yes.

MILES LORD,
Attorney General.

FRANK J. MURRAY,
Spec. Asst. Attorney General

Commissioner of Education.
November 27, 1957. 519-M

44

School District—Eminent Domain Proceedings by—Awards—Future installments of special assessment levied by village before commencement of proceedings are payable out of gross award to landowner and county. County is collecting agent for village.

Facts and Questions

"1. Where a school district condemns land in a village subsequent to the construction of a public improvement by said village and which land prior to said condemnation has been specially assessed for such improvement, payable in future annual installments, and where the check for the award of damages for the taking of such land so specially assessed is made payable to the County of Washington and the land owner involved, may the County deduct the entire amount due for future installments for such improvement from said award check?

"2. Or is the County entitled to collect, for the benefit of the village, only the special assessments due at the time of the taking by condemnation? If yes, is the school district then liable for the future unpaid special assessments?

"3. May the commissioners making the award for damages take into consideration the public improvement and special assessment by either deducting the total special assessments against the land for a net award to the land owner, or must the commissioners award damages on the basis of the enhanced value of the land by virtue of the improvement and thereby require the land owner to pay the total special assessment from his award?"

Opinion

1, 2. It is assumed for the purposes of this opinion that the entire property is being taken in the condemnation proceeding and that the check is large enough to pay the whole assessment. Further, this opinion is limited in its application to the precise situation presented.

A school district exercises its eminent domain power under and pursuant to the terms and provisions of M. S. Chapter 117. See L. 1957, c. 947, Art. IX, Section 3. A village levies special assessments against benefited property for public improvements pursuant to M. S. A. 429.061.

In the situation presented, the public improvement had been made and the property assessed by the village at some time prior to commencement of the condemnation proceedings by the school district. Since, at the time the condemnation petition was filed, the assessment was already a lien on the benefited property (M. S. A. 429.061, Subd. 2), this opinion is written on the assumption that the case of **Independent Consolidated School District No. 27 v. Waldron**, 241 Minn. 326, 63 N. W. (2d) 555, is distinguished on its facts. However, due to the rather broad dicta in the **Waldron** case, its applicability may ultimately have to be determined by the court.

The measure of damages for the taking of land by a school district for school purposes is the true, full, and fair market value of the land at the time it is taken. **In re Oronoco School District,** 170 Minn. 49, 212 N. W. 8. And in making their award, the commissioners are presumed to have taken into consideration all of the factors which determine such value, including among other considerations the presence of abutting public improvements. Of course, the public improvement may or may not in a given situation increase the market value by the amount of the assessment therefor, but that is the landowner's risk.

The submitted facts indicate that at the time of making the award, there were future installments to be paid on the assessment. The village making the public improvement is entitled to said payments. Manifestly, it would be inequitable and contrary to the concept of just compensation for the landowner to retain the entire award, based partially on the presence of a public improvement, when he had not paid in full for such improvement. Conversely, it would be inequitable and contrary to the concept of just compensation for the condemnor school district in such situation to pay the future assessment installments in addition to paying the full award of commissioners. How, then, is the village to be paid?

The key factors to consider are (1) that the village had an existing lien against the land for the payment of the future installments at the time the condemnation proceedings were instituted, and (2) that an eminent domain proceeding is in the nature of a forced sale wherein the landowner is considered as the grantor and the condemnor as the grantee and the award represents the consideration. See the **Waldron** case, supra, and cases cited therein.

The title to the land acquired by eminent domain proceedings passes when the award is paid or secured and in all cases relates back to the date of filing the award. See Dunnell's Minnesota Digest, 3rd Ed., Section 3016 and citations therein. Thereafter the condemnor school district is the owner.

Under Section 429.061, the assessment roll is ordinarily transmitted by the village clerk to the county auditor and the assessments are extended on the tax lists of the county. The owner of the land then pays the assessment in annual installments to the county treasurer along with his taxes. The county thus ordinarily acts as the collecting agent for the village. Subd. 3 of the said statute also gives the owner the right to pay to the county treasurer the entire amount of the assessment remaining unpaid at any time at his option.

By virtue of condemning the land and paying an award which represents the entire value of the property, and by making the award check payable to both the county and the said landowner-grantor, the condemnor school district (the new owner) has in effect elected to pay the entire amount of the assessment remaining unpaid. Therefore, if the county is the collecting agent for the village, it should deduct the entire remaining amount due for such improvement from the award check.

3. It might be argued that the commissioners are to make a separate award of damages to each person or entity having an interest in one specific parcel because of the language in M. S. A. 117.08, relating to duties of commissioners, which provides:

> "* * * Without unreasonable delay they shall make a separate assessment and award of the damages which in their judgment will result to each of the owners of the land by reason of such taking * * *."

However, Chapter 117 contemplates that one condemnation petition can include a number of parcels of land which the condemnor requires for the particular public purpose; and we construe the above quoted phrase in 117.08 to refer to a separate award for each parcel. Certainly, the statute cannot contemplate or require that the commissioners first ascertain the total award for a parcel, then constitute a judicial and fact-finding body to determine the title or the several interests in such parcel that each party to the condemnation proceeding may have, and then attempt to divide the award accordingly. That is not the common and accepted practice in condemnation proceedings nor is it a reasonable interpretation of the statute, and the courts have not so interpreted it. With the above quoted language in the statute, our courts have uniformly held that condemnation proceedings are in rem against the land rather than in personam against the owners and that hence a gross award is properly made. **Kaffka v. District Court of Ramsey County**, 128 Minn. 432, 151 N. W. 144; **Kaffka v. Davidson**, 135 Minn. 389, 160 N. W. 1021; **Peterson v. City of Minneapolis**, 175 Minn. 300, 221 N. W. 14; **Seabloom v. Krier**, 219 Minn. 362, 18 N. W. (2d) 88; **Stemper v. County of Houston**, 187 Minn. 135, 244 N. W. 690.

The legislature did amend Section 117.08 by L. 1953, c. 751, to provide that when the **state** acquires property the commissioners shall make separate wards to the owner and to the lessee or tenant of each parcel, but such provision does not pertain to the instant situation.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Washington County Attorney.
November 25, 1957. 817-o

45

Certificates of indebtedness issued by school district under authority of M. S A. 275.12 on facts stated may be used for purpose of reconstructing playground and football field. On facts stated, an election is not needed to authorize issue of such certificates of indebtedness.

Facts

"Independent School District No. 691, of Aurora, Minnesota, has an athletic field and playground on a certain piece of property, and also has a football field and playground on other property of the School District. The football field needs complete reconstruction and repair.

"The Board intends to construct a new football field on the other site presently used for athletics and playgrounds. It also intends to use funds from the building and rehabilitation fund for this project, since its buildings are not in need of repair or rehabilitation. The Board also intends to issue 3 year Certificates and to retire the same out of monies levied for the building and rehabilitation fund."

Questions

"May the Board, not presently needing money for the rehabilitation, reconstruction, or modernization of its buildings:

"1. 'Use funds provided for by 275.12, Subdivision 1, for the purpose of reconstructing its playgrounds and football field?'

"2. 'Issue Certificates of indebtedness as provided in said section—which Certificates shall not exceed an amount greater than $10.50 per capita, or be due and payable not later than 3 years after issuance—without a vote of the electors of the District as provided for in Minnesota Statutes, 1957, Chapter 475?' "

Comments

"Chapter 796, Laws of Minnesota, 1957 [M. S. A. 275.12], Section 1, provides for the issuance of Certificates of Indebtedness, payable not later than 3 years after issuance, and not exceeding at any one time, an amount greater than $10.50, per capita, for rehabilitation and reconstruction or modernization of school buildings by major repairs or changes therein.

"My interpretation of these laws is that the Board has authority to issue Certificates of indebtedness for the rehabilitation fund, and that the word school buildings, as used in Chapter 796, includes playgrounds and athletic field and that such Certificates may be issued without a vote of the electors as provided for in M. S. 1957, Section 475.58 (6), which provides for the issuance of obligations without an election, if so provided for by law."

Opinion

M. S. A. 275.12, Subdivision 1 establishes alternative limits for tax levies in school districts. Category (a) forbids the levy of a tax greater than $315 per resident pupil unit in average daily attendance **plus** levies for payment of bonds plus interest thereon.

Category (b) forbids levies in excess of specified sums per capita according to the population of the district and other specified factors. If the district makes a levy greater in amount than permitted by clause (a) but not greater than permitted by clause (b), at least $3.50 per capita must be placed in the building and rehabilitation fund. This fund shall be used only for the rehabilitation or construction or modernization of school buildings by major repair or change or payment of bonds or certificates of indebtedness issued for that purpose. Such purpose does not include ordinary current maintenance, replacements or repairs. Certificates of indebtedness issued for this purpose may be issued for three years. They must mature not later than three years after issue. The total thereof at any one time shall not exceed $10.50 per capita of population.

If the district has no buildings needing rehabilitation, reconstruction or modernization, the board may determine that fact by resolution and use the money in such fund for other authorized school purposes.

So we see that by the express terms of this law, if the appropriate resolution is adopted, your first question requires an affirmative answer. Since the district has no buildings needing rehabilitation, reconstruction or modernization, if the board by resolution so determines, then the law says that the district may use the money in the fund for other authorized school purposes. The language is plain. There is no reason to doubt what it means.

The authority to issue the certificates within the stated limitation appears to exist.

Section 275.12 contains no requirement for an election. Certificates of indebtedness are not bonds. This subdivision permits certificates of indebtedness as described to be issued. Such certificates do not and should not pledge the full faith and credit of the district. They are payable out of the building and rehabilitation fund. Such certificates should state in plain language that they are payable only out of such fund. In that event they should not be considered obligations of the district.

M. S. A. 475.51 defines the word "obligation" **for the purpose of c. 475.** It means "any promise to pay a stated amount of money at a fixed future date, regardless of the source of funds to be used for its payment."

In view of the fact that such certificates are payable only from such fund, and they are not **general** obligations of the district, I see no need for an election to authorize their issuance. See **Brown v. Ringdal,** 109 Minn. 6, 122 N. W. 469, **Naftalin v. King,** 252 Minn. 381, 90 N. W. (2d) 185.

MILES LORD,
Attorney General.

CHARLES E. HOUSTON,
Solicitor General.

Independent School District No. 691 Attorney.

June 17, 1958. 519M

46

School District may not acquire a schoolhouse site by a contract for deed. L. 1957, c. 417, without force after July 1, 1958.

Questions

"(1) If the voters of an independent school district duly authorize the purchase of land for an additional schoolhouse site under Section 125.06, Subd. 2, Minnesota Statutes as amended, can the voters of the district by a separate vote on a separate question authorize the purchase of such additional schoolhouse site by a contract for deed the terms of which are set forth in the question voted upon and which would provide for payment of the purchase price in equal, annual installments over a period of years with interest at a specified rate?

"(2) If the voters of the District authorize the purchase of an additional schoolhouse site or if the school board has the power and authority to purchase the site without the vote of the voters of the district, can the school board of the independent district, without the vote of the voters of the district, purchase the site under a contract for deed which would provide for payment of the purchase price in equal, annual installments and interest on the unpaid principal balance from time to time?

"(3) Since Chapter 417 of the Laws of Minnesota for 1957 amending Section 125.06, Subd. 2, Minnesota General Statutes, remains effective by its terms only until July 1, 1958, will the provisions of Chapter 947 of the Laws of Minnesota for 1957 which repeal Section 125.06 become effective July 1, 1958 so as to repeal Section 125.06 and make the provisions of Section 5 of Article V of Chapter 947 of the Laws of Minnesota for 1957 applicable to the purchase of schoolhouse sites by independent school districts and specifically to enable school boards of such districts to purchase schoolhouse sites without a vote of the voters of the district?

"(4) If the answer to the immediately preceding question is in the affirmative, will the board of an independent district have the power after July 1, 1958 to purchase, without the vote of the voters of the district, an additional schoolhouse site by contract for deed providing for the payment of the purchase price in equal, annual installments with interest on the unpaid balance from time to time?"

Opinion

1. M. S. 1953, 125.06, Subd. 2 provides:

"When authorized by the voters at a regular . . . election or at a special . . . election called for that purpose, it may acquire necessary sites for school houses, or enlargments or additions to existing schoolhouse sites . . ."

M. S. A. 122.041, 1957, c. 947, Art. V, Section 5. Subdivision 1 provides:

> "When funds are available therefor, the board may locate and acquire necessary sites of school houses or enlargements, or additions to existing schoolhouse sites . . ."

It is observed that this subdivision does not require an election.

L. 1957, c. 947, Art. IX, Section 9, purports to repeal Section 125.06, supra. But see opinion O. A. G. 83E, August 26, 1957, copy enclosed.

The people by their vote cannot change the law. M. S. A., c. 475, provides the only method by which the district may become indebted and that method is by a bond issue. The ordinary contract for deed reserves the title to the land in the vendor. His interest is that of an equitable mortgagee and the purchaser, in equity, is the owner and the equitable mortgagor. The contract creates a debt of the purchaser to the vendor. A school district may not mortgage public property. Nor can the school district own property subject to a mortgage or lien. So the first question requires a negative answer.

2. For the same reasons the answer to the second question is "no".

3. After July 1, 1958, unless the legislature shall in the meantime extend the effect of L. 1957, c. 417, such law will no longer be effective and M. S. 1953, 125.06 will then be repealed by L. 1957, c. 947, Art. IX, Section 9. Thereupon full force will be given to M. S. A. 122.041, Subdivision 1. See opinion O. A. G. 83-E, March 7, 1958, copy enclosed.

For the reasons stated in answer to the first question, the fourth question is answered in the negative.

MILES LORD,
Attorney General.

CHARLES E. HOUSTON,
Solicitor General.

Independent School District No. 295 Attorney.
April 9, 1958. 622i-11

47

School Board—Independent School District—Resignation, Appointment and Elections. Appointee on school board to fill vacancy caused by resignation of member holds office until next annual election in May, at which time there shall be an election to fill unexpired term of member who resigned and also an election for full term commencing on July 1 next following such election.

Facts

"In Independent School District No. 693 of St. Louis County, Minnesota, a member of the Board of Education, whose term would expire on July 1, 1958, resigned in January, 1958, and P. was appointed by the Board to fill the vacancy."

Questions

1. "Whether P. holds office until the annual election on the third Tuesday in May, 1958, or whether he holds office until July 1, 1958, which would have been the expiration of the term of the former member?"

2. "If the person elected by the Board holds only until the third Tuesday of May, 1958, must some one be elected at the annual election on the third Tuesday of May, 1958, for the balance of the term from the third Tuesday in May until July 1, 1958, and must some one also be elected on the third Tuesday of May, 1958, to succeed such short term member to take effect on July 1, 1958?"

Opinion

You are referred to M. S. A. 122.036, Subd. 4 (Article V, Section 1, Subd. 4, c. 947, Laws 1957) and Section 122.037, Subd. 4 (Article V, Section 4, Subd. 4, c. 947, Laws 1957).

Under the provisions of Subd. 4 of Section 122.037, the person appointed, P., will hold office only until the next annual meeting or election in May, 1958. See opinion O. A. G. 161-A-25, February 16, 1945, copy enclosed. At that time the ensuing vacancy shall be filled by election for the unexpired term of the person who resigned in January 1958, which term under the facts submitted ends July 1, 1958.

At the same election in May 1958, under the provisions of Subd. 4 of Section 122.036, a member shall be elected to fill the vacancy on the board caused by expiration on July 1, 1958, of the full term of the member who resigned in January 1958.

MILES LORD,
Attorney General.

FRANK J. MURRAY,
Spec. Asst. Attorney General.

Commissioner of Education.
February 6, 1958. 161-A-25

48

School Districts—Health—School Board may provide for free inoculation of its students with Salk vaccine.

Question

May a school board furnish and pay for Salk vaccine for inoculations of its students?

Opinion

Yes. There is no question that a school board has a proper interest in the health of its students and that it may do what is reasonably necessary to protect the health of its student body and to prevent the spread of disease among its student body, to the end that the school board will be enabled to carry out its educational functions. **Bright v. Beard,** 132 Minn. 375, 157 N. W. 501; **State v Brown,** 112 Minn. 370, 128 N. W. 294; **State v. Zimmerman,** 86 Minn. 353, 90 N. W. 783. The rendering of medical service to students, however, is not the proper function of a school board. **McGilvra v. Seattle School District,** 113 Wash. 619, 194 P. 817, 12 A. L. R. 913. It is apparent that the two propositions just stated may seem to be in conflict when applied to a particular factual situation. The Attorney General has previously stated the distinction between the two propositions as follows:

> " . . . where the test or treatment is for the benefit of the particular child treated, the cost cannot be borne by the school district. But in accordance with opinions formerly rendered, if the test or treatment was for the benefit of other children than the one tested or treated, then it is an item which the school district may properly bear."

Opinion O. A. G. 159-B-7, March 10, 1943, copy enclosed.

In an opinion, O. A. G. 159-B-7, February 1, 1950, copy enclosed, the Attorney General held that a school board could properly pay for the expense of an immunization program for students whose parents were unable to pay therefor.

If the school board in the exercise of its judgment finds that providing for the free inoculation of its students with Salk vaccine will help protect the health of its students and help prevent the spread of disease within its student body, it may provide, with the consent of the parents or guardians of the students, for such free inoculations.

This opinion is not limited to school boards of Independent School Districts.

MILES LORD,
Attorney General.

JOHN R. MURPHY,
Assistant Attorney General.

Commissioner of Education.
February 6, 1957. 159-B-7

49

Maximum amount which school district may pay superintendent as reimbursement for the use, by him, of his personal automobile in the performance of his duties shall not exceed seven and one-half cents per mile. District is not authorized to pay superintendent a flat sum for such use.

Facts

"It has been the policy of our School Board, when hiring the Superintendent and setting his annual salary, to also authorize a flat sum reimbursing him for school use of his personal automobile."
In his letter the superintendent refers to Section 350.11, Subd. 1.

Question

Is the practice of paying the superintendent a flat sum to reimburse him for the school use of his personal automobile lawful?

Opinion

M. S. A. Section 350.11, Subd. 1, provides:

"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."

Under this statute, the maximum amount which a school district may pay to an officer or employee as compensation or reimbursement for the use of such officer's or employee's own automobile in the performance of his duties is not to exceed seven and one-half cents per mile. We find no statutory authority whereby the school district can pay the superintendent a flat sum to reimburse him for school use of his personal automobile.

Your question is therefore answered in the negative.

MILES LORD,
Attorney General.

FRANK J. MURRAY,
Spec. Ast. Attorney General.

Commissioner of Education.
June 17, 1958. 768-R

50

Registered architect, engineer or surveyor required on public work or improvement when total cost is in excess of $2,000 and plans and specifications, etc. are provided for project or if there is supervision of the architectural, engineering or surveying work. Question is not whether a project is a repair or an improvement but rather is it a public work or improvement paid from public funds. Cost of labor of regular school employees is part of total cost within meaning of statute.

Facts

"The School Board of the Independent School District of Virginia No. 706 intends to make the following repairs or improvements on certain school buildings and grounds which will require expenditures in the following amounts:

1. New roof on Washington Grade School $14,000.00
2. New roof on school garage $ 4,000.00
3. Prepare base and lay bituminous covering on portion of playgrounds at four grade schools $20,000.00"

We are informed that no plans and specifications have been made for the projects.

Questions

1. "In making said improvements or repairs, is it necessary that said school board employ an architect or engineer as required by M.-S. A., Sec. 326.03?

2. "If work is to be done on school properties which can be considered as repairs rather than a public work or improvement, does M. S. A., Sec. 326.03 then apply?

3. "If regular school employees are to do the work on said improvements or repairs, is the cost of their labor taken into consideration when determining whether a certain job will exceed the $2,000.00 figure in M. S. A., Sec. 326.03?"

Opinion

In your questions you refer us to M. S. A. Section 326.03. The pertinent part of the statute provides:

"No person, except an architect, engineer or land surveyor, registered as provided for in sections 326.02 to 326.15 shall practice architecture, professional engineering, or land surveying, respectively, in the preparation of plans, specifications, reports, plats or other engineering or architectural documents, or in the supervision of architectural, engineering, or land surveying work, for any public work or public improvement in this state, excepting any public work or public improvement

the total cost of which does not exceed $2,000, provided that plans and specifications for such work or improvement affecting water supply or waste disposal are approved by the appropriate state agency. Public work or public improvement is defined to mean work or improvement the cost of which is to be paid in whole or in part from public funds . . ."

1. In view of the nature of the proposed projects, it seems to us that before the board can intelligently determine the extent of the work necessary and its probable cost with reasonable certainty and proceed to let bids therefor, it would probably be necessary that plans and specifications be made. From the facts, the apparent cost of the projects contemplated in each instance is in excess of $2,000, and clearly the work proposed is within the definition of a public work or improvement as defined by the above statute. Consequently, if the district does employ anyone to prepare plans and specifications or to supervise the engineering work, then he must be a duly registered architect or engineer respectively as the statute provides. If it is reasonably determined that the job is of such a nature that plans and specifications are not necessary, then Section 326.03 has no application.

2. The questions in each case are not whether a project is a repair or an improvement. The questions are: Is the proposed project a public work or improvement as defined by the statute? Is the total cost in excess of $2,000, and if so, are plans, specifications, reports, plats or other engineering or architectural documents contemplated for the project? Is supervision of architectural, engineering or surveying work contemplated? If these questions are answered in the affirmative, then a registered architect, engineer or surveyor must be employed.

3. M. S. A. Section 326.03 excepts from its provisions " . . . any public work or public improvement the total cost of which does not exceed $2,000.00, . . ." We wish to restate that the statute does not distinguish between repairs and improvements; rather it refers to a public work or improvement which it defines as a ". . . work or improvement the cost of which is to be paid in whole or in part from public funds . . ."

Regardless of the fact, therefore, that regular school employees perform the labor on a public work or public improvement, the cost of their labor is paid from public funds and is a part of the total cost within the meaning of this statute.

MILES LORD,
Attorney General

FRANK J. MURRAY,
Spec. Asst. Attorney General

Independent School District No. 706 Attorneys.
June 6, 1958.

10-A

51

Teachers Retirement Fund — Teacher under age 25 having optional membership under M. S. 135.05, Subd. 1, repealed by Ex. Sess. L. 1957, c. 16, Section 19, is required to be member of fund commencing July 1, 1957.

Facts

"A teacher, age 22, commenced his teaching service in Minnesota in schools to which the law applies in September, 1956. He was not then required to become a member of the State Teachers Retirement Fund, and therefore, was granted a limited certificate of exemption from membership until attaining age 25, under the provision of Minnesota Statutes, Section 135.05, Subdivision 1, paragraph 1.

"The teacher is now teaching under a continuing contract, and will continue his teaching service in the said schools after July 1, 1957."

Question

"Is the teacher now teaching and holding an exemption certificate a new teacher within the meaning of the term, 'new teacher' as used in Chapter 16, Section 3, Subdivision 2 of the Minnesota Extra Session Laws 1957, so as to be required to forfeit his exemption certificate and become a member of the association on July 1, 1957?"

Opinion

M. S. 135.05, Subd. 1, provides in part:

"Members of the fund shall include all teachers who render any teaching service after August 1, 1931, in any of the schools or institutions to which Sections 135.01 to 135.15 apply, except:

"(1) Those who at the time of rendering such service have not attained the age of 25 years; but any such teacher who renders any teaching service after September first after attaining that age shall automatically become a member, any such teacher who has not attained that age shall be admitted as a member upon written application to the board, and any member of the fund who rendered teaching service before attaining the age of 25 years and who has not received credit therefor may, upon written application, receive credit for such service and pay into the fund . . . " (Emphasis supplied)

Ex. Sess. L. 1957, c. 16, Section 3, provides:

"Subdivision 1. * * * Except as provided in this subdivision, any person who was a member of the association on June 30, 1957, shall continue his membership with the association. * * *

"Subd. 2. Except as provided in this subdivision, every new teacher after June 30, 1957, entering the service of the state or its govern-

mental subdivision as a teacher, except persons specially excluded, shall become a member of the association by the acceptance of such employment. Any new teacher over the age of 50 shall not be eligible to become a member unless he has accumulated deductions on deposit with the fund for a number of prior years equal to the number of years his age is greater than 50.

"Subd. 3. Any temporary teacher or substitute teacher not on a regular appointment is not eligible for membership unless the retirement board accepts and approves an application for membership from such teacher."

Ex. Sess. L. 1957, c. 16, Section 19 repeals, among others, "135.05, as amended by Laws 1955, Chapter 361, Sections 2, 3".

Obligatory membership in the Teachers Retirement Fund of all "teachers" as defined in M. S. 135.01, Subd. 2, and 135.27, excepting only those expressly granted the option to become members and those expressly excluded from membership (Ex. Sess. L. 1957, c. 16, Section 3, Subds. 2 and 3), is the basic concept, as it was previously, of said c. 16 amending the Teachers Retirement Act.

M. S. 135.05, Subd. 1, granted to each "teacher" under 25 years of age the right of optional membership until the age of 25 years was attained when membership became automatic, but Section 135.05 was repealed by Ex. Sess. L. 1957, c. 16, Section 19, effective July 1, 1957, and Section 3 specified the sole exceptions from obligatory membership. Teachers whose age is less than 25 years are not embraced in these exceptions, and commencing July 1, 1957, are required to be members in the fund.

The subject-teacher after July 1, 1957, would not be a "new" teacher within the meaning of Ex. Sess. L. 1957, c. 16, Section 3, Subd. 2, but as stated above, after that date his membership in the fund would be automatic and his certificate of exemption from membership would expire by virtue of law.

MILES LORD,
Attorney General

WILLIAM M. SERBINE,
Spec. Asst. Attorney General

Executive Secretary, Teachers Retirement Fund.
June 28, 1957. 331-D

52

School Districts — Labor Relations — L. 1957, c. 789 — School superintendents and principals included within definition of "public employee", and therefore entitled to join a labor organization. Contract provision

embodying a restriction on right to join a labor organization is illegal. Such illegality does not void the whole contract.

Facts

"Under the provisions of the Minnesota Statutes granting authority to the School Board to 'superintend and manage the schools of the district; adopt, modify, or repeal rules for their organization, government, and instruction . . .', the School Board of Independent School District Number 361 of Koochiching County, Minnesota, deeming it to be for the best interests of the school system and believing that classroom teachers have a right to meet and discuss their problems without interference from the School Board or administration of the school, adopted the policy of requiring that superintendents and principals be deprived of membership in local professional organizations that are primarily intended for the classroom teacher

"In compliance with that policy a contract was issued to Mr. Russell L. Johnson, principal of the A. B. and Forestland Schools, which contains this paragraph, 'Teacher agrees to refrain from becoming or retaining membership in any organization that does not admit all administrators and supervisors employed by a school district in Minnesota to full and complete membership including all deliberation, discussions and voting on all questions.' The contract was signed by the teacher, clerk and chairman.

"On September 23, 1957 a request was made by the Executive Council of Local 331 for a meeting with the School Board of this district relative to Mr. Johnson's contract. The request was signed by Mr. F. O. Williams, chairman of the Problems Committee, Local 331 A.F.T.

"In that letter Mr. Williams stated, 'Prior to the issuing of teachers' contracts this spring, Mr. Russell Johnson requested and was granted the privilege of appearing before the School Board to make statements regarding his activities in the American Federation of Teachers. Local 331 has been informed by Mr. Johnson that certain clauses in the contract issued to him are of such a nature that he is not allowed to belong to organizations of his own choice.'

"Mr. Johnson in a signed statement to me said that he has not referred the provision to said Problems Committee.

"Mr. Russell L. Johnson is a principal, teaching one-half day and devoting the rest of his time to administrative duties. He is employed on a ten month basis, working both before the opening of the school year and after the close of the year in the spring.

"He is a principal and under School Board policy Mr. Johnson has rated teachers and has been present at hearings granted to teachers by the School Board when teachers have been requested to resign from their respective positions. As such he is in a position, in the opinion of the School Board, to have more influence in the meetings of the organization than a classroom teacher, either through the intimidation of

teachers or the superior knowledge of administrative policies some may assume him to possess."

Questions

"1. Is the policy, as stated above, and adopted by the School Board of this district legal?

"2. Is the provision contained in the contract mentioned above, and of which a copy is enclosed, a legal provision in the teachers' contract?

"3. If the provision in question two is illegal, is the entire contract void?

"4. If the contract is void, is the contract in force prior to April 1, 1957 binding on the School Board and the teacher?"

Opinion

Your questions involve a consideration of M. S. 1953, Sections 179.51—179.58, popularly known as the "Public Employee No-Strike Law", as amended by Laws 1957, c. 789. Sec. 179.51, in so far as material, provides as follows:

> "No person holding a position by appointment or employment in the government of the State of Minnesota, or in the government of any one or more of the political subdivisions thereof, or in the service of the public schools, or of the State University, or in the service of any authority, commission, or board, or any other branch of the public service, hereinafter called a 'public employee' shall strike, or participate in a strike. * * *"

L. 1957, c. 789, in so far as material, adds the following new provision to Section 179.52:

> "Public employees shall have the right to form and join labor organizations, and shall have the right not to form and join labor organizations. Public employees shall have the right to designate representatives for the purpose of meeting with the governmental agency with respect to grievances and conditions of employment. It shall be unlawful to discharge or otherwise discriminate against an employee for the exercise of such rights, and the governmental agency shall be required to meet with the representatives of the employees at reasonable times in connection with such grievances and conditions of employment. It shall be unlawful for any person or group of persons, either directly or indirectly, to intimidate or coerce any public employee to join, or to refrain from joining, a labor organization."

Sec. 179.51 removes the right to strike of "public employees" as defined therein. In the 1957 amendment said "public employees" are specifically granted the right to "form and join labor organizations." The question is intended to be a matter of free choice with the public employee,

and the law makes it unlawful for any person or group, either directly or indirectly, to intimidate or coerce any public employee to join, or to refrain from joining, a labor organization.

We assume for the purpose of this opinion that the organization specifically involved in your request, namely, Local 331 of the American Federation of Teachers, is a "labor organization" within the meaning of c. 789, and that it is the organization referred to in the quoted clause contained in the contract here involved.

In connection with the application of the Public Employee No-Strike Law to the facts here involved, it must be noted that this office has heretofore ruled that the Public Employee No-Strike Law is applicable to teachers. See opinion O. A. G. 270-D, April 9, 1953, copy enclosed. M. S. 1953, Section 130.02, includes superintendents and principals within the term "teachers", at least for the purpose of certification.

If the individual involved in the facts stated is a "public employee" as that term is defined in Section 179.51, he is entitled to the rights and benefits as well as subject to the obligations and restrictions contained in Sections 179.51—179.58 as amended. This includes, of course, the right to join a labor organization of his own choice.

The definition of "public employee" contained in Section 179.51 is a broad one. It applies, so far as here material, to any "person holding a position by appointment or employment * * * in the service of the public schools." No exception or exclusion is made as to persons holding positions which might usually be termed supervisory in nature, such as superintendents or full or part time principals.

In this respect our Public Employee No-Strike Law is different from the provision of the National Labor Relations Act, as amended by the Taft-Hartley Act[1], which specifically excludes supervisors from the definition of "employee". The Public Employee No-Strike Law is also different than the Minnesota Labor Relations Act, which may be interpreted to exclude supervisors from the definition of employee. M. S. 1953, Section 179.01, Subd. 4, 38 Minn. L. Rev. 730, at 740. The provisions of the Minnesota Labor Relations Act do not apply to public employees. M. S. 1953, Section 179.01, Subd. 3, opinion O. A. G. 270-D, February 2, 1954, copy enclosed. Attention is also directed to M. S. 1953, Section 185.19, which, prior to the enactment of Section 179.58, was interpreted as exempting only those public employees therein specifically designated from the provisions of Minnesota's Little Norris-LaGuardia Act, M. S. 1953, c. 185. **Board of Education of Minneapolis v. Public School Employees Union**, 233 Minn. 134, 45 N. W. 2d 797, 29 A. L. R. 2d 424.

The foregoing instances are referred to only as indications of what a legislature may do when they desire to exclude a certain class from the operation of a statute. In our opinion, there is no indication of any legislative intent contained in Section 179.51 or the other provisions of the Public

[1]49 Stat. 449 (1935), 29 U.S.C. § 152, (1946) as amended by the Labor-Management Relations Act of 1947, 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141 et seq.

Employee No-Strike Law, as amended, to so exclude school superintendents or full or part time principals from the broad definition of "public employee" and to therefore prevent them from joining a labor organization.

Whether or not the duties and responsibilities of school superintendents and principals are such that they ought not to be allowed to form and join labor organizations is a matter to be determined by the legislature, and if they so decide to be expressed by them in the appropriate language. Based upon our statutes as they are now constituted, the legislature, in our opinion, has not so determined to exclude such superintendents and principals.

We are not aware of any sections of the statutes relating to the powers and duties of school board such as the board here involved which would authorize or empower such board to adopt or implement a policy in derogation of the rights granted to its employees by authority of c. 789. Consequently, the board has no power to include or enforce the provision contained in this stated contract, since said provision operates to deprive a public employee of his right to join a labor organization.

However, the illegality of this particular provision does not invalidate or void the entire contract between the school board and the teacher. If otherwise legal, the contract continues in force and effect according to all its terms and conditions except for the illegal provision.

A copy of the contract which you enclose is herewith returned to you.

MILES LORD,
Attorney General.

ROBERT LATZ,
Assistant Attorney General.

Commissioner of Education.
December 9, 1957. 270-D

53

School Districts: Teacher's Contract. Teacher's contract and supplementary agreement are one contract of employment. For failure to perform, teacher can be asked to resign or contract can be terminated as statute provides if such non-performance constitutes a substantial and material breach thereof.

Facts

The Board of Education of Common School District No. 1 states:

"We have several instances where we hired teachers, not only for their ability in certain subject fields, but also because of their ability as athletic coaches . . .

"In our school, the Board of Education has, by resolution made athletics a part of the curriculum . . .

"We also issue two contracts. One is a straight teaching contract. . . . and the other a supplementary contract for . . . coach."

A teacher so hired under two contracts, as a history teacher and as an athletic coach wishes to resign as coach and continue as a teacher. "We . . . have no teaching vacancy, but need a coach. Of course we would not hire a man for coaching duties alone."

Enclosed with the letter is a non-executed "Teacher's Contract" and a "Supplementary Teacher's Contract for Extra-Curricular Activities". On the latter appears the following notation:

"This contract is not a part of the Continuing Teachers Contract. As the position for the contract is an appointment it can be changed from year to year or during the year."

Questions

1. "Under the continuing contract law, could we ask this man, . . . to resign so that we could secure a man to take care of both the teaching and coaching positions?"

2. "Is this supplementary contract (for coaching) a part of continuing contract for this teacher?"

3. Do the contracts meet the requirements of the continuing contract law?

Opinion

We assume that the non-executed copies of the "Teacher's Contract" and "Supplementary Teacher's Contract for Extra-Curricular Activities" are in fact copies of the executed agreement between the school board and the teacher except for the details of the employment.

Section 130.18 M. S. A. provides that the employment of teachers shall be by a written contract which shall remain in full force and effect except as modified by mutual consent of the board and the teacher until terminated by a majority vote of the full board or by written resignation of the teacher before April 1. It is also provided that a teacher is to be given notice of a proposed termination and a hearing if requested. The contract may also be terminated at any time by mutual consent of the school board and the teacher.

There is in fact in this case only one contract between the school board and the teacher. The agreement to perform additional duties in the "Supplementary Teacher's Contract for Extra-Curricular Activities" is a part of the "Teacher's Contract". It is an agreement to teach additional subject-matter (athletics) which has been made a part of the curriculum by action of the board and is to be treated as any other curricular subject taught in the school. It could as well be a contract to teach English, History or a like subject. By its title it is "Supplementary" and in its body it refers to

the original "Teacher's Contract". Together they constitute the whole contract of employment between the school district and the teacher.

Under the statute, 130.18, a teacher cannot be a mere appointee in whole or in part. Neither the board nor the teacher can waive the requirements of the statute or its effect. Dunnell's Digest (3rd Ed.) Section 8686. And if the board attempts to discharge the teacher or if the teacher attempts to resign contrary to the provisions of the statute, Section 130.18, such action is in either case ineffective until consent of the other party is obtained. **Downing v. District,** 207 Minn. 292, 291 N. W. 613.

By mutual consent, therefore, the contract can be modified or terminated or it can be terminated as the statute provides. Under the facts, the board wishes to wholly terminate the contract if the teacher fails to perform his duties as a coach. Since the contract is binding on both parties, both the school board and the teacher must perform according to the terms of the contract. If the teacher fails to perform a substantial and material part of the contract, such non-performance may release the district. See **Hong v. District,** 181 Minn. 309, 232 N. W. 329. And in our opinion failure to perform the coaching duties in this case would be a substantial and material breach of contract.

Your questions are answered as follows:

1. The teacher must perform his contract or he can be asked to resign and his contract terminated by consent or his contract may be terminated otherwise as that statute provides.

2. Yes.

3. The details of the entire contract are not before us and no opinion is given other than as assumed above.

MILES LORD,
Attorney General

FRANK J. MURRAY,
Spec. Asst. Attorney General

Commissioner of Education.
January 13, 1958. 172-C-5

54

School Districts—Towns, City of Chisholm—C. 321, L. 1957, provides for medical and surgical benefits for certain officers, employees and their dependents. The governmental units named may exceed their debt limitation and levy and collect a tax if necessary to provide entire cost of premiums or charges for officers and employees. In case of dependents of officers and employees no levy in excess of that provided by statute may be made.

Facts

A. Independent School District No. 40, Chisholm "operates under M. S. A. 275.12".

B. The Town of Balkan "is under 275.10, a 17 mill limitation law."

C. The City of Chisholm is "under M. S. A. 275.11 and also under the cash basis laws of M. S. A. 471.71 et seq."

Question

Does Chapter 321, Session Laws of 1957, permit levies to be made for the provisions mentioned therein over and above the limitation statutes cited, and if so, to what extent?

Opinion

The following opinion is applicable to the school district, the township and the City of Chisholm.

M. S. 471.61 was amended by Chapter 321, Laws 1957.

Chapter 321 is an act relating to group insurance covering life, health, accident, medical and surgical benefits and hospitalization for public officials, employees and their dependents of any county, municipal corporation, (which includes cities and villages), town, school district, county extension committee or any other political subdivision of the state or combination of two or more subdivisioins. The chapter provides in part:

> "Any such governmental unit. * * * may pay all or any part of the premiums or charges on such insurance or protection and any such payment shall be deemed to be additional compensation paid to such officers or employees." (emphasis supplied)

Thus all of the premium may be paid by the governmental unit.

Enclosed is an opinion O. A. G. 125-A-28, May 24, 1957, which states that the premium payment shall be deemed to be compensation paid to the employee in addition to his present salary. The opinion also said:

> "I see no reason why this additional compensation should not be paid out of the same fund from which the employee's other compensation, including salary, is paid."

Chapter 321 also provides:

> "Any governmental unit which pays all or any part of such premiums or charges is authorized to levy and collect a tax, if necessary, in the next annual tax levy for the purpose of providing the necessary funds for the payment of such premiums or charges," (emphasis supplied)

The municipality or political subdivision is therefore directly authorized to levy and collect a tax for the purposes expressed in the chapter, if necessary to accomplish the purpose of the legislation.

The chapter then continues:

> "and such sums so levied and appropriated shall **not,** in the event such sum exceeds the maximum sum allowed by **any law or** the **charter** of a municipal corporation, be considered part of the cost of government of such governmental unit as defined in any tax levy or per capita expenditure limitation;" (emphasis supplied)

Thus, any governmental unit subject by either charter or statute to a limitation on tax levy or per capita expenditure, or both, may exceed such limitation to provide the coverage under this act, if necessary.

There is an exception as to coverage of dependents, however, as Chapter 321 then continues:

> "provided at least 50 percent of the cost of benefits **on dependents** shall be contributed by the employee **or** be paid by levies within existing per capita tax limitations." (emphasis supplied)

Dependents are then defined by the act. The limitation relative to dependents limits the amount of excess levies that the governmental unit may make for a policy covering them.

It is, therefore, our opinion that within the provisions of Chapter 321, the three governmental units referred to in your question **may** do as follows:

1. In the case of public officers and employees they may pay all of the cost of the premiums or charges provided for in Chapter 321 and exceed their tax or expenditure limitation for the full cost, if necessary to do so.

2. In the case of dependents of public officers and employees no levy in excess of that provided in the statute may be made.

MILES LORD,
Attorney General

FRANK J. MURRAY,
Spec. Asst. Attorney General

Independent School District No. 40 Attorney.
October 4, 1957. 249-B-8

55

School District Employees—Group Insurance—L. 1957, c. 321, M. S. A. 471.61 is authority to school districts to purchase group insurance and pay the premiums thereon for the protection of teachers and other employees against described hazards. Whether the teacher or other person is an employee is determined by the contract, not by the pay days and until the contract is terminated the insurance applies during vacations and other non-working days.

Facts

"The Teachers are under a continuing contract, yet there are about 2½ or 3 months when they are not actually teaching. Some of the teachers are paid 1/10 of their salary every 20 school days and get no pay during the summer months. Some are paid 1/12 of their salary every 20 school days and then get two 1/12ths during the summer. Some of the non-contract or general employees although not under written contract work year after year without a new application, but some are off for three months in the summer. During that three months they receive no pay."

Questions

"1. Can the Board carry said Blue Cross and Blue Shield on the teachers for the entire year?

"2. Can the Board carry Blue Cross and Blue Shield for the non-contract employees who are not on the job for three months of the year?"

Opinion

According to its title this statute is an act relating to medical and hospital benefits for certain public **employees,** and amending former laws. Among other public corporations named, a school district may insure its **employees** and their dependents under group insurance contracts against described hazards. The district may pay all or part of the premiums on such insurance.

The teachers are under a continuing contract. While the contract is in force: that is, until terminated, the teacher is an employee of the district. The school board, not the teacher, fixes the vacation period. While on vacation a teacher is an employee. It is not when a pay day occurs which establishes the relation of employer and employee. It is the contract of employment. So, while a teacher has a contract of employment, she is a teacher on Saturdays, Sundays, holidays, and during vacation. Accordingly the school district may, until the teacher's contract is terminated, purchase and pay for insurance authorized by this act for the benefit of the teacher.

The same reasoning applies to all employees other than teachers.

MILES LORD,
Attorney General.

CHARLES E. HOUSTON,
Solicitor General.

School District No. 221 Attorney.
October 22, 1957. 249-B-8

56

State—College Board—Sovereign Immunity—State College Board is agency of state and engaged in governmental function in its dormitory and food service operations pursuant to L. 1955, c. 715, and L. 1957, c. 603, and hence has immunity from liability for torts in such operations.

Facts

"The State College Board, under authority of Chapter 715, 1955 Laws and Chapter 603, 1957 Laws, is authorized to 'acquire by purchase or otherwise, construct, complete, remodel, equip, operate, control and manage residence halls, dormitories . . .' in the several State Colleges.

"Toward the accomplishment of the above purposes the State College Board has caused to be issued $3,100,000 in revenue bonds to be retired from the income resulting from the operation of the revenue-producing facilities. In connection with the issuance of the revenue bonds, the Board passed a bond authorizing resolution, a copy of which is attached. In section 6.5 of this resolution the Board makes certain covenants regarding the type of insurance that it will carry on the subject facilities. The fourth sentence of section 6.5 is as follows:

'The Board further agrees that it will at all times carry public liability and property damage insurance in such amounts and covering such risks as the Board shall deem to be reasonable and desirable.' "

Comment

"You will note that the amount and nature of the insurance is left to the discretion of the Board. Whether the Board would carry any insurance or not would also seem to be a discretionary matter. This would seem to depend on whether or not the Board has immunity from public liability in connection with the dormitory operations. It is assumed that if the Board does enjoy immunity from suit in connection with public liability there would be no purpose in insuring against a risk that did not exist."

Question

"Does the State College Board in its dormitory and food service operations as authorized pursuant to Chapter 715, 1955 Laws and Chapter 603, 1957 Laws have immunity from suit for public liability?"

Opinion

The doctrine of sovereign immunity from suit is firmly imbedded in the law. See **Berman v. Minnesota State Agricultural Society**, 93 Minn. 125, 100 N. W. 732; and **Dunn v. Schmid**, 239 Minn. 559, 60 N. W. 2d 14, as illustrative. As pointed out in 26 Minn. Law Review 315, our courts have consistently refused to entertain jurisdiction where the state itself is sought

to be made a defendant to a tort action without its consent. Since the state government is administered through its various departments and agencies, the mantle of sovereign immunity likewise falls upon them.

In the interesting case of **George v. University of Minnesota Athletic Association,** 107 Minn. 424, 120 N. W. 750, wherein the plaintiff sued for damages for injuries received when a grandstand collapsed at a University of Minnesota football game, the court conceded without argument that the action should be dismissed if an arm of the state were involved. The court concluded that the defendant was a branch of the University and hence held for the defendant. Subsequently in the leading case of **State v. Chase,** 175 Minn. 259, 220 N. W. 951, Justice Stone specifically held that "Education being one of those ends (of state government) and the University the premier of the state's educational system, it is, in the ordinary and functional sense, plainly an agency of the state." See also opinions O. A. G. 844G-7, November 4, 1929, printed as No. 341 in the 1930 Report of the Attorney General, and February 26, 1957, copies enclosed.

The doctrine further extends to quasi corporations such as counties, towns and school districts, the courts holding that they are involuntary agencies of the state formed for purely public purposes and are therefore not liable for their torts unless expressly provided by statute. **Altnow v. Town of Sibley,** 30 Minn. 180, 14 N. W. 877; **Bank v. Brainerd School District,** 49 Minn. 106; **Mokovich v. Independent School District No. 22,** 177 Minn. 446, 225 N. W. 292; **Bang v. Independent School District No. 27,** 177 Minn. 454, 225 N. W. 449; and **Rittmiller v. School District No. 84 (Minn.),** 104 Fed. Supp. 187. The **Mokovich** case, supra,, expressly holds that school districts are arms or agencies of the state, given corporate powers solely for the exercise of public functions for educational purposes, and hence are not liable in damages for negligence in performing their said governmental functions.

The Minnesota State (Teachers) Colleges are creatures of the legislature, established by L. 1858, c. 79. The first sentence of Sec. 1 thereof provided:

> "There shall be established within five years after the passage of this act, an institution to educate and prepare teachers for teaching in the Common Schools of this State, to be called a State Normal School."

The Act provided in Sec. 4 that the governor appoint the first governing board thereof and that they be elected thereafter by the legislature, and in Sec. 12 that an annual report be made by the board to the governor and legislature. Chap. 136 of M. S. now governs the state colleges and its nine-man governing board. Under Section 136.12, eight of the board members are appointed by the governor and confirmed by the senate while the commissioner of education is the other member; and Section 136.14 provides for biennial reports of the board to the governor and states that the board has the "educational management, supervision and control of the state colleges and of all property appertaining thereto."

Clearly, therefore, the state colleges are as integral a part of the state's educational system as are the school districts and the University; and there can be no doubt that the State College Board is an arm or agency of the state government.

The legislature has authorized the board, in L. 1955, c. 715, and L. 1957, c. 603, to acquire, construct, equip, operate, control and manage student residence halls, dormitories, dining halls, student union buildings, and other similar revenue-producing buildings in the state colleges. In proceeding thereunder, the board would clearly be engaged in providing the means of education and furthering the state's educational system and hence would be performing a governmental function.

The fact that the said activities are permissive rather than mandatory is immaterial. No distinction is made in this state as to liability for torts arising out of the performance of mandatory or permissive governmental functions. See the **Mokovich** case, supra, and cases cited therein.

Nor does the fact that revenue is derived from the operation of such facilities take the board out of its educational functions and convert its activity into one of a proprietary character. The state colleges make incidental charges for many purposes in pursuit of their educational function, including charges for tuition, books, lab fees, activity fees and the like, and they cannot be held to enter the field of private enterprise thereby for they have no power to engage in private business. Cf. the **Mokovich** case, supra, and cases cited therein holding that receiving incidental consideration does not create liability when a governmental function is being exercised.

Based on the foregoing, and the writer being aware of no statute expressly authorizing liability suits against the state colleges or their board, your question is answered in the affirmative.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.
Assistant Attorney General.

Executive Director, State College Board.
September 25, 1957. 316

57

State Colleges—State Blanket Automobile Liability Insurance Purchased Pursuant to M. S. 15.31—Policy protects state college employees and also students who have been authorized to drive college vehicles by employee thereof. Policy provides automobile liability protection for all purposes for which a state college automobile might reasonably be used both within and without the state.

Facts

"The State of Minnesota, under provisions of M. S. A. 15.31, carries a policy of insurance with the M. Insurance Company to cover the personal liability of State Employees while driving state-owned automobiles. For several years the State College Board and several state colleges have had questions as to the extent of the coverage provided by this blanket policy. The following paragraphs attempt to relate some of the uses made of state-owned automobiles in the State Colleges.

"1. The college programs can be divided into several parts. One part can be described as the regular instructional program of the college including all related aspects of administration, service, supply and maintenance connected with this part of the program. There has been no question by the College Board that the state blanket policy would cover the regular state employees, i.e.: administrators, faculty members and custodians, for this portion of the program when the automobile were used within the State of Minnesota.

"2. A second aspect of the college operations relates to the Student Activity program which is financed by a special Student Activity Fee, as authorized in M. S. A. 136.11, Sub. 2, with the Activity Account further defined in M. S. A. 136.11, Sub. 4 and Sub. 5. In the Activity Fund operation, state-owned cars are sometimes used to provide transportation for college sponsored activities including trips for athletic teams, debate teams and other activity fee supported groups.

"3. In addition to the college-wide activities as sponsored through the Student Activity Account, there are voluntary clubs and associations of an educational or recreational nature, e.g. photography club, science club. On occasion a group of students not a part of any formal or informal club or group may be transported in a state car for some college related activity.

"4. The college dormitories are operated separately from the regular instructional program of the college. The dormitories are self-supporting and are non-budgetary in the sense that no budgetary control is exercised by the Department of Administration. Receipts are not deposited with the State Treasurer. State-owned cars may be used in the conduct of business relative to the dormitories.

"5. Under certain circumstances the college cars may be taken outside of the State for various purposes such as inter-collegiate competition and events or the supervision of practice teachers who may be doing their practice teaching in a neighboring state.

"6. Automobiles have been purchased from student activity fund monies but have been privileged to carry tax-exempt licenses and have been included in the list of insured vehicles under the blanket policy. Questions have been raised whether such cars are in fact state-owned automobiles and covered under the blanket policy.

"The above situations and conditions are cited to give examples of the types of uses for which state-owned cars may be used in the State

Colleges. In all of the above situations college students may be called upon to drive the state-owned cars.

"The State College Board has felt that the state blanket liability policy would cover the conditions described in paragraph 1 when the state-owned cars are driven by state employees. It was not sure whether coverage would be provided for conditions described in paragraphs 2, 3, 4, 5 or 6, or under other possible conditions when cars are driven by state employees or in any case when the cars are driven by students, who are not state employees in that they are not paid a salary by the State.

"Because of this doubt, and since the State College Board wishes its employees and students to be protected from personal liability while driving a state-owned car in the interest of the college, the Board has instructed each college to carry automobile liability insurance in addition to the state blanket policy. Premiums for this coverage are being paid from Student Activity Accounts or from bookstore accounts in each college.

"* * *

"The Attorney General's office issued an opinion relative to this matter O. A. G. 316, April 12, 1954. The body of this opinion seems to establish that student drivers are covered if they have received permission from a state employee to drive the state owned automobile. It seems to establish that all aspects of the regular instructional program (as described in paragraph 1) are covered. However, the last paragraph of this opinion (April 12, 1954) seems to leave unanswered many of the Board's questions relative to coverage provided for situations described in paragraphs 2, 3, 4, 5 and 6 of this letter, and other possible situations.

"A series of inquiries from personnel in the State Colleges has been directed to the M. Insurance Company, the company issuing the blanket liability policy, relative to the coverage provided. Responses to these inquiries have been received from the company. Attached are copies of this correspondence.

"It may be noted that the last inquiry was by the Executive Director of the State College Board. In this letter, two questions were asked:

'1. Does the blanket insurance policy as written by your company provide the qualified drivers with personal liability protection for all purposes for which a college car might be used?'

'2. Does the protection as afforded by your policy cover students in the college who have been authorized to drive the car by a state employee?'

"In the reply received from the company, both of the questions were answered in the affirmative.

"The State College Board in its meeting on June 30, 1958, felt that sufficient doubt still remained concerning the protection of drivers under

the state blanket policy that it was necessary to retain the special liability coverage carried by each college unless the Attorney General's office would advise that no reason exists for its continuance."

Question

"Does the blanket policy as carried under provisions of M. S. A. 15.31 provide personal liability protection to all authorized automobile drivers (employees and students) of state-owned automobiles under all conditions for which a State College, including all of its divisions and related activities, might use a college automobile both within Minnesota as well as out of the State?"

Opinion

M. S. 15.31 provides:

"The state shall pay premiums on insurance policies insuring its **employees** against liability from claims for bodily injuries, death or property damage made upon such employees **while operating state owned vehicles in the performance of, in connection with or incidental to their duties as state employees.** Payment of such premiums shall be made from funds appropriated or otherwise available to the various departments and agencies of the state." (Emphasis supplied)

Pursuant thereto the state has purchased blanket automobile liability coverage from the M. Insurance Company. The policy is, of course, a contract; and in essence you are requesting an interpretation of such contract in so far as its coverage provisions are concerned.

An examination of the policy discloses that it covers bodily injury and property damage liability only, with no collision coverage. The named insured in said policy is "The Employees of the State of Minnesota" and the insuring agreement further provides as follows:

"III. DEFINITION OF 'INSURED' AND 'THE EMPLOYEES OF THE STATE'

"With respect to such insurance as is afforded by the policy, the unqualified word **'insured'** includes all employees of the State and also **includes any person while using the automobile** and any person or organization legally responsible for the use therof, **provided the actual use of the automobile is by an employee of the State or with his permission.** * * *

" 'The employees of the State' shall include any person authorized to operate an automobile as defined in Insuring Agreement IV.

"IV. MOTOR VEHICLE AND AUTOMOBILE DEFINED, TRAILERS, PRIVATE PASSENGER AUTOMOBILE, TWO OR MORE AUTOMOBILES

"* * *

"(b) Automobile. Except where stated to the contrary, the word 'automobile' means any motor vehicle owned, purchased, hired, leased

or commandeered for emergency purposes by the State." * * * (Emphasis supplied)

Our opinion O. A. G. 316, April 12, 1954, copy enclosed, construed a similar insuring agreement provision of the then existing policy to cover liability of students at the state colleges who were properly authorized to operate state owned vehicles even though they were not compensated therefor. Such opinion, which assumed that the students were operating the vehicles within the scope of their authority, was further based upon a letter of the insurer itself dated March 23, 1954, in which such contracting party stated that the policy covers the liability of students who are not employees of the state colleges. The insurer thereafter reaffirmed such construction of the policy in its letter to you dated June 3, 1958, by stating categorically that "the policy covers students in the college who have been authorized to drive the car by a state employee." We, therefore, reaffirm the holding of our opinion of April 12, 1954, supra.

Such opinion, however, was limited to the general proposition submitted and did not discuss the various situations in which employees and students operating college vehicles would be covered by the policy. We now turn to a consideration of such situations as outlined in your submitted facts.

The present insuring agreement obligates the insurer as follows:

"1. COVERAGE A — Bodily Injury Liability

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile **for any purpose by any insured in the performance of** or **in connection with** duties as an employee of the State **or incidental to** such duties.

"COVERAGE B — Property Damage Liability

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile **for any purpose by any insured in the performance of** or **in connection with** duties as an employee of the State **or incidental to** such duties." (Emphasis supplied)

It should be noted that such emphasized provisions are in harmony with the phrase in M. S. 15.31 which we have emphasized, supra.

Under date of May 29, 1958, you wrote to the M. Insurance Company advising as to the various activities that are included in the state college program and inquiring as to automobile liability coverage while engaged in such activities. Paragraphs numbered 1 through 5 in your presently submitted facts refer to substantially the same activities. The M. Insurance Company replied by letter dated June 3, 1958, as follows:

"In answer to your first question, blanket insurance policy as written by our company provides the qualified drivers with automobile liability protection **for all purposes for which a college car might be used.**" (Emphasis supplied)

This constituted a clear and unequivocal answer by the party obligated under the insurance contract and should be determinative of your question. The use of college automobiles for the various activities related in paragraphs numbered 1 through 5 of your submitted facts would clearly be either in the performance of authorized state college functions or in connection with such functions or incidental to such functions. The enumerated activities are certainly among the "purposes for which a college car might be used".

In regard to paragraph numbered 6 in your submitted facts, the particular fund used for the purchase of a vehicle is immaterial as long as it is a fund of the state or one of its agencies such as a state college. I presume that the particular fund referred to is the one authorized by M. S. 136.11, Subd. 2, 4 and 5. Since the vehicles carry tax-exempt licenses, title is registered in the state, which is prima facie evidence of state ownership of the vehicles. Even if such evidence should be rebutted in a particular case, the blanket policy still covers vehicles hired or leased by the state. See Insuring Agreement IV, supra.

In regard to using a state college automobile outside the state, as related in paragraph 5 of your submitted facts, M. S. 15.31 does not limit the purchase of liability insurance coverage to state owned vehicles which are to be used only within the state. Part V of the insuring agreement in the blanket policy is determinative of the matter and provides as follows:

"This policy applies only to accidents which occur during the policy period while the automobile is within the United States of America, its territories or possessions, or Canada."

Since your question involves the interpretation of a contract, a copy of this opinion is being sent to the insurer for its information.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Executive Director, State College Board.
August 4, 1958. 980-A-8

58

State College Board—may contract with school districts to supply school psychologist and speech correctionist services and instruction to handicapped children when school districts reimburse college board for salaries and related costs and state college board determines that program constitutes a laboratory school or is otherwise of primary benefit in training state college students as future teachers.

School Districts—may so contract pursuant to 131.083 and may receive state aid therefor pursuant to 131.085.

Facts

"St. Cloud State College has maintained for some years a psychoeducational clinic, which has a dual function of teacher education and of providing psychological services to schools and to individual students in the elementary and secondary grades in the St. Cloud region. The 1957 session of the Legislature passed Chapter 867 of the Session Laws. Under this legislation certain state assistance is available to the public schools for specialized services to handicapped children. Shortly after the passage of these provisions various public school officials contacted the authorities at St. Cloud State College requesting that the college provide the school districts with some of the specialized services contemplated in Chapter 867. An attempt has been made to meet the requests where possible, but the demand has far outstripped the ability of the college to provide the services.

"It is currently being proposed by the St. Cloud State College that additional staff be added to its faculty for the purpose of meeting the demands in two fields: namely, school psychologist and speech correctionist. It is proposed that specialists in these fields be employed by St. Cloud State College and that contracts be entered into by the public school districts and the State College Board acting for the State of Minnesota to provide the abovementioned services to the public schools. It is proposed that a charge sufficient to cover the salaries and all related costs be made to the public school districts so that the program could be operated at no additional cost to the State College Board."

Comment

"The establishment of this program would have a dual purpose. The increase in activity for special services to handicapped children has created a great demand for well trained teachers and specialists in this field. The State Colleges are currently exploring all avenues of providing this training to the future teachers. A program of the type described above would provide an excellent framework for intern training for the students in this area. It would at the same time provide the public schools with a solution to the very serious problem facing them of securing trained personnel for conducting these programs."

Question

"Does the State College Board have the authority to enter into contracts with elementary and secondary schools for the purpose of providing school psychologist and speech correctionist services to these schools?"

Opinion

Preliminary to answering your question, there is a corollary question to be determined:

May school districts provide special instruction and services in the two fields stated in the submitted facts and do so by the method proposed by the St. Cloud State College?

L. 1957, c. 867, to which you refer, has been coded as M. S. Sections 131.081-131.089. Sec. 131.081 makes it mandatory on the part of every school district to provide special instruction and services for handicapped children of school age who are residents of the district. Sec. 131.082 defines handicapped children and includes among such children those who have defective speech, those who are mentally retarded, and those who by reason of an emotional disturbance or a special behavior problem or for any other reason need special instruction and services. Thus it is clear that special psychological services and speech correctionist services and instruction would be appropriate for such handicapped children, and Section 131.085 provides for state aid to school districts in paying for the salary of essential professional personnel in their programs for handicapped children.

M. S. A. 131.083 provides:

"Special instruction and services for handicapped children may be provided by **one or more** of the following methods:

(a) Special instruction and services in connection with attending regular elementary and secondary school classes;

(b) **The establishment of special classes;**

(c) Instruction and services at the home or bedside of the child;

(d) Instruction and services in other districts;

(e) Instruction and services **in a state teachers college laboratory school** or a University of Minnesota laboratory school;

(f) **Instruction and services * * * by any other method approved by (the commissioner of education).**" (Emphasis and bracketed material supplied)

It is our understanding that the state college proposes supplying the services of professional psychologists and speech correctionists to contracting school districts. The activities of the psychologists would largely pertain to testing, guidance and counselling of mentally and emotionally disturbed children both in the districts at regular periodic intervals and, when deemed necessary, in the clinic at the state college; while the speech correctionists

would also conduct special speech classes in the districts. Qualified state college students would accompany such professional personnel as student observers and it is contemplated that they would participate to a limited extent in the instruction and services under strict supervision. Under the proposal, each participating school district would contract to pay its proportionate share of the salaries and related costs of the program to the state college board and would in turn receive aid from the state to the extent provided by Section 131.085.

The foregoing proposal appears to conform in many respects to method (e) and perhaps to method (b) of Section 131.083. But it is unnecessary to make such a determination, for the commissioner of education has informed us that he has already approved the method of providing special instruction and services to handicapped children proposed by the St. Cloud State College, on the assumption that such proposal may not conveniently fit any of the methods specifically enumerated in Section 131.083. Such authority is granted to the commissioner of education by Section 131.083 (f). Therefore, the preliminary question is answered in the affirmative and school districts may participate in the proposed program.

This brings us to a consideration of the precise question which you have submitted, and we answer such question in the affirmative for the following reasons.

M. S. 136.10 provides:

> "The state teachers college board may organize model schools **in connection with** each state teachers college for **illustrating methods of teaching** and school government **only.**" (Emphasis supplied)

The terms "model school" and "laboratory school" are interchangeable. See opinion O. A. G. 316, June 26, 1953, copy enclosed. This statute does not limit the physical location of a laboratory school to a state college campus. Further, it is clear that performance of the St. Cloud State College proposal would result in illustrating methods of teaching, counselling and handling handicapped children, for the benefit of students enrolled at the college. Thus, the state college board could very well determine that execution of the proposed contracts would result in the organization of a laboratory school or something very much akin to it.

M. S. A. 136.14 provides:

> **"The state college board shall have the educational management, supervision, and control of the state colleges** and of all property appertaining thereto. **It shall appoint all presidents, teachers, and other necessary employees therein and fix their salaries. It shall prescribe courses of study,** conditions of admission, prepare and confer diplomas, report graduates of the state college department, **and adopt suitable rules and regulations for the colleges.** * * *" (Emphasis supplied)

Even if the proposal would not technically result in a laboratory school or model school within the meaning of Section 136.10, I am of the opinion that Section 136.14 gives sufficiently broad powers to the state college board

to enable it to engage professional personnel in the fields of child psychology and speech correction for the purpose contemplated. In this connection, it is pointed out that the state college board has maintained a psycho-educational clinic at the St. Cloud State College for a number of years without specific authorization other than the general authority contained in Section 136.14, and in many respects the current proposal would constitute an extension of the services of such clinic. Similarly, the legislature has frequently appropriated money for new programs in the various state colleges which could only be authorized by the general powers given to the state college board by Section 136.14. For example, L. 1953, c. 644, appropriated money for a nurses' training program in the Mankato State College; while L. 1957, c. 3, Extra Session, Section 3, appropriated money for the training of cerebral palsied children at the St. Cloud State College and for special education of handicapped children at the Moorhead and Mankato state colleges.

While the state college board must be guided in the instant matter by the welfare of the state college and its students rather than by any need of the school districts, the board could very well here determine (as presented in your "Comment") that the proposed program would be of primary benefit in training state college students as future teachers. Also, under the proposal, the school districts would reimburse the state college board for all salaries and related costs incident to the program ,and thus very real benefits would accrue to the college and its students from the program at no additional net cost.

Since school boards and the state college board are both authorized to participate in the proposed program, they have authority to enter into contracts to effectuate the same. Cf. opinion O. A. G. 180A, January 3, 1947, copy enclosed, and opinion of June 26, 1953, supra. See also M. S. A. 136.03, 122.026, 122.039, and 131.081 et seq., relative to authorization of the parties to enter into contracts. In view of the provisions of Sections 131.083 (f), 131.084, and 131.085, the form of such contracts should provide space for approval by the commissioner of education.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Executive Director, State College Board.
May 28, 1958. 316

ELECTIONS

59

Member of Congress—Eligibility of member of state legislature. Minn. Const., Art. 4, Section 9 is without application to representative in Congress. Member of legislature is eligible to become candidate for

office of congressman and need not resign as member of state legislature to do so.

Facts

"Article 4, Section 9, of the Minnesota Constitution provides that 'No senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States or the State of Minnesota, except that of postmaster . . .' "

Questions

"(1) Is the secretary of state authorized to accept for the special primary and election an affidavit of candidacy or nominating petition filed on behalf of a person who was elected a state legislator for the term which expires in January 1959?

"(2) Is the secretary of state authorized to accept an affidavit of candidacy or nominating petition on behalf of a state legislator who has been elected for the term which shall expire in January 1959, and has not resigned from said office?"

Opinion

1-2. The qualifications for representative in congress are set forth in the United States Constitution, Art. 1, Section 2, which reads in part as follows:

"The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

"No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen."

United States Constitution, Art. 1, Section 4 provides:

"The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

Minnesota Constitution, Art. 7, Section 7 provides:

"Every person who by the provisions of this article shall be entitled to vote at any election shall be eligible to any office which now is, or hereafter shall be, elective by the people in the district wherein he shall have resided thirty days previous to such election, except as otherwise provided in this Constitution, or the Constitution and law of the United States."

In **Danielson v. Fitzsimmons** (1950), 232 Minn. 149, 151, 44 N. W. 2d 484, our supreme court said:

> "The office of representative in congress is a federal office created by the United States constitution. The qualifications of those who aspire to or hold this office are prescribed by the United States constitution, and **the state may not enlarge or modify such qualifications. The provisions of U. S. Const. art. I, Section 4, permitting the states to regulate the time, place, and manner of holding elections for members of congress, do not permit the state to add qualifications for such office not contained in the United States constitution.** We have so held in State ex rel. Eaton v. Schmahl, 140 Minn. 219, 167 N. W. 481. All authorities, so far as we have been able to find, are in accord. None to the contrary have been called to our attention. Many of the authorities are collected in an exhaustive opinion of the Wyoming court in State ex rel. Johnson v. Crane, 65 Wyo. 189, 197 P. (2d) 864, and we see no need of repeating or reviewing them here." (Emphasis supplied.)

In **State ex rel. Johnson v. Crane,** cited in the **Danielson** case above, relator sought a declaratory judgment that Lester C. Hunt, the then governor of Wyoming, was not eligible to be a nominee for the office of United States Senator in view of the provisions of the Wyoming Constitution, Art. 4, Section 2, which provided that the governor shall not be eligible to any other office during the term for which he was elected. The court held that such constitutional provision did not prevent the governor from becoming a member of the United States House of Representatives or the United States Senate, since the provisions of the federal constitution dealing with qualifications of United States Senators and Representatives are controlling.

State ex rel. Wettengel v. Zimmerman, Secretary of State, et al., 249 Wisc. 237, 24 N. W. 2d 504, involved the right of Joseph McCarthy, then a Wisconsin circuit judge, to be certified as the Republican nominee for United States Senator at the general election, he having received the greatest number of votes at the primary election. The court held that the:

> "Provision of Wisconsin constitution that Judges of the Supreme and Circuit Courts shall not hold any public office, except a judicial office, and that all votes for them shall be void, did not invalidate election of circuit judge as nominee for office of United States Senator or prevent the counting of votes cast for him, since **neither by constitutional provision nor legislative enactment can a state prescribe qualifications of a candidate for nomination for office of United States Senator in addition to those prescribed by the constitution of the United States.** Const. Wis. art. 7, Section 10; U. S. C. A. Const. art. 1, Sections 3-5." (Emphasis supplied.)

See also 91 C. J. S. 29, Section 11.

Where the primary election is part of the machinery for choosing officials, state and federal, the same test to determine the character of discrimination or abridgement should be applied to the primary as is

applied to the general election. See **State v. Zimmerman**, supra, citing **Smith v. Allwright**, 1944, 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 987, 151 A. L. R. 1110.

On the basis of the foregoing, it is my opinion that Minnesota Constition, Art. 4, Section 9 is without application to the office of Representative in Congress; that a member of the state legislature is eligible to become a candidate for such office, and that he need not resign as such member in order to become a candidate for member of Congress. Accordingly, I answer your questions in the affirmative.

MILES LORD,
Attorney General.

Secretary of State.
January 16, 1958. 280-G

60

Secretary of State—Certificate of Elections—Representative in Congress—Secretary of State has no statutory authority to withhold certificate of election on demand, but Congress may have authority to direct that procedure be held in abeyance.

Facts

"The attached telegram from Clifford Davis, Chairman Special Committee to Investigate Campaign Expenditures and Elections, United States House of Representatives 'respectively urges' that the Secretary of State refrain from issuing certificate of election to Odin Langen, Congressman-elect from the Ninth District until December 15, at which time the committee will inquire into the election."

Question

"Has the Secretary of State the authority to comply with this request, notwithstanding Section 206.38 of Minnesota Statutes 1957, and demand by Congressman-elect Langen for his certificate?"

Opinion

It has been heretofore held by the Attorney General that M. S. 206.38 applies to the issuance of a certificate of election to the successful candidate for office of United States Representative in Congress. See opinion O. A. G. 185-B-1, February 25, 1958, copy enclosed. Such statute provides:

"The auditor of each county or the secretary of state, where the district comprises more than one county, shall make, for every officer and member of the legislature elected therein a certificate of such

election, and deliver the same to the person entitled thereto, without fee, upon demand. No certificate of election shall be issued by the auditor of any county, or by the secretary of state, to any person declared elected by the canvassing board of such county, or by the state canvassing board, at any general election until 12 days after such canvassing board has canvassed the returns and declared the result of such election. In case of a contest, the certificate shall not be issued until the district court has determined the contest. The auditor of any county shall also make for any candidate or voter of his county, a certified copy of any statement of votes made by the county canvassing board, on payment or tender of one dollar therefor."

Twelve days having elapsed since the canvassing board has declared the result of such election, the only authority to be found in the statute for the withholding of the certificate of election is where an election contest has been commenced in the District Court. Obviously, this clause is not applicable to the office in question. Article 1, Section 5, Clause 1, of the United State Constitution provides, "Each house shall be the judge of the elections, returns, and qualifications of its own members * * *". The case of **Keogh vs. Horner**, 8 Fed. Sup. 933, in construing this clause, holds that in as much as the power of each House of Congress as judge of the qualifications and the legality of election of its members is supreme, the Courts have no authority to judge the manner in which such members were elected nor interfere with the furnishing to them of election certificates required by State law. See also **Wettengel vs. Zimmerman**, 249 Wis. 237, 24 N. W. 504, and **In Re Youngdale**, 232 Minn. 134, 44 N. W. 2d 459.

The duty of the Secretary of State to issue the election certificate is purely ministerial. See analogous opinion O. A. G. 185-A-1, January 18, 1927, copy enclosed, and the **Keogh** case, supra.

On the other hand, when the House of Representatives passes upon returns, elections and qualifications of its members it acts in a judicial capacity. **State ex rel. Wettengel vs. Zimmerman**, supra.

The message from Congress urging you to withhold further action in this matter until the stated date has come from the chairman of what we must assume to be a duly constituted Congressional committee authorized to act on the matter. It would appear that the Congress has assumed jurisdiction and so acting is exercising its judicial function. Your administrative function in a Congressional election being in the first instance pursuant to the Federal Constitution, (see Art. 1, Section 4, Cl. 1, thereof, and **State ex rel. Wettengel vs. Zimmerman, supra**), you would appear to be subject to the judicial direction and review of Congress in this matter and it would thus appear that that body may have the necessary authority to direct you to hold the procedures in abeyance. **Reed vs. County Commissioners of Delaware Co., Pa.**, 48 S. Ct. 531, 277 U. S. 376, 72 L. Ed. 924. It is for you to determine whether or not this telegram constitutes a valid and binding direction from Congress.

In determining whether or not you should comply with the request or direction of the Congressional committee, as you may interpret it, you

should, of course, be advised that your issuance or withholding of the certificate of election does not foreclose Congress from seating the candidate it determines to be entitled thereto upon completion of its own investigation. The issuance is therefore a mere formality. In the words of the **Keogh** case, supra, at p. 934, if the Secretary of State

> "* * * refused or was prohibited from issuing such certificates of election and the situation was presented to the House of Representatives, I do not doubt but what the House would have the right to seat the members elected without any certificate just as it could refuse to seat the members with a certificate, if it chose so to do. * * *"

Further, in a somewhat analogous situation, on the State level, the Minnesota Attorney General had this to say in his opinion, O. A. G. 185-A-1, January 8, 1927, supra:

> "In view of the indicated conclusions, the inquiry, whether the certificate of election issued by the county auditor to Youngdale was prematurely issued because the appeal to the supreme court leaves the matter still undetermined, is unimportant. The real controversy is, which one of these members was elected to represent this district in the house; and this, under the constitution, the house must determine for itself. Obviously, it is not bound by a certificate of election issued pursuant to the direction of the court in the contest proceeding there pending under the provisions of chapter 162, Laws 1919. If the house accepts the judgment of the court, the certificate of election is of no importance. If the house rejects the judgment of the court and determines the contest upon other evidence, the same result follows."

MILES LORD,
Attorney General.

Secretary of State.
December 4, 1958. 185-B-1

61

Special Elections—Time for convening of the State Canvassing Board—M. S. A. 205.16, 205.15 and 206.54; Time for the issuance of Certificate of Election—205.16, 205.15 and 206.38.

Questions

1. "In the absence of a clear statement in the law as to when the State Canvassing Board should meet to canvass the returns of the Special Election held in the First Congressional District on February 18, 1958, we ask that you render an opinion as to when the State Canvassing Board should convene to carry out the obligations imposed upon such canvassing board.

2. "Under Section 205.15, Minnesota Statutes, the following language is used:

> "'A certificate of election shall forthwith be issued to each person entitled thereto in the same manner and by such officers as is provided for a general election for offices of the same kind as those to be filled at such special election.'

"Does this apply in this instance?"

Opinion

A provision of the special election law generally applicable to the questions you have raised is M. S. A. 205.16, which provides as follows:

> "Except as otherwise provided by Sections 205.05 to 205.17, all such special elections and primaries, and all matters pertaining thereto, shall be governed by the laws relating to general elections and regular primary elections, and matters pertaining thereto, respectively so far as such laws are applicable."

1. The applicable provision of the special election law is Section 205.15 which provides in part:

> "The returns of any special election or primary held under Sections 205.05 to 205.17 shall be transmitted forthwith, when completed, to the auditor of the county wherein such special election or primary is held and shall be canvassed on the next day other than a Sunday or a legal holiday following such special election or primary by the county canvassing board. * * * The returns of such special primary shall be made and canvassed, the results thereof declared and forthwith certified in the same manner as is provided for the regular primary election for offices of the same kind as those to be filled by such special election. * * * The county canvassing board shall determine and declare the results of such special election and certify and file a statement thereof in like manner as hereinbefore provided for such special primary. * * *"

The provision of the general election law is Section 206.54 which provides in part as follows:

> "The secretary of state shall call to his assistance two judges of the supreme court and two disinterested judges of the district court, and such judges, together with the secretary of state, shall constitute the state canvassing board. Such board shall meet at the office of the secretary of state on the second Tuesday after any election, except as otherwise provided for special elections. * * *"

From a consideration of these provisions, it is our conclusion that the general election provision is not applicable and that the State Canvassing Board should be convened without regard to that provision. Specifically you need not wait until March 4th to convene the Board as the general election

provision would require, the State Canvassing Board may be convened as soon as possible.

2. The question as to this portion of Section 205.15 is not whether it applies here but rather how it applies. The general election provision is Section 206.38 which provides as follows:

> "The auditor of each county or the secretary of state, where the district comprises more than one county, shall make, for every officer and member of the legislature elected therein a certificate of such election, and deliver the same to the person entitled thereto, without fee, upon demand. No certificate of election shall be issued by the auditor of any county, or by the secretary of state, to any person declared elected by the canvassing board of such county, or by the state canvassing board, at any general election until 12 days after such canvassing board has canvassed the returns and declared the result of such election. * * *"

The direction in Section 205.15 to issue the certificate of election "forthwith" is inconsistent with a fixed waiting period of 12 days as provided in the above quoted section. M. S. A. 206.38 is therefore superseded in this respect by Section 205.15 and the certificate of election should be issued forthwith after the canvass, not 12 days after the canvass. Issuance of the certificate "forthwith" does not mean that it must be issued immediately but it means that it must be issued without unreasonable or unnecessary delay having regard to the circumstances of this particular case. See **Sorenson v. Swensen** (1893), 55 Minn. 58, 56 N. W. 350, and **Rines v. German Insurance Co.** (1899), 78 Minn. 46, 80 N. W. 693.

What would be a reasonable time here will depend upon all of the circumstances and pertinent facts before you. In any event, you are advised that the certificate of election may be issued without waiting the twelve day period normally required.

MILES LORD,
Attorney General.

HAROLD J. SODERBERG,
Assistant Attorney General.

Secretary of State.
February 25, 1958. 185-B-1

62

Party primary elections are required by M. S. A. 202.11 to be held at regular polling places. School buildings and private buildings designated pursuant to statute and charter provisions as polling places are required to be made available for the holding of such party primary elections.

Facts

"The Common Council of the City of Rochester has designated in accordance with the provisions of Section 8 of the Charter of the City of Rochester and Section 205.25 of the Minnesota Statutes, the polling place in each precinct of the City of Rochester. Included among the polling places so designated are seven public elementary school buildings.

"Representatives of the Republican Party and Democratic Farmer-Labor Party in the City of Rochester in the past have asserted the right under the authority of Section 202.11 of the Minnesota Statutes to use these polling places to hold, on the even numbered years, the precinct caucuses of said political parties.

"The duly elected Board of Education of Special School District No. 4, which encompasses the City of Rochester, has refused to permit the use of these seven public elementary school buildings under the Board's policy that 'facilities shall not be rented to any individual or group to promote party politics or what is not of interest to the community as a whole.'

"In addition, the Common Council of the City of Rochester has designated, in accordance with the above statutes and with the consent of the responsible parties, certain private buildings as polling places for certain precincts in the City of Rochester."

Question

"Whether the Board of Education of Special School District No. 4 and the responsible parties of private buildings are required by Section 202.11, Minnesota Statutes, to make available for such precinct caucuses appropriate space in the designated polling places that are under their control."

Opinion

M. S. A. 202.11 provides as follows:

"Candidates whose nominations are not required to be made by a primary election may be nominated by a delegate convention called for the purpose. The authorized county or city committee of any political party, at least 20 days before the time fixed for the election of delegates, shall give two weeks' published, and at least six days' posted, notice of primaries for the purpose of electing the number of delegates to which each district is entitled, and of the offices for which nominations are to be made. Except as otherwise especially provided, such primaries shall be conducted in accordance with the provisions of this act relating to primary elections, insofar as the same can be applied. **All such primaries shall be held at the regular polling places,** and those of each county on the same day, at an hour thereof between 2:00 and 9:00 p.m. appointed by the committee calling the convention, and shall be kept open for at least one hour." (Emphasis supplied).

The board of education of the special school district does not rely upon any statutory provision in its refusal to permit the use of the school buildings which were previously designated as polling places pursuant to M. S. A. 205.25 and Section 8 of the charter of the city of Rochester. We do not agree that the precinct caucuses of political parties can be considered as only an activity "to promote party politics or what is not of interest to the community as a whole." The precinct caucuses are an integral part of the election processes of this state and are recognized and provided for by law. Beyond that, however, it is our opinion that the policy of the board must yield to the statutory provision above quoted.

In a prior opinion of this office the same question was presented and it was there held that the public officials having charge of the designated polling places had the duty to permit their use for party primaries. That opinion stated:

> "* * * Since the statute provides that party primaries shall be held at the regular polling places, it is the duty of the city clerk or other public official having charge of those places to permit their use for such primaries, when called according to law, upon application by the proper party committee. * * *"

The statute in effect at the time of that opinion has not been changed. A copy of that opinion O. A. G. 186-G, March 9, 1928, is enclosed herewith.

There is no indication in your letter that any of the persons in control of the private buildings who had consented to the use of such buildings as polling places have refused to permit the use of their buildings for conduct of the party primaries. It is our opinion however, that these buildings, having been designated as polling places, must be made available for all of the purposes contemplated for such polling places by the law.

MILES LORD,
Attorney General.

HAROLD J. SODERBERG,
Assistant Attorney General.

Rochester City Attorney.
March 28, 1958. 186-G

63

Cities—Elections—voters residing in territory which was annexed to city pursuant to 413.12 less than 30 days before election are qualified to vote in such city election. Opinion O. A. G. 64-N, November 1, 1945, overruled. Art. VII, Section 1 of Constitution construed. Resident of such annexed territory may be candidate for city office in such election. Art. VII, Section 7 of Constitution construed.

Facts

"* * * the City of White Bear Lake, Minnesota, * * * recently had an annexation of territory that would be included in the Fourth Ward of our City. There is a special election in the Fourth Ward to elect a councilman from that Ward by virtue of a charter amendment at our last City election, which was in March. My question is in regard to the annexed territory which became a part of the City on May 2, 1957.

* * *

"* * * the election to be held is scheduled for May 21, 1957."

Questions

1. "Can the residents of the new territory vote in the coming election?"

2. "Can a resident of the new territory be a candidate for office of councilman in that Ward?"

Opinion

1. The annexation of territory to the city of White Bear Lake, we are informed, was pursuant to M. S. A. 413.12. The annexed territory became a part of the city on May 2, 1957, and is included in the fourth ward thereof, which we are informed constitutes an election district. The special election will be held less than 30 days after the effective date of the annexation.

Art. VII, Section 1 of the Minnesota Constitution states:

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

Since the boundaries of the city and of the fourth ward therein have been expanded within thirty days prior to the election, the basic question is whether or not the persons affected by the annexation are now such residents of the newly expanded election district as are within the purview of the constitutional provision.

The case of **People v. Graham**, 267 Ill. 426, 108 N. E. 699, states the purpose of constitutional provisions establishing residence requirements at page 705 of the Northeastern Reporter as follows:

"The requirement that the party offering to vote shall reside within the district which is to be affected by the exercise of his right has been adopted in most, if not all, jurisdictions to enable persons residing in the neighborhood where the voter resides to become acquainted with him and know that he is a bona fide resident not only of the state and county but of the district where he attempts to vote. By requiring him

to vote among his neighbors who know whether he is legally entitled to vote, the opportunities for illegal or fraudulent voting will not be as great as if the voting were all to take place at a distance and among strangers."

And in **Renner v. Bennett**, 21 Ohio State Reports 431, the court upheld the right of persons to vote who resided in territory which was ceded to the State of Ohio by an act of Congress less than one year before the election, although the Ohio constitution did not permit a person to vote in Ohio unless he had been a resident for one year. The court there stated:

"* * * it seems to us it is sufficient that the voter, **at the time of the election, has a residence**, in the political and jurisdictional sense of the terms, within the proper political division, and has resided in the **same place** for the prescribed length of time, to fulfill this requirement of the constitution. In such a case it is true, in the **primary sense** of the words, that there is no **change of residence**, but merely **a change** of jurisdiction. To say that there is a change of residence is to give the words a secondary meaning." (Emphasis supplied).

In the instant situation the voters who are residents within the fourth ward of the city of White Bear Lake at the time of the election, and who have resided **in the same place** for 30 days and who are **otherwise qualified** to vote, should be entitled to do so. To hold conversely would result in the disfranchisement of a large number of voters; and in construing Art. VII, Section 1 of the Constitution, the Attorney General's opinion O. A. G. 64-N, April 26, 1952, copy enclosed states:

"It appears to have been the intent of the framers of the Constitution that a person who voluntarily moves from one voting district to another, within thirty days before an election, thereby disqualifies himself to vote at such election. It cannot have been the intent of this language to disfranchise a voter who has continuously resided on the same site more than thirty days before the election. The language must have been intended to prevent transients from voting."

We concur in such interpretation of the constitutional provision, which interpretation has been followed by our subsequent opinions O. A. G. 64-S, March 19, 1954, and O. A. G. 187-A-9, April 26, 1954, copies enclosed, and answer your question in the affirmative. The contrary opinion O. A. G. 64-N, November 1, 1945, copy enclosed, is expressly overruled.

2. Art. VII, Section 7 of the Minnesota Constitution states:

"Every person who by the provisions of this article shall be entitled to vote at any election shall be eligible to any office which now is, or hereafter shall be, elective by the people in the district wherein he shall have resided thirty days previous to such election, except as otherwise provided in this Constitution, or the Constitution and law of the United States."

By this provisison the right to vote and the right to hold office are declared to be coordinate. **State ex rel. McCarthy v. Moore**, 87 Minn. 308,

311; 92 N. W. 4. An affirmative answer to your first question, therefore, requires an affirmative answer to your second question as well. See also opinion of April 26, 1954, supra.

MILES LORD,
Attorney General.

White Bear Lake City Attorneys.

May 16, 1957. 64-N

EMINENT DOMAIN

64

Rule 77.04 of New Rules of Civil Procedure does not apply to eminent domain proceedings under c. 117. Rule applies only to orders, decisions or judgments pertaining to individual appeals from commissioners' awards. M. S. A. 117.14.

Your letter calls attention to Rule 77.04 of the New Rules of Civil Procedure in Minnesota which provides that the clerk of court shall serve a notice of the filing or entry of an order or decision or judgment made by the court by mail on every party affected thereby or his attorney of record.

You also call attention to Rule 81.01, which provides that these Rules do not govern procedure and practice in certain statutory proceedings (including eminent domain proceedings, c. 117) in so far as the statutes are inconsistent or in conflict with the procedure and practice provided by the Rules.

Question

Does Rule 77.04 of the New Rules of Civil Procedure apply to eminent domain proceedings?

Opinion

The genesis of the New Rules of Civil Procedure is found in L. 1947, c. 498 (M. S. A. 480.051 et seq.). Section 480.051 provides:

> "The supreme court of this state shall have the power to regulate the pleadings, practice, procedure, and the forms thereof **in civil actions** in all courts of this state, other than the probate courts, by rules promulgated by it from time to time. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant." (emphasis supplied)

Thus the New Rules of Civil Procedure promulgated pursuant thereto relate only to civil actions, whereas it has long been held in this state that condemnation proceedings are not civil actions as such but rather are special proceedings, only quasi-judicial in nature. **State ex rel. Simpson v. Rapp**, 39 Minn. 65, 38 N. W. 926; **State, by Ervin, v. May**, 204 Minn. 564, 285 N. W. 834

In the **Rapp case**, supra, the court said at p. 67 of the Minnesota Report:

> "Condemnatory proceedings in the exercise of the right of eminent domain are not civil actions or causes within the meaning of the constitution, but special proceedings, only quasi judicial in their nature, whether conducted by judicial or non-judicial officers or tribunals. The propriety of the exercise of the right of eminent domain is a political or legislative, and not a judicial question. The manner of the exercise of this right is, except as to compensation, unrestricted by the constitution, and addresses itself to the legislature as a question of policy, propriety, or fitness, rather than of power. They are under no obligation to submit the question to a judicial tribunal, but may determine it themselves, or delegate it to a municipal corporation, to a commission, or to any other body or tribunal they see fit."

In the **May** case, supra, the court stated at p. 567 of the Minnesota Report:

> "In the Wisconsin cases the court regarded the condemnation proceeding as a civil action against all the land-owners whose property was sought in the petition. In this state we regard the exercise of the right of eminent domain by condemnation proceedings as an exertion of the legislative power, 2 Dunnell, Minn. Dig. (2 ed. & Supps.) Section 3014; the 'judicial power comes into play only to the extent that the constitution guarantees to the owner of property right to compensation,' State, by Peterson, v. Severson, 194 Minn. 644, 647 261 N. W. 469, and of course to determine if the taking is for a public purpose. **It follows that the proceeding up to the time awards are made is essentially legislative and only quasi judicial in character**, 2 Dunnell, Minn. Dig. (2 ed. & Supps.) Section 3079, * * * **but as soon as the amount of the commissioners' award becomes controversial by the taking of an appeal the matter assumes the nature of a judicial proceeding, and rules relative to such proceedings apply.** Each award becomes a severable subject of controversy." (Emphasis supplied).

We therefore hold that Rule 77.04 has no application in eminent domain proceedings until and unless a party to the proceedings appeals to district court from the award of commissioners. When such an appeal has been taken, as provided in M. S. A. 117.14, "the trial shall be conducted and the cause disposed of according to the rules applicable to ordinary civil actions in the district court."

Your question is answered in the negative, therefore, except for orders decisions or judgments of the court pertaining specifically to individual appeals from awards of commissioners.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Big Stone County Attorney.
July 10, 1957. 817-F

HEALTH

65

38.161 construed; State not precluded from licensing restaurant at County fairs under this section.

Question

Does M. S. A., Sec. 38.161 exempt the groups named therein from licensure by the State of Minnesota?

Opinion

M. S. A. 38.161 reads as follows:

"Subdivision 1. No governmental subdivision of this state shall impose any license upon or collect a license or service fee from any group, association or organization operating a restaurant, as defined in section 157.01, where the purpose of such operation is solely to provide meals, lunches or refreshments for a limited period not to exceed one week at a fair conducted by a county agricultural society. This exemption from licensure does not exempt such group, association or organization from compliance with any sanitary or public health ordinance or regulation of the political subdivision having jurisdiction over the area in which such operation is conducted.

"Subd. 2. For the purpose of this section a County Agricultural Society shall not be considered to be a governmental subdivision."

This section was enacted by the 1957 legislature, Chapter 59, Laws 1957, by a bill with the following title:

"An Act relating to the service of meals at fairs conducted by a county agricultural society, and permitting such service without payment of **local** license fees." (Emphasis supplied)

It is our opinion that the legislature intended to exclude the groups mentioned by this statute from the burden of a license requirement by a "governmental subdivision of this state" and that it did not intend by this section to exclude these groups from the requirement of a state license.

In the absence of a clear intention to bind the state by the passage of a law, the state is not bound by its passage unless it is specifically named therein (see M. S. A. 645.27).

Your question is therefore answered in the negative.

MILES LORD,
Attorney General

ROBERT J. STENZEL,
Spec. Asst. Attorney General

Crow Wing County Attorney.
July 31, 1958. 62-C

66

Trailer Coach Parks: Purchaser of validly licensed trailer coach park established before passage of Laws 1951, Ch. 428, does not need to accompany license application with permit from municipality. Permit required if park area increased.

Facts

"A situation has now arisen where a new operator has purchased a licensed and operated trailer coach park which was in existence at the time of the enactment of the licensing act in 1951 [Laws of 1951, Chapter 428]. He plans to have all trailers vacated for the purpose of making major alterations."

Comment

"There is contention that in such a case the new owner must secure either the permit or the statement from the municipality in accordance with the provisions of the law [M. S. A. 327.16, Subd. 3] cited above. In short, it is the case of a going business changing ownership with the only variance here being the new owner is having the site vacated of trailers the better to make improvements."

Questions

"1. Is A, the purchaser of a trailer coach park succeeding to the rights of B, the selling licensee who was operating the park at the time of passage of the licensing law, required to secure the permit or state-

ment prescribed in Sec. 327.16, Subd. 3, as a requisite to the continuing operation of the park under the new ownership?

"2. Suppose A, the purchaser in question 1, decides not to operate a trailer coach park and later sells the site as a trailer coach park to C. Is C obliged to secure the permit or statement as prescribed from the municipality?

"3. When an addition to an established licensed park is proposed to be made, would Sec. 327.16, Subd. 3, be construed to require a permit or statement from the municipality as to that addition when such new addition comes under zoning ordinances adopted subsequent to the date of the original license?"

Opinion

The applicable statute is M. S. 327.16, Subd. 3, which reads in part material:

"The application for the first annual primary license shall be submitted with all plans and specifications enumerated in subdivision 2, and payment of $25 for each ten acres or fraction thereof, of land to be used in connection with such trailer coach park and shall be accompanied by an approved permit from the municipality whereon the park is to be located, or a statement that the municipality does not require an approved permit; **provided, however, that such permit shall not be required of any trailer coach park which was established prior to the effective date of this act.** Each year thereafter the license fee shall be $3.50. All annual license fees paid to the department of health shall be turned over to the state department. * * *" (Emphasis supplied.)

The statutory language which exempts a pre-existing "trailer coach park" from the requirement of furnishing an "approved permit" from the municipality whereon the park is to be located or a statement that the municipality does not require an approved permit clearly indicates that the trailer coach park received the exemption and not the owner. The words "trailer coach park" as defined in M. S. 327.14, Subd. 3, means a geographical location. When the legislature intended to refer to a "person, firm, or corporation" they expressly did so as in M. S. 327.15. The issue is whether the trailer coach park in question was established prior to the effective date of Laws 1951, Chapter 428. It is therefore our opinion that the language used does not require this subsequent purchaser of a validly licensed trailer coach park to accompany his annual license application with an approved permit or statement that such is not required.

Your second question presents a hypothetical situation depending upon many considerations not before us and is a question of fact on which this office does not rule. One of the problems presented is whether the use of the site in question as a trailer coach park has been abandoned. Assuming, however, that the site in question has not been abandoned as a trailer coach park, the same reasoning applicable in the answer to your first question would apply.

In answering your third question, we assume that the addition to which you refer is a development of a new tract of land outside the limits of the licensed trailer park site. As a general rule a non-conforming use cannot be expanded or enlarged. McQuillin on Municipal Corporations, 3rd Edition, Sec. 25.206. Generally speaking, a non-conforming use is limited to the area it covers at the time of the enactment of the zoning ordinance or restriction. See **People v. Gerus**, 69 NYS (2d) 283. While this law which we are construing is a licensing law and not a zoning law, similar principles apply. For this reason we feel that the legislature intended that any expansion of an existing trailer coach park must comply with the law requiring that a permit or statement that one is not required be furnished.

MILES LORD,
Attorney General

ROBERT J. STENZEL,
Spec. Asst. Attorney General

Executive Officer, State Health Department.
January 11, 1957. 238-i

HIGHWAYS

67

Power of Commissioner—Trunk Highway Fund—Commissioner of Highways may reimburse employees for part of cost of tuition in attending engineering Aide Program for the development of sub-professional engineers. Expense is proper charge on Trunk Highway Fund.

Facts

"I am now informed by the State Department of Highways that the University of Minnesota, in cooperation with the Minnesota Department of Highways and certain Twin City firms, are offering an Engineering Aide Program for the development of sub-professional engineers.

"In order to meet the competition of private firms in these courses and to avoid adverse criticism which might attach to the Department of Highways if it failed to offer to its employees the same comparable financial assistance as granted to their employees, the Department proposes to reimburse all of its eligible employees who register for the courses as follows:

"Reimbursement of 35 per cent of tuition costs for completion of the course with a 'C' grade, 50 per cent reimbursement for the

completion of the course with a 'B' grade, and 65 per cent reimbursement for completing the course with an 'A' grade.

"To that end, the Department has requested me to set aside and encumber $5,000 of Trunk Highway Funds for the purpose of such reimbursement."

Questions

"1. Is there statutory authority for the program planned by the Department of Highways?

"2. Does the Constitution, Article XVI, permit the use of Trunk Highway Funds to reimburse Highway employees for all or part of an educational program voluntarily undertaken in the manner outlined by the Department of Highways?"

Opinion

1. I find no specific statutory authority for the program planned by the Department of Highways other than the statutes herein cited. That fact, however, is not decisive of the question before you. The Commissioner of Highways has statutory authority to employ such skilled and unskilled help and employees as may be necessary for the performance of his duties. M. S. A. 161.02, Subd. 4. The salary and expenses of such employees are payable from the trunk highway fund. M. S. A. 161.02, Subd. 5.

The Commissioner's responsibility is broad. The Constitution gives him the duty to establish, locate, construct, reconstruct, improve and maintain the public highways of this state. To do this he must have competent engineering help, both professional and sub-professional. Under the circumstances outlined in your letter, and taking into account the shortage of engineering personnel and the resultant competition among employers for engineering personnel, I am of the opinion that it is within the commissioner's discretion to decide whether he will hire such help already trained or whether he will hire people and give them some engineering training.

In **Green v. Kitchin,** 229 N. C. 450, 50 S. E. (2d) 545, the court had before it the legality of the action of a town in paying without specific statutory authority the salary and expenses of a policeman while he attended a 90 day police training course at the National Police Academy of the Federal Bureau of Investigation at Washington, D. C. The court upheld the action of the town. The reasoning of the court in that case is cogent and is applicable here. The court said:

"Whether a municipal corporation should rely upon experience, or training, or both for securing competency in its police ought to be left to the discretion of its governing body. Likewise, whether or not necessity compels or prudence justifies a specific outlay of municipal funds to provide special training for a particular officer seems to be a problem which of right lies within the domain of the municipality involved.

"For these reasons, we conclude that the power of a city or town to spend tax money for instruction of its police in the performance of

their duties is fairly implied in and incident to a power expressly conferred upon the city or town to appoint and employ police for preserving law and order within its limits . . ."

As to the argument that the expense was an outlay of public funds for a private purpose to benefit the individual, the court said:

"The complaint reveals that the defendent, P. R. Kitchin, has been serving the Town of Weldon in the capacity of a police officer ever since he completed the course at the National Police Academy. For this reason, it seems somewhat inappropriate to argue here that the spending of municipal funds to train a policeman for the more efficient performance of his duties must be deemed to serve merely a private purpose because the municipality can not compel him to remain in its service after obtaining the training until it has received recompense for its outlay of public moneys. But, in any event, this objection seems relevant to the question of the advisability of making the expenditure rather than to the existence of the power to make it . . .

"The expenditure of tax moneys by a city or town to further the training of its policeman does not grant an exclusive emolument or privilege to the policeman contrary to Article I, Section 7, of the Constitution because it is for a public purpose and 'in consideration of public services.' . . ."

In **Lindquist v. Abbett**, 136 Minn. 233, 265 N. W. 54, the Minnesota court upheld the action of a school district in paying the expenses of its truant officer incurred in attending a national convention of social workers since the convention dealt with problems involved in his work. See also **Tousley v. Leach**, 180 Minn. 293, 230 N. W. 788.

2. This question is answered in the affirmative.

There can be no question that the commissioner can hire sub-professional engineering personnel and that the salary and expenses of such personnel may be paid from the trunk highway fund. In view of what has been said in answer to the first question, the partial reimbursement of such employees for tuition charged them in attending the Engineering Aide Program is a proper charge on the trunk highway fund.

MILES LORD,
Attorney General

State Auditor.
October 16, 1957. 229-A

68

Villages—The act of the Village Council of Houston purporting to grant an easement in a Village Street for the construction and maintenance of a scale platform is ultra vires and of no force and effect.

Facts

The Redding Elevator Company owns and maintains a scale platform within the right of way of Trunk Highway No. 76 in the Village of Houston. Prior to becoming a part of Trunk Highway No. 76, by the Commissioner of Highways' Order dated July 12, 1955, the area in question was Grant Street in the Village of Houston. On March 26, 1942, the Village Council of the Village of Houston executed an instrument intended to convey an easement for the construction and maintenance of said platform in Grant Street adjacent to the Redding Elevator. By virtue of a joint cooperative agreement between the State Highway Department and the Village of Houston, plans have been prepared for the improvement of 44 feet of the Trunk Highway between new curb lines in the Village of Houston, which require removal of the scale platform. There is presently 54 feet 8 inches of available width for public use between the curb line on the east side of Grant Street (T.H. No 76) and the outside edge of the scale platform on the west side of the street.

Question

(a) Is the easement binding upon the Village of Houston, or, stated another way, did the Village Council exceed its powers in executing the instrument dated March 26, 1942? (b) Can the State Highway Department now require the removal of the scale platform?

Opinion

The discussion herein assumes the proposition that parties contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make a contract.[1]

Making this assumption, it must then be determined whether the Village Council of Houston acted within its power when it executed the instrument in question, which purports to give an irrevocable easement so long as the platform is maintained.

In **Nash v. Lowry**, 37 Minn. 261, 33 N. W. 787 (1887), the Court made this statement concerning an irrevocable permit granted by the City of St. Paul to the St. Paul City Railway Company:

> "The ordinance, when passed, was invalid as an irrevocable contract; for it is undoubtedly the rule, in accordance both with principle and authority, that a municipal corporation, intrusted with power of control over public streets, cannot by contract or **otherwise**, irrevocably surrender any part of such power without the explicit consent of the legislature, because such power is in the nature of a trust held by the corporation for the state."

---

[1]**State ex rel. City of St. Paul v. Minnesota Transfer Railway Company**, 80 Minn. 108, 83 N. W. 32 (1900); **Bell v. Kirkland**, 102 Minn. 213, 113 N. W. 271; **Martin v. Common School Dist. No. 3**, 163 Minn. 427, 204 N. W. 320 (1925).

Although the legislature ratified the ordinance in this case, the rule stated has been consistently followed in Minnesota.[2] No statute has been found ratifying the act here in question.

State v. Marcks, 228 Minn. 129, 36 N. W. (2d) 594 (1949), may appear to raise a question concerning the Court's present position, but is distinguishable in that the Court held the street in question had been abandoned prior to the conveyance to Marcks by the City of Windom. The Court stated:

> "It is settled that under ordinary circumstances a municipality has no power to convey to another property dedicated **and in use** for highway purposes. It holds the qualified or terminable fee title thereto in trust for the people, and it can neither sell such title nor devote it to private use. (Cases cited). This being true, unless the evidence here is sufficient to sustain the trial court's finding that First Avenue in Windom had been abandoned for highway purposes before the Commissioner's orders of January 30, 1947, it is clear that the quit claim deed from the city to defendent on October 7, 1941, was of no force and effect."[3]

The facts as presented here do not suggest an abandonment of Grant Street by the Village of Houston prior to the Commissioner's order of July 12, 1955. The instrument itself negates such a conclusion by providing for return of the premises to highway purposes if and when the scale is removed.

10 McQuillin on Municipal Corporations (3d Ed.), Sec. 30.113, points out that in the absence of legislative authority, a municipality has no power to grant a license to an abutting owner to maintain a weighing scale in the street in front of his property. Likewise, a charter power to regulate "the selling, weighing and measuring of hay, wood, coal, and other articles" does not carry authority to grant such use of the street. Citing **Warden v. Elroy**, 162 Wis. 495, 156 N. W. 466. McQuillin further states that:

> "The municipility may grant a **temporary revocable** permit to maintain a platform scale in the street, where such use does not interfere with the public use of the street for travel or any other lawful public use thereof."

Conceding for the purposes of discussion that the village may issue a permit, its power would, at the farthest, extend to the issuance of a temporary, revocable permit under which the scales could be maintained in the street only until such time as the public interests would require their re-

---

[2]**Long v. City of Duluth**, 49 Minn. 280, 51 N. W. Rep. 913 (1892); **State ex rel. City of St. Paul v. Minnesota Transfer Railway Company**, 80 Minn. 108, 83 N. W. 32 (1900); **Northwestern T. E. Co. v. City of Minneapolis**, 81 Minn. 140, 86 N.W. 69 (1900); **Merchants National Bank of St. Paul v. City of East Grand Forks**, 94 Minn. 246, 102 N. W. 703 (1905); **Calderwood v. Jos. Schlitz Brewing Co.**, 107 Minn. 465, 121 N. W. 221 (1909); **Jensen v. Independent Con. School Dist. No. 85**, 160 Minn. 233, 199 N. W. 911 (1924); **City of Minneapolis v. Minneapolis Street Ry. Co.**, 215 U. S. 417, 54 L. Ed. 259 (1910). See also O. A. G. 204-A-5, Dec. 28, 1933, printed in 1934 Report, No. 144.

[3]Compare **City of Stillwater v. Thomas Lowry and others**, 83 Minn. 275, 86 N. W. 103 (1901). Also noted in 16 M. L. R. at 493, 22 L. R. A. (N.S.) 932n. See also **City of St. Paul v. Chicago, M.&St. P. Ry. Co.**, 63 Minn. 330, 63 N. W. 267.

moval. O. A. G. 396-C-3, December 28, 1942, printed in 1942 Report of Attorney General, No. 258. In essence, this is nothing more than mere recognition of the well established principle that an abutting owner owns to the center of the street, subject to the easement of the public, and may use it for a purpose compatible with the free use by the public of its easement. See 8 Dunnell's Digest (3d Ed.), Section 4183.

The plans and specifications of any proposed street improvement which might require the removal of the scale platform would have to be approved by both the governing body of the village and the Commissioner of Highways. M. S. A., Sec. 161.03, Subd. 3. Municipalities are authorized by M. S. A., Sec. 160.531, to enter into agreements with the Commissioner of Highways for the performance of and the responsibility for the work of constructing, improving or maintaining the highway, including the work of constructing a roadway of greater width or capacity than would be necessary to accommodate the normal trunk highway traffic within the limits of the municipality.

If the use of the scale in the street is or becomes incompatible with the public use of the street, then removal of the scale platform may be effected by a reasonable and proper exercise of the inalienable police power. The use of a trunk highway within the limits of a village is subject to supervision and control by the Commissioner of Highways and by the governing body of the village. **Automatic Signal Co. v. Babcock** (1926), 166 Minn. 416, 208 N. W. 132. Those public authorities have full power to remove or abate nuisances, obstructions, or encroachments on the public streets.[4]

MILES LORD,
Attorney General

RUSSELL A. SORENSON,
Spec. Asst. Attorney General

Houston Village Attorney.
October 3, 1958.

396-G-9

69

County Highway Engineer and survey crews have the right to enter upon private property for the purpose of making surveys and examinations. M. S. A. 117.04 and 117.20, Subd. 7.

Facts

"The County Engineer desires to make borings on a private party's land in rural Chippewa County to determine whether or not gravel is

[4]See **Mueller v. City of Duluth**, 152 Minn. 159, 188 N. W. 205 (1922); O. A. G. 396-A-1, July 7, 1928 (No. 43, 1928 Report), May 25, 1931 (No. 49, 1932 Report).

present in sufficient quantities and grade to use in county highway construction. If gravel is found in this area in sufficient quantities, it is the intention of Chippewa County to condemn the land for the purposes of taking the gravel. The landowner refuses to permit personnel from the County Highway Engineer's office to go on his land for the purpose of making borings."

Questions

"1. Does the Highway Engineer, in the absence of permission of the landowner, have the right to go on to said land for the purpose of making borings?"

"2. Is there any legal procedure by which Chippewa County may acquire the right to enter said land for the purpose indicated above?"

Facts

"County State Aid Road No. 9, Chippewa County, is currently constructed on a 66 foot right-of-way. It is the wish of the County Board of Chippewa County that the road be widened, improved and regraded and for that purpose it will be necessary to acquire a 102 foot right-of-way. It is necessary for county survey crews to go onto landowner A's property for a distance not to exceed 50 feet for the purpose of surveying the route of the proposed widened and improved road. Landowner A has forbidden the survey crew to go onto his land for this purpose and has threatened to sue the individual members of the survey crew in the event that they traverse his land for purposes of making a survey. It is the intention of the County Board to acquire by condemnation whatever portion of landowner A's land is needed for the improvement and widening of County State Aid Road No. 9."

Question

"Does the County Engineer's survey crew have the right to traverse landowner A's property for the purpose of making the survey described above prior to the instituting of condemnation proceedings?"

Opinion

Minnesota Statutes provide as follows:

117.01 Right of eminent domain

"When the taking of private property for any public use shall be authorized by law, it may be acquired under the right of eminent domain in the manner prescribed by this chapter; * * *."

160.021 Width of roads

"All roads, except cartways, established by town and county boards, shall be at least four rods wide and when necessary for the construction and maintenance or the safety of public travel additional right of way and easements for the erection of snow fences may be procured by

purchase or condemnation, and the necessity for the taking of such additional right of way and such easements shall be determined by the town board, in case of town roads, and by the county board, in the case of county roads."

M. S. A. 160.251 authorizes a County Board to acquire material suitable to road purposes by condemnation as follows:

"When the commissioner, or any county board, town board, or council of any village or city shall deem it necessary for the purpose of building or repairing public roads or streets within his or its jurisdiction, he or it may procure by purchase or condemnation in the manner provided by law any plot of ground not exceeding 40 acres containing any material suitable for road purposes, together with the right of way to the same of sufficient width to allow teams, trucks, or other vehicles to pass, and on the most practicable route to the nearest public road."

Sections 160.021 and 160.251 authorize the acquisition of land for additional right of way and material suitable for road purposes by purchase also, but for the purpose of this opinion acquisition will be by condemnation.

M. S. A. 117.20 Proceedings by state or its agencies

Subd. 7. "The petitioner may, except as to lands already devoted to a public use, at any time after the filing of the order appointing commissioners for the condemnation of any land for a trunk highway, road, street, sanitary sewer, or storm sewer, or for material for the construction or improvement thereof, take possession of such land; **and may at any time enter upon any lands and make surveys and examination thereof in the location of trunk highways, roads, streets, sanitary sewer, or storm sewer, or in the acquisition of material for the construction or improvement thereof.**" (Emphasis added).

Particular attention is directed to the last phrase of this subdivision wherein it is stated that the petitioner, here the county, may at any time enter upon any lands to make surveys and examinations thereof, **M. S. A. 117.04** is authority for this entry in order to determine where right of way will be located and to examine for road building material.

M. S. A. 117.04 Entry for surveys

"For the purpose of making surveys and examinations relative to any proceedings under this chapter, it shall be lawful to enter upon any land, doing no unnecessary damage."

In **Nichols on Eminent Domain**, Section 6.11, it is stated that a momentary entry for the purpose of a survey is not considered a taking even if the survey is preliminary to some public work. It was indicated that even where there is no authorizing statute, such as M. S. A. 117.04 (supra), a temporary entry is not a trespass.

Therefore, the answer to Question No. 1 pertaining to the first fact situation is in the affirmative.

Question No. 2 is answered in the statute cited above. No legal procedure is necessary.

M. S. A. 117.04 specifically authorizes entry for the purpose of making a survey to determine the location of the right of way to be acquired under condemnation. Therefore, the answer to the question based on your second fact situation is in the affirmative.

MILES LORD,
Attorney General

EDWARD J. GEARTY,
Spec. Asst. Attorney General

Chippewa County Attorney.
June 5, 1958. 817-F

70

M. S. 169.67, Subd. 1, makes it mandatory that the braking system on a power grader, being a motor vehicle within the meaning of M. S. 169.01, Subd. 3, includes two separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two wheels.

Facts

" 'X' company manufactures a power grader. The specifications for the brakes on 'x' company's power grader are as follows:

" 'BRAKES—Foot-operated service brake (14" x 2¾") hydraulic expanding; and hand-operating mechanical expanding parking brake. Both operate on drive shaft—braking all wheels.'

"On the power patrol of said 'x' company both brakes operate on the drive shaft as stated in the specifications. If the drive shaft broke, neither set of brakes would work to have the brakes on at least two wheels. On this machine none of the brakes operate to brake the wheels themselves."

Question

"Does the power grader of 'x' company whose brakes are as shown by the specifications conform to the requirements of M. S. 169.67; in other words, are the brakes of the power grader of 'x' company legal within the meaning of M. S. 169.67?"

Opinion

Attention is directed to **M. S. 169.01, Subd. 3:**

"**Motor vehicle.** 'Motor vehicle' means every vehicle which is self-propelled and not deriving its power from overhead wires."

For the purposes of this opinion we can assume that the power grader to which the specifications apply is self-propelled. Therefore, the power grader is a motor vehicle as defined in M. S. 169.01, Subd. 3, supra.

Also, **M. S. 169.02, Subd. 2:**

"It is unlawful and, unless otherwise declared in this chapter with respect to particular offenses, it is a misdemeanor, for any person to do any act forbidden or fail to perform any act required in this chapter."

This section states that to violate this chapter is to be guilty of a misdemeanor; unless otherwise declared. There is nothing in Chapter 169, or elsewhere, otherwise declaring a different designation as to M. S. 169.67, Subd. 1.

M. S. 169.67, Subd. 1, reads as follows:

"Motor vehicles. Every motor vehicle, other than a motor-cycle, when operated upon a highway, shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, including two separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two wheels. If these two separate means of applying the brakes are connected in any way, they shall be so constructed that failure of any one part of the operating mechanism shall not leave the motor vehicle without brakes on at least two wheels."

The language contained in M. S. 169.67, Subd. 1, is clear and unambiguous. The specifications contained therein are explicit and to the point. The braking system of the motor vehicle referred to herein must be adequate to control the movement of, and to stop and hold such vehicle when not moving. In the situation presented such would not be the case if the drive shaft broke.

There must be two separate means of applying the brakes, each of which shall be effective to brake two wheels so that if one fails, the vehicle is not left without brakes. The specifications of 'x' company state that both braking systems operate on the drive shaft and there is no direct braking on any of the wheels.

This is directly contrary to M. S. 169.67, Subd. 1. Therefore, it is our opinion that the operation of this power grader upon the trunk highway system of the State of Minnesota would be illegal.

MILES LORD,
Attorney General

ROBERT W. MATTSON,
Deputy Attorney General

Aitkin County Attorney.
November 19, 1957. 989-A-18

71

Motor Vehicle Registration — Under L. 1957, c. 714, a motor vehicle is registered in accordance with state law if it is registered by March 1, 1958.

Facts

"I have just received the following letter from M. E. Winslow, superintendent of police of the City of Minneapolis:

" 'I respectfully request an opinion setting forth the date upon which officers of the Minneapolis Police Department shall take enforcement action upon those owners of vehicles who use the streets and highways in the City of Minneapolis and whose vehicles do not bear and display license plates for the current year.

" 'In other words upon what specific date does it become unlawful to operate a motor vehicle upon the streets and highways of the City of Minneapolis without displaying license plates for the current year.

" 'This opinion is respectfully requested because we are in doubt as to whether any enforcement action can be taken on this matter before 12:01 a.m. on March 2nd of any current year.'

"Since this request relates to the interpretation of the state law, and since prosecutions for failure to have license plates upon automobiles depend upon this interpretation, and since the time subsequent to which prosecutions may be made for failure to have the new license plates should be uniform throughout the state, I respectfully request that your office furnish me with an answer to the request of the superintendent of police.

"It seems to me that the particular difficulty arises from the amendment in Chapter 714 of the Laws of 1957 to Minnesota Statutes, Sec. 168.10. Prior to the amendment the statute provided that application for registration should be made between October 1 and December 31, each year. Under Section 168.31, the taxes in connection with the license were due on January 1, payable on October 1 preceding, and subject to a penalty if paid after November 15. Under the old statute it seemed to be clear that an automobile driven without a new license was in violation from and after January 1.

"Under the amendment the application is to be made between November 15 and March 1 following (Laws of 1957, Chap. 714, Sec. 2, amending Sec. 168.10). Under Sec. 3, amending Sec. 168.31, there is still provision that the taxes shall be due on January 1, and payable between November 15 and December 31. The Section then provides that a penalty shall attach after January 10. Are these new provisions of the statute to be interpreted to mean that a motor vehicle without a new license is illegally using the streets under the terms of Minnesota Statutes, Sec. 168.09, prior to March 2?

"The applicable Minneapolis ordinance is found in the permanent edition, 9:1, Sec. 601, which prohibits the operation of a motor vehicle on streets and highways unless it has been registered in accordance with the laws of the state, and shall have plates for the current year only."

Opinion

Minneapolis Ordinance 9:1, Sec. 601, Minneapolis City Charter and Ordinances, Permanent Edition, provides as follows:

> "No person shall operate or drive a motor vehicle upon the streets or highways **unless such vehicle shall have been registered in accordance with the laws of this state** and shall have the number plates for the current year only, as assigned to it by the registrar of motor vehicles, conspicuously displayed thereon in such manner that the view thereof shall not be obstructed." (Emphasis supplied)

In view of the emphasized portion of the above traffic ordinance, you have asked us to advise you when a motor vehicle is registered in accordance with the state law.

The applicable provisions of the law were amended during the last session of the legislature by the Act you have referred to, L. 1957, c. 714. Sec. 2 of that Act amended M. S. 1953, Sec. 168.10, Subd. 1 so that it now provides to read in part:

> "(1) Except as provided in clause (2) of this subdivision, every owner of any motor vehicle in this state, not exempted by section 168.012 or section 168.26, shall as soon as he shall become the owner thereof and annually thereafter during the period November 15 to March 1 following, both dates inclusive, file with the registrar on a blank provided by him, a listing for taxation and application for the registration of such vehicle, * * *"

This provision is unambiguous and clearly permits registration of motor vehicles during the period from November 15 to March 1. Therefore, registration of a vehicle during this period must be considered as registration in accordance with state law.

The provision in Sec. 3 of L. 1957, c. 714, amending M. S. 1953, c. 168.31, Subd. 1, to which you refer, providing that the tax which is due on January 1 shall be delinquent after January 10, does not make registrations after January 10 not "in accordance with the laws of this state", but merely provides that the taxes due are delinquent and penalties are provided in Subd. 2 of that section.

We believe that the foregoing will answer your inquiry.

MILES LORD,
Attorney General

HAROLD J. SODERBERG,
Assistant Attorney General

Minneapolis City Attorney.
January 10, 1958. 632-D

72

Chauffeur's License—Revocation—Major offenses in the use of motor vehicles are not limited to these motor vehicles "the operation of which requires a chauffeur's license" except as to clause (b) of M. S. A. 168.44. Revocation under Section 168.44 applies to school bus driver's license. Revocation is mandatory upon conviction of a major offense.

Facts

"Mr. 'X' was recently involved in a violation of the Drivers License Law and was convicted of four charges in connection with the same violation. They are as follows:

"1. Driving a motor vehicle while under the influence of intoxicating liquor.

"2. Driving after suspension of his driver's license.

"3. Leaving the scene of an accident where personal injury was involved.

"4. Reckless driving.

"The offenses were committed while 'X' was driving a passenger automobile the operation of which did not require a chauffeur's license or a school bus driver's license. Mr. 'X' is licensed as a school bus driver and holds a valid license issued by our Chauffeur Licensing Division. The court in which Mr. 'X' was convicted has filed the certifications as evidence of the violations and subsequent convictions. The court has not to our knowledge ordered the offender to return his school bus driver's license to the Secretary of State nor is there any indication so far as we know that the court revoked the school bus driver's license."

Questions

"1. If a licensed chauffeur is convicted in this State of a major offense, must the Secretary of State revoke the chauffeur's license of such chauffeur even though the offense was committed by such licensee when operating a passenger automobile which requires him to have only a valid driver's license in order to operate such vehicle on the public streets or highways?

"2. If your answer to question (1) is in the 'affirmative' would this likewise be true if the violator was a licensed school bus driver instead of a licensed chauffeur?

"3. If the answer to the second question is in the 'affirmative' must the Secretary of State revoke the school bus driver's license issued to Mr. 'X' because of the charge of leaving the scene of an accident resulting in personal injury notwithstanding the lack of specific reference to such revocation by the court in which he was convicted?"

Opinion

1. Since the major offense involved herein is "leaving the scene of an accident where personal injury was involved", the fact that the motor vehicle involved was not one "the operation of which requires a chauffeur's license" is immaterial. Of the major offenses listed in M. S. A. 168.44, only (b), which relates to the operation of a motor vehicle while under the influence of intoxicating liquors or narcotic drug, specifies that the motor vehicle must be one "the operation of which requires a chauffeur's license".

2. Your second question is also answered in the affirmative. The provisions for revocation of chauffeur's license under Section 168.44 would apply to one having a school bus driver's license. Thus, Section 168.39 provides:

> "The term 'chauffeur,' as used in Sections 168.39 to 168.45, means and includes:
>
> "* * *
>
> "(4) Every person who drives a school bus transporting school children. * * *"

3. Your third question is also answered in the affirmative. Section 168.44 provides in part:

> "* * * If a licensed chauffeur is convicted in this state of a major offense, revocation by the secretary of state of his chauffeur's license shall be mandatory. * * *"

Since you have an official record of conviction, your duty to revoke is mandatory.

MILES LORD,
Attorney General

HAROLD J. SODERBERG,
Spec. Asst. Attorney General

Secretary of State.
July 9, 1957.

635-D

INDUSTRIAL COMMISSION

73

District Boiler Inspectors—Sick leave—District and deputy district boiler inspectors entitled to sick leave payable out of fees collected under M. S. 1957, Sections 183.38—183.58.

Questions

(1) Are district boiler inspectors and deputy district boiler inspectors entitled to sick leave such as other state employees?

(2) If they are entitled to sick leave, is such sick leave to be paid from the fees collected within their respective districts, or may such sick leave be paid from funds appropriated from the general revenue fund?

Opinion

Both district boiler inspectors and deputy district boiler inspectors appointed under Sections 183.38 and 183.40, respectively, are state employees. **Tillquist v. State Department of Labor and Industry**, 216 Minn. 202, 12 N. W. 2d 512. They are within the classified civil service. See opinions O. A. G. 644-B, May 23, 1939, and November 6, 1945, copies enclosed.

M. S. 1957, Section 43.22, Subd. 2, provides for the granting of sick leave to state employees with permanent civil service status. Without doubt district and deputy district boiler inspectors come within the class stated in Section 43.22, Subd. 2, and are entitled to sick leave. Therefore your first question is answered in the affirmative.

While for other purposes the district and deputy district boiler inspectors are within the classified civil service, the amount and manner of payment of compensation and expenses are governed by the provisions contained in M. S. 1957, Section 183.38. That section with respect to this matter provides as follows:

> "The district boiler inspectors shall receive as full compensation for their services all fees collected by them for the inspection of boilers, pressure vessels, and hulls, and 50 per cent of all fees collected by them for examination of applicants for engineer's license, and also 50 per cent of the annual renewal fees received from such engineers. Fifty per cent of such renewal fees shall be remitted to the chief of the division of boiler inspection.
>
> * * * *
>
> "All fees collected by the chief of the division of boiler inspection under sections 183.38 to 183.58 shall be paid into the state treasury in the manner provided by law for fees received by other state departments, to be credited to the revenue fund, except that 50 per cent of such license fees collected by the chief of the division of boiler inspec-

tion for chief and first-class engineer's licenses shall be paid to the district boiler inspector of the district in which the applicant resides.

"Every district boiler inspector who shall collect fees in excess of $375 in any calendar month, after deducting such necessary expenses as may be allowed by the commission, subject to the approval of the department of administration, shall pay the excess of such sum of $375 and expenses into the state treasury, to be credited to the revenue fund. Any such district boiler inspector whose fees amount to less than $375 in any one month, after deducting such expenses, shall have the right to retain a sufficient amount of fees collected in any succeeding calendar month in excess of the amount herein provided to be retained by him in such calendar month, to reimburse such district boiler inspector for any deficit due such inspector in such prior month."

See also opinions O. A. G. 644-B, cited supra.

The civil service salary ranges apply to the deputy district inspectors, but his salary is paid from the fees collected by or paid to the district boiler inspector.

Sec. 183.54 provides for the amounts of the inspection and license fees. Section 183.55 provides in part that:

"* * * At no time shall the salaries and expenses exceed the amount appropriated for carrying out the provisions of sections 183.38 to 183.58. In no event shall the disbursements exceed the fees collected."

As can be seen, the statutes require that the compensation and expenses of the district and deputy district boiler inspectors are to be paid solely from the fees collected. Apparently no portion of their compensation or expenses are paid from funds appropriated out of the general revenue fund. As above noted, Section 183.55 explicitly limits the disbursements of salary and expenses to the fees collected.

Payment of sick leave would constitute part of the expenses of the office of the district boiler inspector. Therefore, based upon these statutory provisions, it is our opinion that sick leave for the district and deputy district boiler inspectors may be paid from the fees collected by or paid to the district boiler inspector under Sections 183.38 to 183.58.

Of course, in the event that the fees collected under law are insufficient to provide enough funds for the payment of sick leave to these state employees, it is within the power of the legislature to appropriate funds for such purpose.

MILES LORD,
Attorney General.

ROBERT LATZ,
Spec. Asst. Attorney General.

Industrial Commission.
January 30, 1957. 644-B

74

Navigable Waters—Federal control law—Lake Bemidji, Cass Lake and Lake Winnibigoshish considered.

You enclosed with your letter a memorandum dated May 26, 1958, from the Office of the Collector of Customs, District 35, Minnesota, to Mr. F. W. Cooper, Chief, Division of Boiler Inspection; copy of a release of excerpts of a letter dated May 16, 1958, from the Commander, United States Coast Guard, Second Coast Guard District, to the Collector of Customs relating to the meaning of the term "navigable waters"; and photostatic copy of a letter dated 23 May 1958 from C. H. Stober, Captain, United States Coast Guard, to Mr. Neal Gauw, Captain Division I, Second Coast Guard Auxiliary District, all of which concerns the federal control and regulation of navigation on navigable waters of the United States. For the purpose of exercising federal control of navigation, Bemidji Lake has been classified by an agency of the federal government as navigable under the federal rule.[1]

Observations

"The question arises if Lake Bemidji is under Government supervision due to the river running through it, what is the status of Cass Lake and Lake Winnibigoshish.

"If these lakes are under Government supervision, would they then be considered as not being inland waters and therefore not subject to any jurisdiction by the State of Minnesota."

Question

"So that there will be no conflict of purposes, we will appreciate your opinion as to whether any of these lakes would come under Government supervision and if so, whether it will relieve the state of all responsibility of inspecting power boats regardless of size and the licensing of pilots."

Opinion

The question of whether Lake Bemidji, Cass Lake and Lake Winnibigoshish are navigable bodies of water under the federal rule of navigability is essentially a question of fact, and if they are navigable in fact then they are navigable in law. Taking into consideration the size and geographical location of these three lakes, I believe that the court would take jurisdictional notice that these lakes are navigable bodies of water as defined by the decisions of the United States Supreme Court both in fact and in law and in consequence thereof are subject to federal regulation, control and jurisdiction.

The power of Congress to regulate commerce upon navigable waters is found in the United States Constitution, Art. I, Section 8, which in part reads:

[1]Letter to Mr. Neal Gauw, p. 2, item f.

"The Congress shall have power:

* * *

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

* * *"

The power of the federal government to control nagivation and exercise jurisdiction over navigable waters of the United States springs from the above constitutional provision. In speaking of the Constitution of the United States the court said:

> "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. * * * Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded." South Carolina v. United States, 199 U.S. 437, pp. 448-449.

In addition to the powers of the federal government to regulate commerce, which includes navigation upon navigable waters of the United States by virtue of the above commerce clause, Congress has prescribed regulations of motorboats under the Motorboat Act of 1940.[2]

In light of the foregoing, I am of the opinion that the federal government has the power to exercise jurisdiction over matters pertaining to navigation in the navigable waters of the United States. When it chooses to exercise that power, its will is the law notwithstanding any conflict with state regulations. However, until it chooses to exercise its power, the regulations of the state are operative. This principle of law is firmly settled. In the case of **New Jersey v. Sargent,** 269 U.S. 328, on p. 337 the court said:

> "* * * one should have in mind the doctrine, heretofore firmly settled, that the power to regulate interstate and foreign commerce, which the Constitution vests in Congress, includes the power to control, for the purposes of such commerce, all navigable waters which are accessible to it and within the United States, whether within or without the limits of a State, and to that end to adopt all appropriate measures to free such waters from obstructions to navigation and to preserve and even enlarge their navigable capacity; and that the authority and rights of a State in respect of such waters within its limits, and in respect of the lands under them, are subordinate to this power of Congress."

From the foregoing we conclude that Congress has the power to exercise control in all navigable waters of the United States situated within the state, and when it chooses to exercise such control the rights of the state in respect thereto are subordinate to the powers of Congress, provided, however, that until Congress acts all such navigable waters within the state are subject to the control of the state. In the instant case the

---

[2]USCA Title 46, Subchapter II, Sections 526-526t.

federal government has not chosen to exercise its right to control navigation upon either Cass Lake or Lake Winnibigoshish irrespective of their navigable character. Consequently, there is no restriction upon the power of the state to regulate navigation thereon and therefore the provisions of M. S. 1957, Section 183.44 are applicable.

MILES LORD,
Attorney General.

VICTOR J. MICHAELSON,
Spec. Asst. Attorney General.

Industrial Commission.
June 16, 1958. 273-A-7

INSURANCE

75

National Automobile Warranty—held to be an insurance agreement.

Facts

"The Employers Liability Assurance Corporation has entered into an agreement with National Bonded Cars, Inc., of New Jersey, copy of which is enclosed herewith, whereby the company for a $20.00 premium agrees to indemnify the insured for loss sustained by any purchaser of a used automobile which is insured under an instrument known as National Automobile Warranty, copy of which is enclosed herewith.

"When an automobile dealer wishes to sell an automobile under the Warranty, the automobile is given a complete inspection for required repairs and replacements and then an inspection report, a copy of which is herewith enclosed, is executed. For this inspection the dealer pays a fee to National Bonded which fee is retained by National Bonded whether or not the automobile is ever actually sold under the Warranty. If the dealer complies with the inspection order and sells the automobile under the Warranty, he executes the Warranty and gives it to the purchaser and detaches the perforated portion at the bottom and mails it to National Bonded together with completed inspection reports. These inspection reports, together with statements of losses paid by National Bonded under the Warranty, are forwarded to Employers Liability for accounting of premiums and reimbursement of losses. The cost of the Warranty is $20.00 which is included in the selling price by the dealer and does not appear on the Warranty. The $20.00 premium charge is an agreement between National Bonded and Employers Liability and may be subject to modifications between them depending upon

experience. The name Employers Liability does not appear on the Warranty certificate.

"We would like to point out that the following are the relationships involved:

a. Between National Bonded Cars and automobile dealers by agreement for the Warranty facilities.

b. Between the automobile dealer and the automobile purchaser for the issuance and delivery of the Warranty.

c. Between National Bonded Cars and the automobile purchaser in the event of a claim.

"Section 60.64, 'Insurance Agent or Solicitor, License for' provides:

'No person shall act or assume to act as an insurance agent or solicitor in the solicitation or procurement of applications for insurance, nor in the sale of insurance or policies of insurance, nor in any manner aid as an insurance agent or solicitor in the negotiation of insurance by or with insurer, including resident agents or reciprocal or inter-insurance exchanges, except fraternal beneficiary associations and township mutual companies, until such person shall obtain from the commissioner a license therefor, which license shall specifically set forth the name of the person so authorized to act as agent or solicitor and the class or classes of insurance for which he is authorized to solicit or countersign policies.' "

Questions

"1. Is the National Automobile Warranty when issued by National Bonded Cars, Inc. an insurance agreement within the meaning of M. S. 1949, Section 60.02, Subdivision 3, in so far as it protects the Warranty holder from cost of repairs arising within one year from the date of purchase which includes:

a. Replacement of parts.

b. Labor

"2. May any person of National Bonded Cars or any person of an automobile dealer negotiate and execute the Warranty under discussion without being duly licensed to act as an insurance agent."

Opinion

1. The questions here presented follow very closely those presented in O. A. G. 850-i, June 17, 1952. That opinion held that where an independent contractor (as opposed to a manufacturer of or dealer in television sets) contracted merely to furnish service in maintaining a television set in workable order for a specified consideration, this did not constitute the business of insurance; but if it contracted to replace tubes, that this constitutes the business of insurance.

It is our opinion that the position taken in that opinion as to replacement of parts applies here with equal force. Therefore the warranty agreement of National Bonded, since it provides for replacement of parts, is an insurance agreement.

In view of the foregoing it is unnecessary for us to consider here whether the National Bonded Warranty Agreement provision for protection against the cost of labor also constitutes this agreement an insurance agreement.

2. In view of the determination we have made in our answer to question number 1, the answer to question number 2 is in the negative.

MILES LORD,
Attorney General.

HAROLD J. SODERBERG,
Spec. Asst. Attorney General.

Commissioner of Insurance.
January 23, 1957. 249-B-3

LEGISLATURE

76

Members of House—Compensation—Section 3.10, as amended by L. 1957, c. 811, construed. Salary of incumbent ceases as of date of death. Member dying on last day of month has been paid in full since monthly salary was paid on first day of month in advance.

Your letter of April 9, 1958, calls attention to the last paragraph of M. S. 3.10, as amended by L. 1957, c. 811, paragraph 1. You advise that a certain member of the House of Representatives died February 28, 1958; that pursuant to Section 3.10, as amended, you had certified $200 as payable to him on January 15, 1958, and $200 as payable to him on February 1, 1958; and that he was paid such sums on or about such dates.

Question

Should I make any further certification in regard to compensation of this deceased member of the House of Representatives?

Opinion

M. S. A. 3.10, as amended by L. 1957, c. 811, Section 1, provides in material part:

"The compensation of each member of the House of Representatives of the Legislature shall be $4,800 for the entire term to which he is elected, **which shall be due on the first day of the regular legislative session of the term** and payable as follows:

"$200 on the fifteenth day of January and on the first day of each month, February to December, inclusive, during the term for which he was elected.

* * * *

"On the fifteenth day of January and on the first day of each month, February to December inclusive, the secretary of the Senate and the chief clerk of the House of Representatives, shall certify to the state auditor, in duplicate, the amount of compensation then payable to each member of their respective houses, and the aggregate thereof." (Emphasis supplied)

Despite the language emphasized above, your question must be answered in the negative for the following reasons.

There have been three prior opinions of the Attorney General relative to payment of compensation to a deceased legislator, and we enclose same herewith. The opinion O. A. G. 280D, March 27, 1939, stated that it has been the uniform holding of this office for over twenty years that the salary of a public officer ceases with his death and that such ruling applies to members of the House of Representatives. At the time of such opinion, the statute (then Section 35 of Mason's 1927 Statutes, as amended) fixed the members' salaries at $1,000 "for the entire term to which they are elected, payable as follows: * * *." When the opinion of April 14, 1947 (same file number) to the same effect was written, M. S. 3.10 contained identical language to that quoted immediately supra; and both opinions stressed the fact that the stated salaries were "for the entire term". The statute still contains such phrase.

L. 1949, c. 525, Section 1, then amended the statute to also include therein for the first time the language which we have emphasized above in the present statute; and said language was thereafter carried forward into L. 1951, c. 701, and into all subsequent amendments to Section 3.10. The Attorney General's opinion of December 31, 1953 (same file number) stated that the legislative intent as to payment to the estate of a deceased legislator was not clear under said c. 701, but held that, in any event, under L. 1953, c. 467 (which contained in addition a phrase to the effect that the payment to be made to a legislator on January 1 of the second year of the term "shall be compensation for that full year"), neither a deceased or resigned legislator could receive compensation for the period following his death or resignation.

In considering the present statute, we must also agree that the presence of the phrase beginning "which shall be due ***" muddies the otherwise clear legislative intent, inasmuch as the word "due" is susceptible of many different meanings and interpretations. See 13 W & P 435 et seq. Further, such phrase appears to be in conflict with the other statutory

provisions quoted, since the legislature has not specifically provided for the situation about which you inquire.

In answering your question, we must be cognizant of the fact that M. S. 351.02 provides that **every** office shall become **vacant** on the death, resignation or removal of the incumbent before the expiration of his term. And in view of the present provisions of Section 3.10 that the compensation "shall be $4,800 for the entire term" and be payable in twenty-four monthly payments of $200 each (which implies that payment for each month shall be compensation for that full month), and in the absence of specific authorizing language, we cannot assume that the legislature intended that a member who has resigned or been removed during his term should nevertheless receive compensation for the entire term for which he was elected. Similarly, we cannot assume that the legislature intended a deceased member to receive compensation for the entire term. The fact remains that the salary annexed to a public office is incident to the title to the office (opinion of April 14, 1947, supra), and when the office becomes vacant, for whatever reason, the salary must cease.

In that connection, it should also be remembered that Art. IV, Section 17, of the Minnesota Constitution and M. S. 205.06 provide for the filling of vacancies in the legislature. If we were to hold that under Section 3.10 a deceased, resigned or removed member was entitled to the salary for his full term, it would amount to paying two salaries for the same public office at the same time.

Therefore, although Section 3.10 has been amended many times, the basic principles remain unchanged and we must follow the precedent of the prior opinions of this office.

It is clear from the present language of Section 3.10 that the salaries of members of the House of Representatives are now paid monthly in advance except in January. The deceased member received his full January compensation on January 15th and his full February compensation on February 1st. He died on the last day of February, 1958, and thus had been paid up-to-date. You are therefore advised to delete his name from your March 1 certification and all subsequent certifications since he had no further compensation payable to him after the date of his death.

MILES LORD,
Attorney General.

Chief Clerk, House of Representatives.
April 30, 1958. 280-D

77

Law partners as legislator and municipal judge—Incompatibility—Conflict of interests—No incompatibility of offices or conflict of interest present when one partner in law firm holds office of state legislator at same

time that other partner holds office as municipal judge. Art. IV, Section 9, of Minnesota Constitution not applicable.

Facts

"State Senator A and Mr. B are attorneys with offices in Albert Lea who operate under the name of A and B. It is apparently a partnership.

"At the last general election Senator A was reelected to the State Senate. Mr. B. was elected as Municipal Judge of Albert Lea."

Questions

"1. May one partner in a law firm hold office as a State Senator at the same time as the other partner is a Municipal Judge?

"2. If incompatibility exists, what is the practical effect thereof?"

Comment

"The only authority either way that I am able to find is the opinion of the Attorney General No. 159 issued in 1906. The recent change in the Constitution will undoubtedly affect that opinion, however."

Opinion

Art. IV, Section 9, of the Minnesota Constitution, which has not been amended, provides:

> "No senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States or the State of Minnesota, except that of postmaster, and no senator or representative shall hold an office under the state which has been created or the emoluments of which have been increased during the session of the legislature of which he was a member, until one year after the expiration of his term of office in the legislature."

By virtue thereof the same person would clearly be precluded from holding both the office of state legislator and the office of municipal judge. See opinion O. A. G. 280H, January 17, 1906, also printed as No. 159 in the 1906 Report of the Attorney General, to which you refer, and opinion O. A. G. 280-H, January 6, 1920, copies enclosed. However, that is not the present situation. The constitutional provision has no application to the instant situation which involves two different individuals holding two different state offices. The mere fact that they happen to also be partners in the practice of law does not make them as one in regard to state offices having no connection with their legal practice. See Dunnell's Minn. Digest, 3d ed., Section 7358. In that connection, we enclose a copy of our analogous opinion O. A. G. 280-H, November 21, 1950, holding that there is nothing in the constitutional provision preventing the wife of a legislator from being appointed to any city office.

The common law question of incompatible offices only arises when a person holding one public office also accepts another public office or employment. McQuillin on Municipal Corporations (3rd ed.), Section 12.67; Dunnell's Minn. Digest, Section 7995; and **Hilton v. Sword**, 157 Minn. 263, 196 N. W. 467. Manifestly, that is not the present situation.

Further, we fail to see where the somewhat broader question of a common law conflict of interests would arise in a situation where two law partners each hold state offices unrelated to the law partnership. Each partner is only the agent of the other as to matters pertaining to the firm business. Dunnell's Minn. Digest, Section 7358. Consequently, neither would be the agent of the other in any respect in regard to the conduct of their respective state offices so as to make applicable the criteria enunciated in 42 Am. Jur. 885 and 43 Am. Jur. 81. It is true that, in the performance of their official duties, public officers must be uninfluenced by any personal interests or considerations. McQuillin on Municipal Corporation, Section 12.126, at p. 455. However, we do not see that there can arise any question of a conflict of interests from the fact that by virtue of Art. VI, Section 7, of the Minnesota Constitution the compensation of all judges shall be prescribed by the legislature. The offices of municipal judge and state legislator are personal to the persons holding them, and hence we must presume that the salaries of such officers will not become a part of the income of the law partnership.

Your first question is answered in the affirmative and thus there is no occasion to answer your second question.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Albert Lea City Attorney.
December 3, 1958. 280-H

LIQUOR

78

Municipal Liquor Stores — Municipalities — Checks-Cashing — Operation of Municipal Liquor Store is partly proprietary. Governing body may authorize the cashing of checks in ordinary course of business and make regulations therefor.

Question

Can a municipality accept checks in connection with the operation of a municipal liquor store?

Opinion

At the outset I wish to note the common practice of municipalities in accepting checks, not only in connection with the operation of municipal liquor stores, but also for water bills, sewer charges, building permits, dog licenses and other services. Further it is apparent that any loss to be sustained may be insured against or paid out of a fund made up of nominal charges for the cashing of checks.

The fact that, in operation at least, municipal liquor stores are conducted as businesses for profit has been judicially recognized by the Minnesota Supreme Court in its last pertinent expression, **Hahn v. City of Ortonville**, 238 Minn. 428, 57 N. W. (2d) 254. In discussing the proprietary governmental distinction in the **Hahn** case, the Court made the following comment at page 433:

> "Strictly speaking the governmental-proprietary test properly relates only to the field of common-law torts."

The assumption heretofore made seems to be that if the operation of a municipal liquor store be governmental in its nature, the store is without power to cash checks, but if the operation be proprietary in its nature, the store may accept checks. In my opinion, the question you pose raises no issue of liability but is rather directed to the issue of municipal power. I find no authority holding that the question of municipal **power** is a function of the governmental-proprietary distinction. The language quoted above from the **Hahn** case is an indication of our court's recognition of this fact. It could well be argued that even if the establishment of a municipal liquor store be exclusively an exercise of the police power, the municipality would not be precluded from cashing checks. It cannot be said that the police power or rather the power to establish does not carry with it all powers incidental to the operation of the store after its establishment. It has been said that municipalities enter the liquor merchandising field in an effort more closely to supervise the liquor traffic. At least in so far as the cashing of checks makes for closer control, increased business, and greater observation of the consumers on the part of the authorities it would seem to implement the object of the municipal operation. The conclusion of this section is that the proprietary-governmental test is not an applicable one here and that even if it be assumed that municipal operation of liquor stores is governmental, it would not follow that the store lacks the power to cash checks.

The governmental-proprietary distinction is a tool used either to impose or prevent the imposition of liability in tort cases involving governmental units. Its usefulness in this regard is of course subject to serious question. **See Davis on Tort Liability of Governmental Units**, 40 Minn. Law Review 773, and cases there cited. Starting with the historical proposition that the sovereign can do no wrong, courts have consistently diminished the immunity at times by using the governmental-proprietary distinction.

> "Some states have already abolished the distinction * * * in keeping with the modern tendency which is to restrict rather than

extend the doctrine of municipal immunity." **Hahn v. City of Ortonville,** 434.

In the **Hahn** case, our Court recognized that the distinction can be looked to for the purpose of determining municipal liability for a statutory wrong. In fact in the **Hahn** case, our Court found that the operation of a municipal liquor store **involved a proprietary function.** This is particularly significant in view of the fact that such a finding there meant the imposition of liability on the municipality. The finding resulted in a diminution of municipal immunity from liability. Clearly, if the Court be willing to hold operation of municipal liquor stores proprietary where the holding results in statutory tort liability, it should be equally willing to abide by its holding, where so doing results in an increase in a municipal power. This is especially true where, as here, the power is not even inconsistent with the governmental function and is in no sense contrary to public policy as is evidenced by the manner of payment for the various services mentioned in paragraph 1.

The **Hahn** case recognizes that the operation of municipal liquor store involves the use of the police power, but in discussing **Stabs v. City of Tower,** 229 Minn. 552, 40 N. W. (2d) 362, the Court took the position that while the operation of such a store may be a governmental activity to the extent that a municipality need not be required to license itself, the Court stated at page 435:

> "* * * it does not follow that such operation is not also an invasion of the proprietary field. To ignore realities and press a juristic concept to such abstract extremes that a given situation must be held wholly black or wholly white is neither sound logic nor good sense. [citing **N. Y. v. U. S.,** 326 U. S. 572] Municipal liquor stores, although established as a part of a liquor-controlling system, are also enterprises which invade the profit-making field. No one will deny that a municipal liquor dispensary is normally a source of financial profit for the municipality. * * *"

In my opinion, the case of **Stabs v. City of Tower,** supra, is in no sense any authority for the position that the operation of a municipal liquor store **is exclusively governmental** in its nature. While it may be as the Court said in the **Stabs** case, absurd to require a municipality to license itself, it is in no sense absurd to allow a municipality to cash patrons' checks. In fact, it is entirely possible that such permission would as suggested above, result in a closer supervision of the liquor traffic.

The Minnesota Supreme Court in **Keever v. City of Mankato,** 113 Minn. 55, 129 N. W. 158, held that a municipal enterprise is proprietary when it is profit-making in the sense that, when conducted by private persons, it is operated for profit. The cost of private liquor licenses and the number of municipal liquor establishments are eloquent testimony of their profit-making nature. There is, of course, nothing inconsistent in recognizing the actual facts by holding that the operation of a municipal liquor store involves an exercise of both governmental and proprietary powers. If it can be held that the operation of a municipal liquor store is proprietary for purposes of sub-

jecting a municipality to liability for tort, it certainly can be so held for the purpose of aiding in the operation of the enterprise. The conclusion in the **Stabs** case that a municipality need not license its own operation of a municipal liquor store was based, in part, on the distinction between public ownership of a liquor establishment and municipal licensing of liquor establishments. It is apparent that the compelling reason for finding the operation of a municipal liquor store to be governmental, present in the **Stabs** case, is totally absent here where we consider only the **power** of a municipality to do a thing necessary in the ordinary course of its business.

M. S. 1953, Section 340.07, subd. 5, provides in its part here material as follows:

> "* * * It [the store] shall be under control of an individual owner or manager and, if located in municipalities other than cities of the first, second, and third class, it may be owned and operated by the municipality **as the governing body thereof shall direct."** (Emphasis supplied)

Should the appropriate governing body determine that the operation of a municipal liquor store requires the cashing of checks in the ordinary course of business, it is my opinion, in view of the above discussion and on the authority of **Hahn v. City of Ortonville,** that the municipally operated liquor store may accept checks in the course of its business. The governing body may also prescribe suitable regulations.

Your question is therefore answered in the affirmative and all pertinent prior opinions of this office based on **Stabs vs. City of Tower,** ought to be and hereby are overruled in so far as they are inconsistent with this opinion.

MILES LORD,
Attorney General.

ALBERT H. NEWMAN,
Spec. Asst. Attorney General.

Brooklyn Center Village Attorney.
October 31, 1957. 218-R

79

Non-Intoxicating Malt Liquor—Dance Halls—Power of county board to regulate not superseded by Dostal v. McLeod County.

Facts

"Minnesota Statutes 340.01 provides that the County Board has the authority to license and regulate certain vendors of non-intoxicating malt liquor. Pursuant to that statute, the County Board of Isanti County adopted a resolution governing the sale of non-intoxicating malt liquor,

a copy of which resolution is attached to this letter, marked Exhibit 'A' and made a part hereof for your reference. This resolution defines non-intoxicating malt liquor in Section 1 and provides in Section 9 that 'no license shall give permission to sell non-intoxicating malt liquor in any theatre, recreation hall or center, dance hall, ball park or other place of public gathering for the purpose of entertainment, amusement, or playing of games, and no liquor shall be consumed there.' Prior to the case of Dostal v. County of McLeod the dance hall operators licensed by the county kept completely separated the dance hall from the place where 3.2 beer was sold, as this was apparently required by Minnesota Statutes 617.46. However, after the Dostal v. County of McLeod case which holds that 3.2 beer is not 'intoxicating liquor' within the meaning of the dance hall act, the question has arisen whether or not the Isanti County Board has the authority to regulate such sale, as provided in Section 10 of their resolution."

Section 9 of the Resolution reads:

"No license shall give permission to sell non-intoxicating malt liquor in any theatre, recreation hall or center, dance hall, ball park or other place of public gathering for the purpose of entertainment, amusement or playing of games, and no liquor shall be consumed there."

Section 10 of the Resolution reads:

"No non-intoxicating malt liquor as defined in this Resolution shall be consumed upon any public road, street, alley or thoroughfare, or in any vehicle thereon or in any public places except as have been granted 'On Sale' licenses, within the limits of this County."

Question 1

"Whether Minnesota Statutes 340.01 gives authority to the County Board to regulate the sale of 3.2 beer in dance halls as is done by this resolution."

Answer

Your question is answered in the affirmative. In this regard we enclose for your information a copy of an opinion O. A. G. 802-A-17, April 23, 1934.

Question 2

"What, if any, are the limitations upon the county or other governing body, as to the powers conferred upon them by Minnesota Statutes 340.01?"

Answer

Considering the broad nature of your question, I believe it can be best answered by referring you to Dunnell's Digest, Third Edition, Sections 4912, 4913, 4914, 4915 and 4916. For a good general discussion of the point involved, I would suggest that you read Cleveland v. County of Rice, 238

Minn. 180, 56 N. W. (2d) 641 (1952) and **Abeln v. City of Shakopee**, 224 Minn. 262, 28 N. W. (2d) 642 (1947).

Question 3

"Does the case of Dostal v. County of McLeod supersede and reverse Section 10 of the Isanti County resolution governing the sale of non-intoxicating malt liquor?"

Answer

In my opinion the case of **Dostal v. McLeod**, 247 Minn. 452, 77 N. W. (2d) 654, holding that 3.2 beer is not within the legislature's definition of intoxicating beverages for purposes of the dance hall act, M. S. 617.46, does not supersede or reverse the regulations of the Isanti County Board governing the places of sale or consumption of non-intoxicating malt liquors. To construe the **Dostal case**, supra, as authority for the proposition not only that M. S. 617.46 does not prohibit the sale of 3.2 beer in dance halls, but further that county boards do not have the authority to make a resolution prohibiting such sales, would be an unwarranted extension of the court's holding. Particularly is this so in view of the language of M. S. 340.01 charging the county to consider such matters when issuing or renewing a non-intoxicating malt liquor license.

"* * * Before issuing or renewing any license, the county board shall consider the recommendation of the sheriff and the county attorney, the character and reputation of the applicant, **the nature of the business to be conducted and the type of premises and propriety of the location of said business.**" (Emphasis supplied.)

And, of course, the power to license such establishments includes of necessity the power of reasonable regulations, including restrictions on the use of the licensed premises. **Cleveland v. County of Rice**, supra.

MILES LORD,
Attorney General.

ROBERT W. GARRITY,
Deputy Attorney General.

Isanti County Attorney.
January 15, 1957. 802-A-10

MUNICIPALITIES

80

City Council Meetings—Executive Sessions—must be open to the public. L. 1957, C. 773.

Facts

"The legislature recently passed a law forbidding executive sessions of public bodies such as school boards, utility boards, City councils, and other administrative tribunals, and I would be pleased if you could tell me just what this means. * * *

"* * * For many years, it has been customary for the Austin Council to go into executive session perhaps four or five times a year * * *. No actual business was ever transacted at these executive sessions. No motions were made but the matter involved was merely discussed informally and certain matters would be mentioned which would be extremely embarrassing if these remarks were made in public. * * * The mechanics of the procedure are as follows when the Council wants to go into executive session:

1. A motion is made and seconded, that the Council resolve itself into executive session.

2. When that motion is carried, then all the spectators and everyone in the room leaves.

3. The matter is then discussed informally by the Aldermen and the Mayor among themselves.

4. When the discussion is finished, the door is opened and the public is invited to come in and resume their former attendance at the meeting if they care to come in, and then a motion is made that the Council resolve itself back into regular session and that motion is carried and the Council meeting resumes.

"As pointed out above, no motions are made at executive sessions and no minutes are kept. If a matter is desired to be passed upon officially after it has been discussed in executive session, then that matter is officially handled in open meeting by passage of the proper motion or resolution and there is further opportunity given at that time for further remarks or debate if any is desired."

Question

"Now I want to know if this kind of procedure is prohibited by this new law."

Opinion

The legislation that you refer to is Laws 1957, Chapter 773, which provides:

> **"Except as otherwise expressly provided by law, all meetings, including executive sessions, of the governing body of any** school district however organized, unorganized territory, county, **city,** village, town or borough and of any board, department or commission thereof, **shall be open to the public.** The votes of the members of such governing body, board, department or commission on any action taken in a meeting herein required to be open to the public shall, unless the vote is unanimous, be recorded in a journal kept for that purpose, which journal shall be open to the public. In case the action is questioned where there is an unrecorded vote, that shall be deemed unanimous." (Emphasis supplied).

A New York court in **Blum v. The Board of Zoning and Appeals of Town of North Hempstead,** 149 N. Y. S. 2d 5, p. 8; 1 Misc. 2d 668, p. 671, stated:

> "An executive session is one from which the public is excluded and at which only such selected persons as the Board may invite are permitted to be present."

Cited in W. & P., Vol. 15-A Pocket Parts.

The proceedings in question are meetings of the governing body of the city, the city council. There seems no doubt that the proceedings in question are executive sessions. These proceedings come within the aforementioned definition, and they are even called executive sessions in the motion initiating them.

In **Acord v. Booth,** 93 Pac. 734, 33 Utah 279, the Utah Supreme Court held that a statute requiring a council to "sit with open doors" required that the public could not be excluded when the council chose to sit as a "committee of the whole", and the Court stated:

> " * * * The purpose [of the statute] was not that the public might know how the vote stood, but the purpose evidently was that the public might know what the councilmen thought about the matters in case they expressed an opinion upon them. Moreover, the public have the right to know just what public business is being considered, and by whom and to what extent it is discussed. These discussions and deliberations could thus all be taken up in committee of the whole, and the public be excluded from the very proceedings which the statute intended should be conducted with open doors."

The legislature specifically included executive sessions within the purview of Ch. 773, supra, and required that said meetings be open to the public unless otherwise expressly provided for by law. I can find no express provision excepting executive sessions of the city council of Austin. L. 1957,

Ch. 773, requires that the meetings of the city council referred to in your letter must be open to the public.

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.,
Spec. Asst. Attorney General.

Austin City Attorney.
June 13, 1957. 63-A-5

81

City Mayor—Vacancy in Office—Under M. S. 471.46 and St. Paul City Charter, Councilman is not eligible for appointment to fill vacancy.

The legal problems which you have posed concern the power of the council to fill a vacancy occurring in the office of mayor and the person eligible to be appointed to such office in the circumstances as recited in the following

Questions

"1. In the event of the occurrence, during the elective term, of a vacancy in the office of Mayor, could the Council effectively supply such vacancy by its appointment or election of any elected City Officer?

"2. In any such case, could the Council effectively supply such vacancy by its appointment or election of a Councilman either before or after such Councilman's resignation?

"3. In any such case, would any Councilman who had been nominated for appointment or election by the Council to supply any such vacancy in the office of Mayor be eligible to vote or otherwise participate in any such Councilmanic appointment or election?"

Opinion

Before categorically answering these questions, we consider certain charter provisions and legal principles that are pertinent to, and decisive of each question.

The government for the City of St. Paul is prescribed by its charter, which has been amended from time to time. The last amendment, so far as material to the questions here considered, was adopted on October 17, 1950.

Under the provisions of the city charter, the elective officers of the City of St. Paul consist of the mayor, comptroller, six councilmen[1] and the members of the board of education.[2]

---

[1]C. II, Sec. 5.

[2]C. XIX. Amendment adopted October 17, 1950. (Unless otherwise indicated, all references by sections will be to the St. Paul City Charter.)

The judges of the municipal court, as provided for by L. 1957, c. 927, Section 4, are state officers and are not officers of the city.[3]
composed of the six councilmen and the mayor.[4] Unless otherwise prescribed by the charter [Sec. 59] the rights of each member of the council, which includes the mayor, are equal with respect to the exercise of the legislative functions vested in it.

In disposing of the questions here considered it is necessary to first determine the nature of the status of a councilman and the mayor when engaged in discharging the legislative functions of the city as members of the city council.

A councilman is an officer of the city. His right to sit as a member of the city council emanates from his office as a councilman. Upon election or appointment and qualifying as a councilman, he becomes a member of the council and not an officer on the council. Consequently, the status of a councilman, as a part of the legislative body of the city, is not an officer on the council but a member thereof. The mayor is, by virtue of Sections 57 and 58, empowered to assign and reassign members of the council (councilmen) as heads of various administrative departments of the city.[5] The duties of each member upon assignment as administrative head of a department are prescribed by the above charter provisions and, when engaged in the performance of these administrative duties, each councilman is then acting in an administrative and not in a legislative capacity.

The mayor is an elective city officer and as a councilman upon his election and qualifying he becomes a member of the city council. In addition to his right to participate in and vote upon matters coming before the council for disposition, the mayor by authority of Section 110 is also the ex-officio presiding officer or president of the council. Sec. 55 also prescribes that the mayor shall preside at the meetings of the council. The mayor, when performing his duties as ex-officio presiding officer of the council, is an officer thereof. However, such office emanates from his title to the office of mayor and not from any action, affirmative or otherwise, by the city council. The status of the mayor as ex-officio presiding officer of the council is dependent upon his title to the office of mayor. His duties as ex-officio presiding officer are of a different character from his administrative duties or his legislative duties as a mere member of the council.

An "ex-officio member" of a board is one who is a member by virtue of his title to a certain office and without further warrant or appointment.[6]

Having reached the conclusion that councilmen are members and not officers of the council, and that the mayor by virtue of his title to that

---

[3]State ex rel. Simpson v. Fleming, 112 Minn. 136, 127 N. W. 473.
The legislative authority of the City of St. Paul is vested in the council,

[4]Sec. 110.

[5]Department of Finance, C. XII; Department of Public Works, C. XVII; Department of Public Safety, C. XVIII; Department of Parks, Playgrounds and Public Buildings, C. XX; Department of Public Utilities, C. XXI; Department of Libraries, Auditoriums and Museums, 398 et seq.—Amendment as adopted October 17, 1950.

[6]State ex rel. County of Hennepin v. Brandt, 225 Minn. 345, 31 N. W. (2d) 5; W. & P. (Perm. Ed.), Vol. 15A, pp. 392-393.

office is ex-officio presiding officer on the council, it becomes necessary, in view of the provisions of M. S. A. Section 471.46, to determine whether there are other officers on the council in addition to the three mentioned within the meaning of the term "different office on the council" as used in said statute.

Sec. 113 of c. VIII, which deals with the council and its general powers and duties, reads in part:

> "(a) Vice-Presidents. On the first Tuesday of June of each even numbered year, or as soon thereafter as practicable, the council, by ballot, shall elect from its members, a vice-president and a second-vice-president, each of whom shall hold office for a term of two years beginning with the said first Tuesday and until their successors are elected."

In consequence of this section and Sec. 110, we are of the opinion that the vice-president, second vice-president and the mayor, by virtue of being ex-officio presiding officer of the council, are the only officers on the city council. This conclusion is in accord with an opinion O. A. G. 61-i, September 4, 1953, wherein we pointed out that the officers of the council under the charter of the City of International Falls, were its president and vice-president.

The case of **Van Cleve v. Wallace**, 216 Minn. 500, 13 N. W. (2d) 467, involved the question of the status of the president of the Minneapolis City Council. The syllabus of that case reads:

> "1. The president of the Minneapolis city council is an 'officer' within the language of the charter, and an affirmative vote of a majority of the members of the council is required to elect him."

The conclusion reached by the court in the **Wallace** case apparently overrules an earlier opinion of the court where the court held that the president and vice-president of the council of the City of Minneapolis may not be officers of the council within the usual meaning of that term.[7]

Although no specific question has been presented, we point out that in the event of a vacancy in the office of mayor, the vice-president of the council is empowered to exercise all of the powers and discharge all of the duties of the mayor, and in such capacity he shall be styled "acting mayor of St. Paul"; and that the second vice-president of the council shall perform the duties and exercise the powers of the acting mayor in case of the inability of the vice-president to act as mayor.[8]

Whenever a vacancy occurs in any office elected by the people of the City of St. Paul, such vacancy shall be filled by appointment, by a majority vote of all of the members-elect of the council, including the mayor.[9]

Upon the foregoing observations we specifically consider each of the questions in the order stated:

---

[7]State ex rel. Childs v. Kiichli, 53 Minn. 147, 54 N. W. 1069.

[8]Sections 56 and 115.

[9]Sections 27 and 120.

1. In our opinion the city comptroller and the members of the board of education are the only eligible elective city officials who may be appointed to fill a vacancy in the office of the mayor of the City of St. Paul.

2. We believe that Section 471.46, supra, which in its entirety reads,

"No county, city, village, borough, town or school district officer shall be appointed to fill a vacancy in any elective office if he has the power, either alone or as a member of a board, to make the appointment; and his ineligibility shall not be affected by his resignation before such appointment is made. **This section shall not prevent the appointment of a member of a city or village council to a different office on the council.**" (Emphasis supplied)

is dispositive of this question.

The city council is a "board" as used in this statute. The mayor, by authority of his title to such office, is an officer on the council only when acting as ex-officio presiding officer or president of the council. Such ex-officio office, as heretofore pointed out, springs from his title to the office of mayor. In the event of a vacancy in the office of mayor, the council is authorized to fill such vacancy by appointment, and the person so appointed, upon qualifying, becomes ex-officio presiding officer or president of the council. The council has no authority to appoint a person to the office as ex-officio presiding officer of the council. Accordingly we conclude that the mayor, as a member of the city council under Sec. 110, does not hold or occupy, as such, a different office on the council within the meaning of that term as used in the above statute, which compels a negative answer to your second question.

3. Our answer to your second question is controlling and disposes of your third question.

In addition to what has heretofore been stated, we point out that, without any statutory prohibition such as is contained in Section 471.46 which is expressive of the common law, it is contrary to public policy for a board having the power to make an appointment, to appoint a member thereof to a position authorized to be filled by the appointing board.

This principle of law is stated by the Supreme Court of Kentucky in the case of **Meglemery v. Weissinger**, 131 S. W. 40, 31 L. R. A. (N. S.) 575, on p. 578 as follows:

" * * * It is of the highest importance that municipal and other bodies of public servants should be free from every kind of personal influence in making appointments that carry with them services to which the public are entitled and compensation that the public must pay. And this freedom cannot in its full and fair sense be secured when the appointee is a member of the body and has the close opportunity his association and relations afford to place the other members under obligations that they may feel obliged to repay. Few persons are altogether exempt from the influence that intimate business relations enable associates to obtain, and few strong enough to put aside personal considerations in dispensing public favors. And it is out of regard for this

human sentiment and weakness, and the fear that the public interest will not be so well protected if appointing bodies are not required to go outside their membership in the selection of public servants, that the rule announced has been adopted, and ought to be strictly applied."

The same general rule is stated in McQuillin, Mun. Corps. (3rd Ed.), Section 12.76, p. 290.

The common law rule above cited would, independent of the provisions of Section 471.46, supra, compel a negative answer to your third question.

MILES LORD,
Attorney General.

VICTOR J. MICHAELSON,
Spec. Asst. Attorney General.

St. Paul Corporation Counsel.
June 28, 1957. 61-i

82

City of Minneapolis—Park Board Commissioner—Conflict of Interests—If business agent for park board employees regarding wages set by board and member of the board at the same time, there is conflict of interests which is not removed merely by abstaining from voting on matters affecting park employees.

Facts

"Four Commissioners were elected to the Board of Park Commissioners of the City of Minneapolis at the municipal general election held in this city on June 11, 1957. They were elected for a six-year term commencing July 1, 1957.

"One of the newly elected Park Commissioners taking office on July 1, 1957, advises that he is employed as Secretary-Treasurer and Business Representative of Municipal Drivers and Helpers Union Local 664. Said Local 664 represents maintenance men and drivers employed in the various departments of the city government, including Park maintenance men and drivers employed by the Minneapolis Board of Park Commissioners. All of the Park employees who are members of Local 664 are in the classified service of the City and are subject to the rules of the Civil Service Commission so far as selection, tenure and removal or discharge are concerned. The direction of their work, rates of pay and terms and conditions of their employment are established by resolution, ordinance or other appropriate action of the Board of Park Commissioners. There is no written, signed contract by and between the union and the Board of Park Commissioners."

Comment

"Chapter 16 of the Minneapolis Home Rule Charter provides for the government and regulation of the Minneapolis Park and Parkway System, and Section 1 of said Chapter 16 provides among other things that 'No Commissioner shall be interested in any contract made under the authority of said Board'."

Questions

"1. Is he disqualified from serving as a member of the Board of Park Commissioners by reason of his offices with Municipal Drivers and Helpers Union Local 664?

"2. If the Park Commissioner in question terminated his employment as Business Agent for the Park employees section of Local 664 but continued to serve as Secretary-Treasurer and Business Agent for other sections of said Local 664, would he be disqualified to serve as a member of the Board of Park Commissioners?"

Opinion

You state that there are no contracts executed between the union and the Park Board and that all of the park employees who are members of the union are under civil service regarding selection, tenure and removal. Such being the case, the provision of Chapter 16, Section 1, of the Minneapolis charter which you quote has no direct application in the instant situation.

Nor do we, strictly speaking, have before us the question of incompatible offices, wherein the acceptance of a second office operates to vacate the first, since there are not two public offices herein involved. See Dunnell's Minn. Digest, 3rd Ed., Section 7995; **Hilton v. Sword**, 157 Minn. 263, 196 N. W. 467; McQuillin on Municipal Corporations, 3rd Ed., Section 12.67. Nevertheless it is apparent from these citations that a close analogy to incompatible offices may be drawn from the submitted facts. Incompatibility of offices arises where the duties of one public office held by an individual involves supervision, regulation and control over another public office which is held by the same person. In the instant case, the duties of the office of Park Board Commissioner require that he exercise powers of supervision, regulation and control over the park employees, while as a private business agent for such employees he stands in their shoes for the purpose of dealing with their employer, the Board of Park Commissioners. The duties manifestly conflict just as much as though two incompatible public offices were held by the same person; and by analogy, therefore, such conflict of duty should clearly preclude an individual from engaging in the dual role of a private business agent for park employees and a member of the park board which employs them.

The submitted facts further raise the similar, but broader, question of a conflict of interests.

Chapter 16, Sec. 1, of the Minneapolis charter, and statutory provisions to the same general effect, are merely declaratory of the rule at

common law. McQuillin on Municipal Corporations, Section 29.97. And such common law rule prohibiting municipal officers from being interested in contracts with the municipality, and the common law prohibition against holding incompatible offices, are but illustrations of the broad basic common law principle based on public policy that in the performance of their official duties municipal officers must be uninfluenced by any personal interests or considerations. McQuillan on Municipal Corporations, Section 12.126, p. 455. The concept is well stated in 42 Am. Jur., Section 8, p. 885, as follows:

> "The American concept of a public office is that of a public agency or trust created in the interest and for the benefit of the people. * * * Such trust extends to all matters within the range of the duties pertaining to the office. Public officers, in other words, are but the servants of the people, and not their rulers. They are amenable to the rule which forbids an agent or trustee to place himself in such an attitude toward his principal or cestui que trust as to have his interest conflict with his duty."

and in 43 Am. Jur., Section 266, p. 81, as follows:

> "A public officer owes an undivided duty to the public whom he serves, and is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interests of the public. If he acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence. One of the most familiar applications of this doctrine is the rule which prevents an officer from having an adverse interest in any contract which he executes on behalf of the public. **And an officer cannot lawfully act as the agent of one person where the private agency will come in conflict with his official duties. To act for one of the parties implies an interest adverse to the other.**" (Emphasis supplied)

Is there, then, a conflict of interests present in the instant situation? Applying the foregoing considerations we think there is. Although there are no contracts between the union and the Park Board, nevertheless proposals or recommendations are made by or under the direction of the union business agent to the Board of Park Commissioners in regard to wages and other matters affecting the Park Board employees who are members of such union. The wage-scales and other matters then established by resolution, ordinance or order of the Board of Park Commissioners, of which the union business agent is a member, are determined after consideration has been given to such proposals or recommendations presented to the board in his capacity as such business agent.

As business agent for the park employees' section of the union, the commissioner must exert his best efforts in representing such employees while as a commissioner he owes an undivided duty to the public to exert his best efforts on behalf of the board. It thus appears that his private interests conflict with his official interests, a conflict which public policy prohibits. Under the stated facts, a situation of divided loyalty would arise

in which he could not discharge with equal fidelity and loyalty to the board of which he is a member and to its employees whom he represents, the duties owed by him in a dual capacity. Truly it has been said that a man cannot serve two masters.

Such conflict of interests would not be removed by the commissioner merely abstaining from voting on matters affecting the park employees. [See opinion O. A. G. 90-E, May 22, 1957, copy enclosed, relating to a city officer's interest in a contract with the city, which holds that his abstention from voting thereon would not validate such contract.] The commissioner would still be a member of the board while representing individuals in matters before the board. And 43 Am. Jur., Section 265, p. 81, states that "It is the duty of public officers to refrain from outside activities which interfere with the proper discharge of their duties." The commissioner's official duties include deliberating upon and considering all matters coming before the Park Board and voting upon such matters.

The conflict of interests would, of course, be resolved by resigning from the Board of Park Commissioners. On the other hand, if the commissioner in question were to terminate his employment as business agent for the park employees' section of the union, then your questions would be answered in the negative for the source of the conflicts of interest would be removed.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Minneapolis Board of Park Commissioners.
September 16, 1957. 59-B-11

83

Cities—Officers—Interest in Sale, etc. Where city airport is supervised by corporation which services and sells gasoline to airplanes, distributor is not prohibited by M. S. 471.87 from selling gasoline to such corporation because he is mayor of city.

Facts

"The City of Alexandria owns an Airport. The Airport is operated under a contract with the N Aircraft Corporation whereby they are compensated on a monthly basis for the supervision of the airport, and in addition receive the profits they make on servicing and sales of gasoline, etc.

"Demand is being made by airplanes passing through for 100 octane gas. Presently the facilities permit only one type of gas, 87-88 octane.

In order to provide the additional type of gas, N Aircraft or some supplier will have to expend approximately $10,000.00 to install the facilities and have requested of the council an exclusive franchise for a period of ten years in order to justify such an expense. The franchise has been given to N Aircraft, subject to cancellation in the event their management contract is terminated.

"N Aircraft has contacted the present supplier of gas and they are not interested in putting in additional facilities. They have also contacted the S Oil Distributor in Alexandria and either he, as the local distributor, or the S Oil Company itself will install the facilities and furnish the gas upon an exclusive contract basis. Apparently no other supplier is willing to make this investment for the purpose of serving the airport.

"The local distributor for S Oil Company is H, the Mayor of the City of Alexandria. Whether the facilities are put in the airport by H as the local distributor for the S Oil Company, or by the S Oil Company itself, the gasoline would be furnished to the local distributor and he would, of course, make a profit thereon.

"The contract with the supplier, either Mr. H or the S Oil Company, would be made between the N Aircraft and the supplier or distributor, and not with the City of Alexandria.

"I might also call to your attention, that N Aircraft has indicated that because of certain preferences of their own, they would desire to have S aviation products furnished for their own planes as well as those they would service, and Mr. H has not solicited this business, but would accept it if it is permissible under an interpretation of the above statute.

"Under our charter, the Mayor does not vote, although he executes the contracts as the Mayor."

Questions

"1. Would a contract between N Aircraft and H as the Distributor, or between N Aircraft and S Oil Company as the supplier be void by reason of the provisions of M. S. A. 471.87?

"2. Assuming the answer to the above question would be yes, if no other supplier in Alexandria is willing to make the necessary investment in order to meet the requirements of the contract, and such fact was shown by the affidavit of N Aircraft, would this sufficiently show the 'involuntary' aspect of the situation so as to avoid the penalty provisions of M. S. A. 471.87?"

Opinion

1. M. S. 471.87 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

contract in his official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom. Every public officer who violates this provision is guilty of a gross misdemeanor." (Emphasis supplied)

The city is not a party to the proposed contract. Any interest it has in it is only incidental. While "H." is a party to the contract, neither his official position nor his duties as mayor are involved. In our opinion 471.87 is without application to the above factual situation. See opinion of Attorney General to attorneys for Independent School District No. 77, May 1, 1952, 90c-1, copy enclosed.

Accordingly, we answer your first question in the negative.

2. In view of the foregoing, it is not believed that your second question requires answer nor comment.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Alexandria City Attorney.
May 27, 1958. 90-E-5

84

Municipal Employees—Vacation and Sick Leave—Where vacation leave has accrued under resolution still in effect, the leave is due and employee not required to deduct sick leave from vacation.

Facts

"An employee who designated a definite two week period as his vacation time had a death in his family while on said vacation. He asked for three days' additional absence without loss of pay by virtue of paragraph 6 in addition to his vacation period. When his request was refused by the head of his department, he filed a grievance and the Committee of the City Council on Grievances requested an opinion from your office on this question as well as on the question of sick leave."

Comment

"I have ruled that the employee under paragraph 6 would be entitled to have the three days without loss of pay if a death did occur even though he was on vacation because it seemed to me that this section 6 is mandatory that he receive three days' absence without loss of pay since his vacation is really earned by the employee. Despite my ruling, the supervisor of this employee failed to give him the three days' leave and as a result, the grievance procedure took place."

Questions

"1. Under paragraph 6 is an employee entitled to three days' absence without loss of pay in the event of a death of a member of the immediate family even though the death occurs while the employee is on vacation?

"2. Assuming that an employee took sick while on vacation, would he be entitled to use his sick leave and have his vacation time continue after his sick leave expired?"

Opinion

I shall consider both questions together for purposes of convenience.

The Home Rule City Charter of the City of Virginia states at Section 36, that "the city council shall have the power to fix the compensation of any and all city officers and employees." The council has by resolution provided for vacation and sick leave for all city employees.

Section V, provides:

"All full-time employees shall receive two weeks of annual vacation with pay after one year of service. After ten (10) years of continuous service, full-time employees shall receive three weeks of annual vacation with pay. Employees working half-time or more, but less than full-time shall receive vacation benefits on a pro-rata basis. In determining length of continuous service, no deduction shall be made for sickness, military service or leaves of absence of thirty (30) days or less.

" * * * * "

Section VI, provides:

"After one year of service, all full-time employees shall receive thirty (30) working days sick leave with pay. Thereafter, sick leave credits shall accrue at the rate of thirty (30) working days per year up to a maximum of ninety (90) days. Employees working halftime or more, but less than full-time, shall receive sick leave benefits on a pro-rata basis. A doctor's certificate shall be required for sick leave absences.

"Three day's absence without loss of pay shall be allowed an employee in the event of the death of a member of the immediate family, namely: Husand, Wife, Son, Daughter, Father, Mother, Sister, Brother, Father-in-Law, and Mother-in-Law. In the event travel is required to a point outside a 100-mile radius of the City of Virginia, an additional two days will be allowed."

The Minnesota Supreme Court has discussed the problem of sick leave in the case of **Halock vs. City of St. Paul,** 227 Minn. 88, 35 N. W. 2d 705. There the Court said that city employee was not entitled to payment for accrued sick leave where the city changed its ordinance establishing such sick leave prior to application therefor by the city employee. The Court referred to sick leave as a gratuity and as terminable at the will of the city.

It based its decision on the previous case of **Nollet vs. Hoffmann,** 210 Minn. 88, 297 N. W. 164.

In the **Nollet** case the Court held that a civil service rule providing for paid vacations could not have retrospective operation. In that case it was admitted by defendant, State Highway Department, that the employee was entitled to vacation with pay based on service rendered after the date upon which the rule providing for vacation pay went into effect. The decision was founded upon the principle that all work rendered prior to the effective date of the rule was under a hiring at an hourly wage, fully paid, and under no agreement or understanding that vacations could be taken with pay.

Neither of these cases referring to vacation and sick leave as gratuities are applicable to the instant situation. In the first case, the city had changed its ordinance prior to application for sick leave. The second case considered only an application for paid vacation for service rendered prior to the establishment of the rule establishing paid vacations. Here the rule is in effect and the provisions as to vacation and sick leave have not been terminated. Assuming the vacation leave to have accrued subsequent to the adoption of Section V of the resolution of the City Council, such paid vacation and provision for sick leave become a part of the compensation paid the employee and one of the conditions under which the employee has continued to work for the city. **State ex rel. Gorczyca vs. City of Minneapolis,** 174 Minn. 594, 219 N. W. 924; **Mattson vs. Flynn,** 216 Minn. 354, 13 N. W. 2d 11. Both the latter cases involve the rights of an employee to pension payments and the **Gorczyca** case established the proposition that such payments are "not a gratuity when the services are rendered while the pension or retirement relief statute in in force, so that the statute becomes a part of the contract of employment and contemplates such pension or allowance as part of the compensation for the services rendered." **State ex rel. Gorczyca vs. City of Minneapolis,** supra at 598.

Until termination of the vacation and sick leave resolutions of the city council, such rights remain due. To force an employee to deduct three days from his vacation to attend the funeral of a member of his family, whose death occurred during his vacation, would be to withhold unlawfully from the employee a portion of his "additional compensation for services rendered".

It is thus my opinion that the employee is entitled to receive as a part of his compensation, the entire vacation which he has accrued. Should he become ill during that vacation or should death occur in the family during his vacation, the time thus consumed consistent with Section VI of the resolution, should not be deducted from his allowable paid vacation.

MILES LORD,
Attorney General.

EDWARD J. PARKER,
Assistant Attorney General.

Virginia City Attorney.
December 15, 1958. 120

85

Incompatible Offices—Charter Commission—City attorney and attorney for charter commission not incompatible.

Facts

The duties of the Lake City attorney are defined by C. III, Section 5 of the city charter which reads as follows:

> "**City Attorney.** The Common Council shall have power to appoint an attorney for the city, who shall hold said office for the term of two years, and who shall perform all professional services incident to the office, and when required, shall furnish written opinions upon any subject submitted to him by the Common Council or its committees. He shall also advise with, and counsel all city officers in respect of their official duties and attend the regular meeting of the Common Council and of such committees as shall request his assistance.
>
> "He shall receive such compensation for the services rendered by him as may be fixed by the Common Council."

Question

> "Are the positions of City Attorney for the City of Lake City, Minnesota, and attorney employed by the Charter Commission of the City of Lake City, Minnesota under the provisions of M. S. A. 410.06 incompatible?"

Opinion

M. S. 1953, Section 410.05 provides for the appointment of a board of freeholders to frame a city charter. The second sentence thereof was added by L. 1949, c. 210, Section 1, which provides as follows:

> "No person shall be disqualified from serving on such board by reason of his holding any other public office or employment."

M. S. Section 410.06 provides in part that the board may employ an attorney to assist in framing such charter, and makes provision for his compensation.

The manifest purpose in the enactment of L. 1949, c. 210, Section 1 was to make available to the board, through its membership, the knowledge and experience of public officials relating to municipal matters. The legislature apparently believed that in this particular instance the benefits to be gained outweighed any detriment which might result from conflict of duties. Following the amendment and in conformity with it, we ruled that the mayor or member of the council of the city of Tower may be appointed to its charter commission. See opinion O. A. G. 358-E-1, November 3, 1949, printed as No. 129 in the 1950 Report at page 231 (copy enclosed). The amendment had the effect of nullifying our contrary opinions rendered prior to its enactment.

Inasmuch as a city attorney, by reason of the 1949 amendment above quoted, is made eligible to membership on the charter commission, we see no reason why he cannot as well be employed as its attorney and compensated as provided by Section 410.06. In the one situation he participates in the board's deliberations and votes; in the other, he merely advises. The likelihood of incompatibility is no greater in the latter situation. Sec. 5 of C. III of the city charter calls for the services usually required of a city attorney and contains no prohibitions against his serving on a charter board. Any conflict of interest can be disposed of if and when it arises.

On the basis of the foregoing it is our opinion that the position of city attorney for Lake City and that of attorney employed by its charter commission under M. S. 1953, Section 410.06 are not incompatible.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Spec. Asst. Attorney General.

Lake City Attorney.
January 17, 1957. 358-E-1

86

Policemen and Firemen included within definition of "public employees"—authorized by M. S. 179.52 to join labor unions and present grievances.

Facts

"Section 179.52 permits public employees to form and join labor unions and authorizes such unions to present to the governmental agency employing them their grievances and conditions of employment for adjustment. This law also requires governmental agencies to meet with the representatives of employees at reasonable times in connection with such grievances and conditions of employment.

"The local police force of Austin is represented by a local union. The firemen are also represented by a union, but not a local union.

"At the present time the local union is conducing negotiations with the Common Council of Austin regarding wage conditions of the City policemen.

"I have been asked whether or not the above quoted law, Section 179.52, was intended to include firemen and policemen as well as other public employees."

Comment

"I do not find any exceptions for any class of employees and the law in question seems to be general in its application **for all public** employees.

"It is my opinion that all public employees, including policemen and firemen are covered by Section 179.52."

Question

"Do municipal firemen and policemen have the right to present a wage question through their labor union representing them, and does the labor union representing the policemen and firemen have the right to negotiate regarding a wage question with the City Council, and do they come under the provisions of Section 179.52?"

Opinion

M. S. 179.51, which delineates the scope of M. S. 179.52, is meant to be all inclusive and of application general enough to cover all levels of government and classes of employees. In order to be excepted from such broad language, a group of public employees would necessarily have to be defined specifically by statute. The only exception of which I am aware, applicable to policemen and firemen, concerns only cities of the first class. M. S. 418.21. Austin is a city of the second class, and thus not within the specific statutory exception.

It is my opinion, therefore, that policemen and firemen of cites of the second class are included within the meaning of the term public employees, as used in M. S. 179.52.

MILES LORD,
Attorney General.

EDWARD J. PARKER,
Assistant Attorney General.

Austin City Attorney.
December 16, 1958. 270-D

87

Cities — Expenses of municipal officers to conferences and conventions. Payment of expenses by municipality of expenses of municipal officers attending conventions or conferences involves questions of fact and policy, and are left to discretion of governing body.

Facts

"In early December of 1957, Senator Humphrey, through the Commissioner of Conservation, George Selke, invited representatives of this

community and other communities to a hearing to be held in St. Paul at the Commissioner of Conservation's Office dealing with the proposed Senate File No. 1176 commonly known as the Wilderness Preservation Act.

"In response to such request, the city council directed that myself and any city councilmen that desired to attend, should attend at the city's expense. Submission by myself and by the Mayor of expenses incurred at that hearing were approved by the city council and paid. The Mayor has, however, withheld cashing of his draft until such time as the legality of this action was determined.

"It should be borne in mind that the City of Ely is located in the middle of the National Superior Forest and would be affected by Senate File No. 1176. The city council prior to authorizing the above mentioned attendance at such hearing had gone on record opposing certain provisions in that bill. A transcript, totaling 116 pages of that hearing was prepared for all interested parties' use. Appearance at that hearing was also made by commissioners from St. Louis County, Lake County and Cook County."

Question

"Whether such reimbursement for travel was a legal expenditure under the Charter of the City of Ely and the statutes of this State."

Opinion

The general rule as to the authority of a municipality to pay the expenses of municipal officers incurred under the circumstances above related is stated in **Tousley v. Leach,** 180 Minn. 293, 230 N. W. 788, as follows:

"If the purpose is a public one for which tax money may be used, and there is authority to make the expenditure, and the use is genuine as distinguished from a subterfuge or something farcical, there is nothing for the court. Whether there shall be such use is then one of policy for the legislature. * * * "

The court in its decision went on to say that the attendance of municipal officers at conferences and conventions can result in their bringing back information of value and that "they are supposedly of serious purpose in practical aid of public interest." (180 Minn. 295). See also **Lindquist v. Abbett et al.,** 196 Minn. 233, 265 N. W. 54.

Ch. 8, Section 62 of the charter of the city of Ely (October 1954) provides that "the city of Ely shall have full power to deal with all matters of municipal concern. * * * ". You call our attention to Section 68 of the charter, paragraph third, which makes provision for a General Fund for the payment of such expenses of the city as the council may determine proper.

Under Section 62 of the charter the council could properly inquire into and consider in what manner and to what extent the proposed bill would affect the interests and welfare of the city and its inhabitants and incur

reasonable expenses in connection therewith. In other words, a public purpose could be involved, in which event expenses necessarily incurred could be paid out of municipal funds. Matters of this kind involve questions of fact and of policy. Our courts have indicated that it is wisest to leave such matters to the reasonable discretion of those who represent the interests of the city, i. e., its governing body.

In connection with problems of this kind, see opinion O. A. G. 63-A2, May 17, 1954; February 7, 1939; February 9, 1934, printed in 1934 Report as No. 113; and opinion O. A. G. 469-B-1, April 7, 1954, copies of these opinions being enclosed herewith.

In view of the factual and policy questions involved in the question submitted, we cannot give you a categorical answer.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Ely City Attorney.
April 29, 1958. 63-A-2

88

The authority of a City Council to pay for legal services and costs rendered in defense of an official prosecuted for improper conduct in office is dependent upon the question of good faith of the official in the performance of official duties which is a fact question for the council to determine in most cases.

Facts

"During an audit by this department of a city of the fourth class operating under a home rule charter, this department investigated allegations concerning the conduct in office of two members of the City council. The findings of this department concerning the allegations were furnished to the County Attorney who presented them to the grand jury for its consideration.

"Each of the two Councilmen engaged legal counsel to represent him. In each of the two cases, the grand jury returned a no true bill.

"The attorneys who were engaged, billed the two Councilmen, individually and personally, for the legal services performed. Subsequently, the attorneys, relying on an opinion rendered by the City Attorney on the specific question, filed claims against the City for their services. The claims were allowed by the council and paid from City funds. A copy of the City Attorney's opinion and certain excerpts from the City Charter are enclosed herewith."

Question

"Was it lawful to pay the claims in question from City funds?"

Opinion

In the case of **City of Moorhead v. Murphy**, 94 Minn. 123, 102 N. W. 219, the court had before it a similar question of payment. In that case the defendant was the chief of police of the City of Moorhead. In the performance of his official duties, he had effected the arrest of one "X" for a violation of a city ordinance. Subsequently, after Mr. "X" was found innocent of the charge, an action was commenced in the United States court by Mr. "X" against the defendant chief of police to recover damages for false arrest and imprisonment. The city attorney appeared by virtue of his office and assisted in the defense of the defendant police officer who also employed certain attorneys to represent and defend him at the trial. The attorneys so employed rendered a bill to the defendant in the sum of $390.00 for their services and disbursements. Defendant presented the bill to the plaintiff city, and the common council duly allowed and paid the same. Thereafter, the city attorney upon the request of certain taxpayers appealed from the decision of the council allowing and paying the bill.

Upon appeal, our State Supreme Court held that the city had the power to reimburse the police officer for these expenses and attorneys' fees incurred in the defense of the action for false imprisonment. The court stated:

> "The general welfare, good order, protection, and safety of the people of the city are among the specific duties imposed upon the common council to accomplish by appropriate legislation. In furtherance of this authority, city ordinances were passed for the prevention of crime, and it is made the duty of the chief of police to serve and execute warrants issued out of any justice court of the city, and to pursue and arrest any person charged with or who has committed any violation of any city ordinance; and he is constituted one of the conservators of the peace, with authority to command the peace, and in a summary manner suppress all riotous and disorderly proceedings. Unless expressly prohibited, the municipality possessed the general powers of a municipality at common law, and under the common law is was authorized to secure special legal assistance. **Horn v. City of St. Paul**, 80 Minn. 369, 83 N. W. 388.
>
> "We have been unable to discover any provisions in the city charter which either expressly or by implication are in conflict with the common-law power to employ such legal assistance. It is made the duty of the county attorney, when directed by the council, to appear and conduct the defense in any action against any officer or employee of the city on account of any act done by him in the performance of his official duties, but the common council is not limited to the services of such attorney."

The city charter of Moorhead involved in the foregoing decision contained provisions which are practically identical with the charter provisions

of the city in question, except that the city charter here involved contains an added provision being Section 63 infra. The here pertinent parts of the city charter are as follows:

> Sec. 59. "He shall be the legal advisor of the city, and of all the boards and departments thereof; he shall perform all such services incident to that office, and appear in and conduct all civil suits as may be referred to him by the city council, any board or department thereof and shall conduct all prosecutions and proceedings in which the city or any board or department thereof shall be directly or indirectly interested except as in this charter specifically otherwise provided; and when necessary he shall take charge of and conduct prosecution for, the violation of all ordinances and resolutions of the city or any board or department thereof and for the violation of any of the provisions of this charter and such other duties as may be required of him."
>
> Sec. 61. "He shall, when directed to do so by the council, appear and conduct the defense in any action, prosecution or proceeding against any officer or employee of the city, or any board or department thereof, on account of any act done by such officer, board or department while engaged in the performance of official duties."
>
> Sec. 62. "In case of sickness or inability of the attorney to act, he may, at his own expense, appoint, by and with the consent of the council, another attorney to act in his stead for the time being."
>
> Sec. 63. "The city council shall have the power to contract with, employ or retain, legal counsel, to take charge of and conduct any litigation in which the city is interested directly or indirectly or to which it may be a party or in which its welfare may be concerned or may appoint such counsel to assist the city attorney in the prosecution or maintenance of any litigation in which the city is interested."

Accordingly, the city council is authorized to pay for legal services and expenses incurred in the defense of one of its officials in certain prosecutions and proceedings. Such authority to pay is not without qualification, however, for the acts giving rise to the proceeding must have been done in the performance of official duty and must have been done in good faith. Generally speaking, these are factual questions upon which this office cannot render an opinion, and as stated in the **City of Moorhead**, supra:

> "It would seem, therefore, to be the wisest to leave the indemnification of the officer to the discretion of those who represent the interests of the city * * * "

Whether or not the city council upon the particular facts of the case has made a proper disposition is always subject to review by the courts upon proper application. Its members are also answerable to the electorate.

I am enclosing copies of opinions O. A. G. 469-B-1, November 20, 1940, November 16, 1939, April 22, 1952, April 15, 1950, and January 23, 1956,

which deal with similar problems and have a bearing upon the question. See also **State ex rel. Feist v. City of St. Paul**, 151 Minn. 130, 186 N. W. 230.

MILES LORD,

Attorney General
MELVIN J. PETERSON,
Deputy Attorney General

Public Examiner.
April 7, 1958.

469-B-1

89

Cities—City of Stillwater cannot by ordinance, without charter provision, limit its liability for defects in sidewalks and streets to actual notice prior to injury.

You refer to the recent decision of the Minnesota Supreme Court, **Fuller et al. v. City of Mankato**, 248 Minn. 342, 80 N. W. (2d) 9, in which our court upheld the validity of the city charter of the city of Mankato which limited the liability of said municipality for damages resulting from defective streets and sidewalks. The specific charter provision in question, Sec. 137, provided:

"Said city shall be absolutely exempt from liability to any person for damages or injuries suffered or sustained by reason of defective streets or sidewalks within said city unless actual notice in writing of such defects in said streets or sidewalks shall have been filed with the city clerk within at least ten days before the occurrence of such injury or damage on account of such defects, and in all cases such notice shall describe with particularity the place and nature of the defects of which complaint is made."

Question

You ask whether, in view of the recent decision, the city of Stillwater can, by ordinance or resolution, accomplish the same exemption from liability as the city of Mankato did by the above charter provision.

Sec. 389 of the Stillwater city charter provides:

"The Council shall pass such ordinances, resolutions, regulations, by-laws and orders as may be necessary to carry out and make effective the provisions of this charter."

You mention that the only provision in the Stillwater city charter limiting liability for damages is in Sec. 370 which includes a one-year statute of limitation and requires notice of claim to be filed within 30 days after occurrence of the injury or damage. There is no mention in your charter concerning notice of defects prior to injury.

Opinion

The court in the **Mankato** case, supra, upheld the validity of the aforementioned Mankato charter provision, based on **Schigley v. City of Waseca,** 106 Minn. 94, 118 N. W. 259. The provision of the Waseca charter was almost identical to that of Mankato. Note that the cities of Gilbert, Glencoe, Lake City, Madison and Northfield have similar charter provisions.

To answer your inquiry we must look to the reasoning of the **Waseca** case and see if it applies to an ordinance.

In the **Waseca** case the court set forth on page 96 of the Minnesota report the general rule in Minnesota:

> " * * * chartered municipalities are now held liable for damages resulting to individuals from defects in streets of which they had actual or constructive notice for such a time as to justify the conclusion of negligence. * * * "
> And on page 97 said:
>
> "The liability, then, is inferred or implied from the imposition upon the corporation of duties accompanied by the power and authority necessary for the proper performance of such duties. The legislature may delegate the power over streets and highways to municipalities, or it may create a special body within the municipality and vest it with full power over the streets. Manifestly, by virtue of its plenary power over the highways and over all the agencies of government which it has created, it may properly determine whether such agencies shall or shall not be liable to individuals for damages resulting from the careless and negligent manner in which such delegated duties are performed. An individual has no right of action against the state for its failure to construct and maintain the highways in proper condition, and as against the will of the state he has no greater right against an agency of the state to which it has delegated the performance of such duties. But the state may, if it chooses, authorize a right of action, if the municipality neglects the proper performance of its duties; and, as we have seen, an intention to authorize such an action is inferred when a chartered municipality is given full power of control over the streets and highways within its limits. A right of action against the municipality is thus a matter of legislative favor, and may be granted absolutely or conditionally. When it has been held to exist by implication, it may be taken away by the legislature, without violating any constitutional right of the individual. Obviously, then, the right of action may be made to depend upon compliance with certain conditions."

Thus, if the legislature can impose or withhold liability for torts of the state or its subdivisions, it may condition such liability also. 16 Minn. Law Review 859.

The court in the recent **Mankato** decision quoted the **Waseca** case, supra, p. 100, as follows:

" * * * the legislature may determine the manner in which such notice [of defect] shall be given, and * * * a general statute enacted by the legislature which contained the provision which we have quoted from the charter of the city of Waseca would be constitutional.

* * *

"There can * * * be no serious question as to the right to insert in a municipal home rule charter a provision prescribing the conditions under which an individual may maintain an action against the city for personal injuries caused by the failure of the authorities to keep the streets and highways in proper condition. Under the common law of the state a person so injured cannot recover damages unless he can prove that the municipality had notice of the defect. He may, however, establish this essential element of his right of action by facts which charge the municipality with constructive notice. This charter changes the general rule to the extent of requiring actual notice in writing. The written notice need not, of course, have been given by the injured party. It does not relieve the city from liability in all cases, although it manifestly places a very serious obstacle in the way of the injured party. The policy of such a limitation may be open to serious question; but that is a matter to be determined by the legislature and the voters of the particular city."

A statute may, therefore, abrogate the law of Minnesota relating to a municipality's liability for injury due to defective sidewalks or streets and a charter may do so also, because a home rule charter is "but a constitutional diversion of the legislative power from the constitutional legislature to the citizens of the charter-making area." " * * * the people of the state carved out of the power of the legislature and vested in the electorate of the municipalities to which it applied the power to make charters for self-government, within certain limitations." Dunnell's Dig., 3rd Ed., Sec. 6535; 83 A. L. R. 288.

An ordinance does not stand on the same ground as a statute or a charter. Dunnell's Dig., 3rd Ed., Sec. 6748.

A resolution passed by a municipal council with all the formalities required in the enactment of ordinances is equivalent to an ordinance. Dunnell's Dig., 3rd Ed., Sec. 6749.

"There is, of course, a difference between an ordinance adopted by a municipal body and a statute enacted, or charter granted, by a state legislature, * * * . The granting of a charter to a municipal corporation is the exercise of the state legislative authority. * * * the source of all power—conferred the right, by the constitution upon the city to so legislate by its organic law, just as they granted the legislative power generally to the General Assembly, or the judicial power to the courts." **McQuillin, Municipal Corporations**, 3rd Ed., Sec. 15.15.

Thus, we do not believe that the reasoning of the **Waseca** and **Mankato** cases, supra, would support the limitation by ordinance, in contrast to

statute or charter, of the liability of municipalities for damages due to defects in sidewalks or streets to actual notice within a certain time limit. Your question is answered in the negative.

MILES LORD,
Attorney General

JOHN F. CASEY, JR.
Spec. Asst. Attorney General

Stillwater City Attorney.
January 22, 1957. 844-B-8

90

Cities — Charter Commission — Amendment: Charter may be changed in whole or in part only by amendment. $1500 expense limitation in M. S. A. 410.06 not applicable to charter amendment. Reasonable compensation to be paid attorney and stenographer.

Facts

"Section 410.06 of the Minnesota Statutes Annotated deals with costs and expenses of the Board of Freeholders. The last sentence of this section reads as follows:

" 'The cost of preparation, printing, and legal services in framing and submitting such charter in the first instance shall not exceed $1,500'."

Question

"Does this section limit the amount that a board of freeholders may spend in amending, revising, or preparing a new charter in lieu of the old one that now exists in the City of Glencoe to the sum of $1500.00 for attorney's fees, expenses of stenographer, and the cost of printing?"

Opinion

You inquire as to the expense of "amending, revising, or preparing a new charter in lieu of the old one." **Leighton v. Abell,** 225 Minn. 565, 31 N. W. (2d) 646, held M. S. 410.23-410.25 to be unconstitutional in so far as they attempted to authorize the submission of a new charter or a charter revision to the voters otherwise than as an amendment. Whether the existing charter is changed in whole or in part, therefore, the change amounts only to an amendment. See opinion O.A.G. 58-C, November 14, 1956, copy enclosed. Does, then, the $1500 limitation in M. S. A. 410.06 apply to charter amendments?

Section 410.06 states in its entirety:

"The members of such board [of freeholders] shall receive no compensation, but the board may employ an attorney and stenographer to assist in framing such charter, and any amendment or revision thereof, and their **reasonable compensation** and the cost of printing such charter, or any amendment or revision thereof, when so directed by the board, shall be paid by such city or village. The cost of preparation, printing, and legal services **in framing and submitting such charter in the first instance** shall not exceed $1,500."

This statute provides for payment of printing costs and for reasonable compensation to the attorney and stenographer employed by the said charter commission to assist in framing the charter or any amendments thereof. What is reasonable compensation is to be determined by the said board. However, the last sentence of the statute clearly limits the cost of preparation, printing, and legal services to $1500 in connection with framing and submitting the charter **in the first instance.**

The monetary limitation, therefore, clearly does not extend to charter amendments. See opinion O. A. G. 58J, October 10, 1952, copy enclosed. If the legislature had thought it necessary to limit the cost of charter amendments to a specific sum, it would have so provided.

Your question is answered in the negative.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.
Assistant Attorney General.

Glencoe City Attorney.
April 2, 1957. 58-C

91

Cities—Stillwater City Charter. Snow Removal. If estimated annual cost of snow removal exceeds $500, council must advertise for bids if it determines to contact on annual basis. Council may treat each snowfall on a separate basis and do work by day labor. May fix maximum rates for labor and equipment rental, when bidding is not involved. May not delegate determination if an emergency exists.

Facts

"During the winter months the City of Stillwater makes it a practice to remove accumulations of snow from downtown streets and from streets adjacent to public buildings in other areas. The City does not have the equipment such as trucks, loaders, etc., nor the manpower to

accomplish this project as expeditiously as desired and, therefore, it has been supplementing its own facilities by hiring private equipment and operators. Private individuals providing this service are compensated in accordance with a schedule of hourly rates fixed by motion of the City Council.

"While actual expenditures for the hire of such equipment and services over a season are variable, depending on snowfall, on the basis of experience, there is no question that the annual cost exceeds $500.00. The cost of such hire following the November, 1957, snowstorm alone amounted to $721.00.

"Your correspondent has taken the position that, under present circumstances, this is a service the estimated cost of which each winter will inevitably exceed $500.00 and, consequently, a matter within the public bidding requirements of the City Charter.

"In our opinion, applicable provisions of the Charter are as follows:

"Article XIII, Sec. 272—'All contracts for commodities, or service to be furnished or performed for the City, involving an expenditure of more than Five Hundred ($500.00) Dollars shall be made as in this article provided.'

'The words "commodities" and "service" as used in this article shall be construed to include all labor, materials or other property . . . '

'The word "contract" as used in this article shall be construed to include every agreement, in writing or otherwise, executed or executory, by which any commodities, labor or service are to be furnished to or done for the City, and every transaction whereby an expenditure is made or incurred on the part of the City.'

'Any action in this article required or authorized to be taken by the Council shall be by resolution or ordinance.'

"Article XIII, Sec. 273—'The Council, in the first instance, shall on its own motion, or may, on the recommendation or report of any officer of the City, determine in a general way, the commodities, labor or service to be done or furnished, and shall estimate the cost thereof, and in order to determine such estimated cost may require estimates from any officer or employe of the City.' . . .

'In all cases where such estimated cost exceeds the sum of Five Hundred ($500.00) Dollars, said commodities, labor or service shall be furnished or done only upon public bids.'

"Article XIII, Sec. 287—'In case of emergency, and when delays occasioned by carrying out the provisions of this article would cause great damage to the public or endanger the public safety, the Council may do such work as it may deem necessary by day labor and procure materials therefor in the open market'."

Questions

"1. Assuming that the estimated annual expenditure for snow removal services outlined above exceeds $500.00, is the Council required to advertise for bids for the furnishing of such service?

"2. Is it permissible, even though the estimated annual cost may exceed $500.00, to treat each individual snowfall as a separate transaction and do the work by day labor under the emergency provisions of aforesaid Sec. 287?

"3. Should you answer Question No. 2 in the affirmative, is it proper for the Council to fix maximum rates for rental of equipment and for labor by motion and, without further action, leave it to the street department to determine when an emergency exists and do the work accordingly, having in mind the last sentence of the aforesaid Sec. 272?"

Question

1. Sec. 273 of the Charter also provides:

"In case such estimated cost does not exceed the sum of Five Hundred ($500.00) Dollars, the Council may direct that the commodities, labor or service be procured by or through the proper officer of the City without public bids."

Opinion

The provisions of the Charter of the City of Stillwater, particularly Section 272, are broad enough to include contracts for the rental of snow removal equipment and for labor in connection with its operation.

The fact that the estimated annual expenditure for snow removal will exceed $500 does not of necessity require the city council to contract for snow removal solely on an annual basis, the charter making no express provisions therefor. The council has the right to determine, within reasonable limits, the manner and method of such removal. Cf. **Davies v. Village of Madelia**, 205 Minn. 526, 531; 287 N. W. 1.

If the council, in the exercise of its discretion, determines to contract for the rental of equipment and the services of operators for the period of one year, or for any period during which the estimated cost would exceed $500, it will be necessary for the council to advertise for bids in accordance with the provisions of the charter. See, in this connection, O. A. G. 707-A-15, October 8, 1945, printed as No. 80, 1946 Report.

2. We see no reason why the council, in its discretion, may not treat each snowfall separately and have the work of snow removal done by day labor with rented equipment, apart from the emergency provisions of Section 278. If the estimated rental charge for the use of any particular piece of equipment on a separate job or project exceeds $500, the council, of course, must advertise for bids in connection with such particular rental. It might be added however, that even though the council may not be re-

quired by the charter to advertise for bids, it is generally commendable practice for the council to do so. Cf. **Griswold v. County of Ramsey,** 242 Minn. 529, 65 N. W. 2d 647. On the matter of dividing the work so as to avoid bidding requirements, see O. A. G. 707-A-4, April 29, 1952, printed as No. 85, 1952 Report, copy enclosed.

3. While it is undoubtedly within the power of the city council to fix the maximum rates for rental of equipment and labor (when bidding is not involved), we question the propriety of the council delegating to any subordinate officer or employee, the determination of when an emergency exists. Section 287 of the charter authorizes the council to employ day labor and procure materials in the open market in case of emergency and when delays occasioned by carrying out the provisions of Art. XIII would cause great damage to the public or endanger its safety. This involves a factual determination by the council as to when an emergency exists. The power to make such determination involving as it does, the discretion and judgment of the council, is one that cannot be so designated. 13 Dunnell's Digest 3d Ed., Section 6576.

As to what may constitute an emergency, see O. A. G. 59-B-2, May 15, 1934, printed as No. 52, 1934 Report, copy enclosed. See also 43 Am. Jur. "Public Works and Contracts" 772, Section 31, and 10 McQuillin, Municipal Corporations 3d Ed., 284, Section 2938.

In connection with motions and resolutions, see 13 Dunnell's Digest 3d Ed. Sections 6748, 6749, and 13 Am. Jur., "Municipal Corporations," 775, Section 142.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Stillwater City Attorney.
January 3, 1958. 707-A-4

92

Cities—City may levy a tax, if necessary, to provide group insurance coverage for employees of water and light department and city hospital, even in excess of charter or statutory limitations pursuant to M. S. 471.61 as amended by L. 1955, c. 193 and L. 1957, c. 321.

Facts

"I have been requested to secure an opinion from you relative to the effect of Chapt. 321 of the Laws of 1957, regular session. The second paragraph of this section as amended authorizes a municipality to levy and collect a tax for the purpose of providing funds for payment

of such premiums or charges in excess of any per capita expenditure limitation, assuming that other municipal expenditures or levies equal the per capita limitation.

"In the past year and for many years prior thereto no tax monies have been expended to defray the cost of operating the Municipal Hospital or the Water and Light Department and all costs of operations have been received from either the patients as charges for hospital service or from the sale of various utilities supplied and generated by the Water & Light Department."

Question

"The precise question raised in this regard is whether or not the City of Virginia may levy a tax in excess of its per capita limitation to defray the cost of paying such premiums or charges for employees of its Municipal Hospital and Water and Light Department which hospital and department perform proprietary functions and receive revenues based upon the performance of their functions."

Opinion

Your city charter as to the water and light department in Section 145 provides:

"The city may acquire or establish water, gas, heat, power and light plants, or either of them, and dispose of the same at will. The city may maintain, enlarge, extend, repair and operate the same. * * * "

and Sec. 146:

"The control, management and operation of all such water, heat, power and light plants shall be committed to a board to be known as the 'Water and Light Commission,' * * * "

and Sec. 148 provides in part:

" * * * Said board may employ * * * other necessary help as will enable it to properly perform its duties under this charter, * * * . Said board shall prescribe the duties of all such employes and shall fix their compensation. * * * "

and as to the hospital commission in Sec. 200-A:

"There is hereby created a board to be known as the 'Hospital Commission.' * * * "

and in Sec. 200-C:

"Generally the commission shall have charge of the administration, maintenance and control of all hospitals now or hereafter owned by the City of Virginia * * * called the 'Municipal Hospital.' This general power shall not be considered to have been limited by enumeration of specific powers in this chapter. The commission shall have the power: to hire a superintendent of hospitals and all other necessary employees;

to fix and pay their compensation; to reimburse officers and employees for expenses necessarily paid or incurred in performance of their duties; * * * "

This office in an opinion O. A. G. 59-A-25, May 21, 1956, ruled that a city utility commission is an agency of the city and as such is authorized to pay group insurance premiums covering employees of the municipal light plant pursuant to M. S. 471.61 as amended by L. 1955, c. 193. The same reasoning applies to employees in your municipal water and light plant and municipal hospital. Said employees can be covered by group insurance as provided in the aforementioned section. Payment of the premiums is compensation in addition to present salary. See opinion O. A. G 125-A-28, May 24, 1957.

L. 1957, c. 321 amended M. S. 471.61 as amended by L. 1955, c. 193 and added:

" * * *

"Any governmental unit which pays all or any part of such premiums or charges is authorized to levy and collect a tax, if necessary, in the next annual tax levy for the purpose of providing the necessary funds for the payment of such premiums or charges, and such sums so levied and appropriated shall not, in the event such sum exceeds the maximum sum allowed by any law or the charter of a municipal corporation, be considered part of the cost of government of such governmental unit as defined in any tax levy or per capita expenditure limitation; provided at least 50 percent of the cost of benefits on dependents shall be contributed by the employee or be paid by levies within existing per capita tax limitations." (Emphasis supplied)

This tax levy is authorized "if necessary."

Your charter specifically directs the water and light department in Sec. 149:

"Said board shall fix and maintain the rents and rates for water, heat, power and light furnished by it, so that the water and light fund of the city shall, in each fiscal year, be at least sufficient to defray the cost of the operation and maintenance of the water, heat, power and light system of the city." (Emphasis supplied)

and the hospital commission in Sec. 200-D:

" * * * the commission shall from time to time establish and provide for the collection of suitable charges for the use of the Municipal Hospital and its facilities. In fixing such charges and in all other business practices the commission shall have in mind this purpose: that the Municipal Hospital shall be self sustaining insofar as proper business practices can make it so. To accomplish that purpose the commission among other business practices may provide for advance payments and the furnishing of security. * * * " (Emphasis supplied)

The charter does recognize that tax money may be necessary for the water and light department as Sec. 131 provides for:

> " * * * **'Water and light fund' into which shall be paid** all money derived from the sale of any property acquired for or used in connection with the water, heat, power and light plants of the city or either of them, and the **proceeds of all taxes** and special assessments levied on account of or in connection with such water, heat, power and light plants, or either of them; * * * " (Emphasis supplied)

and as to the hospital, Sec. 200-E provides in part:

> " * * * The **council shall make** an annual levy for the detention hospital fund and make an **annual levy for the municipal fund,** in such amounts as it deems advisable having in mind all needs of the city and the limitations on taxing power. * * * " (Emphasis supplied)

The 1957 amendment, supra, provides for a tax levy, **if necessary,** in excess of any limitation as to tax levy or per capita expenditure imposed by any law or charter. Whether such a tax levy would be necessary in view of the duties imposed on the water and light commission to fix and maintain rents and rates to defray the cost of operation and maintenance and the obligation placed on the hospital commission to fix charges so that the municipal hospital shall be self sustaining, depends on questions of fact and involves administrative determinations. A city may, if necessary, levy a tax, even in excess of statutory or charter limitations, to provide group insurance under M. S. 471.61, as amended, for municipal employees in the water and light department and city hospital.

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.
Spec. Asst. Attorney General.

Virginia City Attorney.
October 4, 1957. 59-A-25

93

Special Assessment—Installments—M. S. A. 429.061, subd. 3, construed in situation where property owner wishes to pay entire remaining balance of assessment at one time. Where assessment roll is retained by city clerk, installment in process of collection, including interest to end of year in which paid, shall be paid to county treasurer. The remaining principal balance of assessment, including installment to become due the following January, should be paid to municipal treasurer without interest. Such payment by property owner authorized any time during year without regard to certification of installments by municipal clerk to county auditor.

Facts

"The City of Fridley has been using Section 429.061 of the Minnesota Statutes to certify special assessments for local improvements to the Anoka County Auditor. The City maintains the complete assessment roll, and certifies annually the assessment that is due and payable during the following year. It is my understanding that the assessment which will be due in 1958 has to be certified by our city office to the Anoka County Auditor by November 1, 1957. A property owner now wants to pay up his assessments in full. There is a residue of assessments for future years, which we have retained. We appreciate that under the statute he can pay up that residue to the City Treasurer. However, the installment, which does not become due until January 1, 1958, has been certified to the County Auditor."

Questions

"1. Can the taxpayer pay to the City Treasurer the assessment due after January 1, between the time that its certification leaves the city office and prior to January 1, when it becomes due and payable in the office of the County Treasurer?

"2. If it can be paid to the City Treasurer, so long as interest has been added through December 31, 1957, may the city office deduct from the assessment roll the additional interest which has been added to include interest due up to December 31, 1958?"

Opinion

For convenience, both questions are answered together.

M. S. A. 429.061 provides in pertinent part as follows:

"Subd.2. * * * The assessment, with accruing interest shall be lien upon the property included therein, concurrent with general taxes, and shall be payable in equal annual instalments extending over such period, not exceeding 20 years, as the council determines. The first instalment shall be payable on the first Monday in January next following the adoption of the assessment unless the assessment is adopted too late to permit its collection during the following year. All assessments shall bear interest at such rate as the council determines, not exceeding six percent per annum. **To the first instalment shall be added interest on the entire assessment from the date of the resolution levying the assessment until December 31st of the year in which the first instalment is payable. To each subsequent instalment shall be added interest for one year on all unpaid instalments.**

"Subd. 3. After the adoption of the assessment, the clerk shall transmit a certified duplicate of the assessment roll with each instalment, including interest, set forth separately to the county auditor of the county to be extended on the proper tax lists of the county; but **in lieu of such certification, the council may in its discretion direct the**

clerk to file all assessment rolls in his office and to certify annually to the county auditor, on or before October 10 in each year, the total amount of instalments of and interest on assessments on each parcel of land in the municipality which are to become due in the following year. * * * All assessments and interest thereon shall be collected and paid over in the same manner as other municipal taxes. The owner of any property so assessed may, at any time prior to certification of the assessment or the first instalment thereof to the county auditor, pay the whole of the assessment on such property, with interest accrued to the date of payment, to the municipal treasurer, except that no interest shall be charged if the entire assessment is paid within 30 days from the adoption thereof; and, except as hereinafter provided, he may at any time thereafter pay to the county treasurer the entire amount of the assessment remaining unpaid, with interest accrued to December 31 of the year in which such payment is made. If the assessment roll is retained by the municipal clerk, the instalment and interest in process of collection on the current tax list shall be paid to the county treasurer and the remaining principal balance of the assessment, if paid, shall be paid to the municipal treasurer." (Emphasis supplied)

It is clear that if a certified duplicate of the assessment roll is transmitted by the municipal clerk to the county auditor, an assessed property owner would thereafter have the right to pay at any time during a year the entire assessment remaining unpaid, paying interest only to December 31 of the year in which such payment is made. Thus, for example, if he pays the entire remaining assessment on December 30, 1957, interest would be payable only to December 31, 1957, and not to December 31, 1958.

A city may, as in the instant situation, elect to keep the assessment roll in its possession so that it only certifies annually to the county auditor on or before October 10 the installments and interest which will become due on the following January 1st. But that does not constitute a valid reason for penalizing a landowner, who wishes to exercise his right of paying the remaining balance of the assessment at any time, by requiring that he pay interest for the following year as well when he makes such payment during November or December. It would be inequitable to treat him any differently than he would be treated where the county auditor has possession of the assessment roll, and we do not so construe Section 429.061.

The county acts merely as the collecting agent for the city. The last sentence of subd. 3 of the statute specifically provides that where the assessment roll is retained by the municipal clerk, the installment and interest in process of collection on the current tax list shall be paid to the county treasurer and the remaining principal balance of the assessment shall be paid to the municipal treasurer. Prior to January 1, 1958, the only installment in the process of collection would be the installment due January 1, 1957, which includes interest to December 31, 1957. If the municipal clerk has already certified next year's installment of principal and interest to the county auditor at the time the property owner pays the assessment in full, that fact is immaterial in so far as the landowner is concerned. The

following year's installment with interest to December 31, 1958, is neither due nor in the process of collection in 1957.

Therefore, we construe Section 429.061 to require a landowner who wishes to pay the entire remaining amount of assessment before the end of 1957 to pay to the county treasurer the installment due January 1, 1957, with interest to December 31, 1957, if same has not already been paid, and to pay the remaining principal balance of the assessment, including the installment of principal due on January 1, 1958, to the municipal treasurer. If the entire remaining balance of the assessment is thus paid at any time during 1957, the interest on the assessment should only be paid to December 31, 1957.

Of course, in that event and in order that the county (as the city's collecting agent) may then have full and correct information as to the total installments of and interest on the assessments which are to become due in January, 1958, in order to properly extend the tax lists, the municipality should promptly de-certify the particular 1958 installment of principal and interest or otherwise notify the county auditor that the particular 1958 installment has been paid by the designated landowner. This is a matter of bookkeeping for the municipality and the county to work out.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.
Assistant Attorney General.

Fridley City Attorney.
December 13, 1957. 408-C

94

Taxation—City where less than 50% but more than 25% of its assessed valuation consists of iron ore, may levy for general tax purposes, an amount in excess of the $54.00 per capita limitation, an amount resulting from the formula prescribed by M. S. 1957, Section 275.11, Subd. 3 (L. 1957, c. 710, Section 3).

Facts and Comment

"A city where more than 50% of the assessed valuation consisted of iron ore, prior to 1957, regularly levied taxes for all general and special purposes in accordance with the provisions of M. S. 1953, Section 275.11, Subds. 1 and 2. In the year 1957 the percentage that the valuation of iron ore bore to the total assessed valuation of the property in the city fell below 50%.

"Laws 1957, Chapter 710 added Subdivision 3 to M. S. 1953, Section 275.11, ostensibly for the purpose of providing authority for cities and villages having more than 25%, but less than 50% iron ore valuation, to levy a tax in addition to the levy provided for in M. S. A. Section 275.11, Subd. 1.

"Because the references in Subdivision 3 are to limitations imposed by the village code, the question arises as to the applicability of Subdivision 3 to cities."

Question

"May a city, where less than 50% but more than 25% of its assessed valuation consists of iron ore, levy for all general and special purposes, in addition to the amount of $54.00 per capita provided by M. S. A. Section 275.11, Subd. 1, an additional tax in accordance with the provisions of M. S. A. Section 275.11, Subd. 3?"

Opinion

M. S. 1957, Section 275.11 in its entirety reads:

"Subdivision 1. The total amount of taxes levied by or for any city or village, for any and all general and special purposes, exclusive of taxes levied for special assessments for local improvements on property specially benefited thereby, shall not exceed in any year **$54.00** per capita of the population of such city or village.

"Sub. 2. In cities and villages where more than 50 percent of the assessed valuation consists of iron ore, in addition to the levy provided for in subdivision 1, and in addition to any charter limitation, an additional levy may be made for general fund purposes as herein provided:

"If the Revised Consumers Price Index, as published by the United States Department of Labor, Bureau of Labor Statistics, for the City of Minneapolis (or if no such index is published for the City of Minneapolis, for the nearest city to Minneapolis for which such index is published), as of December 15 of any year (or for the date nearest to December 15 if no such index is published as of December 15), shall be above 102 (using the average for the years 1947-1949 as a base), the maximum levy permitted by subdivision 1 or by charter shall be increased by 3⅓ percent for each of the first 6 points that said index may be increased and by one percent for each additional point increased above 6. A fractional point increase shall be disregarded if less than one-half point and treated as one point if one-half point, or more.

"Subd. 3. In cities and villages where more than 25 percent of the assessed valuation consists of iron ore, in addition to the levy provided for in Minnesota Statutes, Section 412.251 an additional levy may be made for general fund purposes as herein provided:

"If the Revised Consumers Price Index, as published by the United States Department of Labor, Bureau of Labor Statistics, for the city of Minneapolis (or if no such index is published for the city of Minneapolis, for the nearest city to Minneapolis for which such index is published), as of January 15 of any year (or for the date nearest to January 15 if no such index is published as of January 15), shall be above 102 (using the average for the years 1947-1949 as a base), the maximum levy permitted by Section 412.251 shall be increased by $10.80 per capita for the first 6 points that said index may be increased and by $.54 per capita for each additional point increase above 6. A fractional point increase shall be disregarded if less than one-half point and treated as one point if one-half point or more. Provided that except as otherwise specifically provided, the total levy of any such village including the additional levy herein authorized, shall not exceed the limitations provided for by Subdivisions 1 and 2 of this section." (Emphasis constitutes amendment by L. 1957, c. 710)

Examination of the chronology of this statute discloses its origin as L. 1921, c. 417, comprising 6 sections, exclusive of Section 7, which prescribes the effective date of the act. In connection with the question here considered, it is significant to note the title which reads "An act to limit the annual levy of taxes in **all cities, villages,** and **school districts in the state** of Minnesota". (Emphasis supplied) Sections 1 to 6, inclusive, of this act are coded in Mason's Minn. Statutes 1927 as Sections 2061, 2062, 2063, 2064, 2065 and 2066 respectively.

The first amendment to the original law was by L. 1929, c. 206, which fixed a per capita limitation on the annual tax levy for all cities and villages for general and special purposes, exclusive of taxes levied for local improvements, in the amounts and for the years therein specified. This amendment applied generally to all **cities** and **villages**. School districts were not included therein.

The next amendment was by L. 1941, c. 543, which amended Mason's Supplement 1941, Section 2061[1] and Mason's Minn. Statutes 1927, Section 2062[2]. The amendment of Section 2061 by c. 543 fixed a per capita limitation on the annual tax levy by any **city** or **village** having a population in excess of 3,000 for general and special purposes, exclusive of taxes levied for special assessments.

The next amendment was by L. 1951, c. 539, by adding what appears as M. S. 1957, Section 275.11, Subd. 2, and which pertains to and authorizes **cities** and **villages** where more than 50 percent of the assessed valuation consists of iron ore, to levy in addition to the per capita limitation contained in Subd. 1 of said section ($50.00) an additional amount resulting from the formula as prescribed by the amendment.

The last amendment was by L. 1957, c. 710, here involved. This amendment increased the per capita limitation of $50.00 as specified in Section

[1]L. 1921, § 1, as amended.

[2]L. 1921, § 2.

275.11, Subd. 1, to $54.00. Subd. 2 of this section was not affected. Consequently, **cities** or **villages** where more than 50 percent of the assessed valuation consists of iron ore, may levy a tax in excess of the $54.00 per capita limitation, in conformity with the formula prescribed in said Subd. 2.

Pertinent to your question is that part of L. 1957, c. 710, Subd. 3 which reads:

> "In **cities** and **villages** where more than 25 percent of the assessed valuation consists of iron ore, in addition to the levy provided for in Minnesota Statutes 1953, section 412.251 an additional levy may be made for general fund purposes as herein provided: * * * " (Emphasis supplied)

It seems logical to conclude from the above language that the legislature intended that this amendment should become operative and apply to **cities** and **villages** in cases where more than 25 percent but less than 50 percent of the assessed valuation consisted of iron ore. Under Subd. 2 of this section, cities or villages having an assessed valuation of more than 50 percent of iron ore are entitled to make an additional annual tax levy as therein provided.

We believe that the reference to M. S. 1953, Section 412.251, in the amendment applies only to villages and that any city having an assessed valuation, of which not more than 50 percent nor less than 25 percent consists of iron ore, is authorized to levy an annual tax in addition to the per capita limitation of $54.00, such an amount as will result by applying the formula provided in Chap. 710.

In reaching this conclusion, we are guided by the rules laid down by the legislature for interpreting statutes which are in part as follows:

> M. S. 1957, Section 645.16. "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.
>
> "When the words of a law 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.
>
> "When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:
>
> "(1) The occasion and necessity for the law;
>
> "(2) The circumstances under which it was enacted;
>
> "(3) The mischief to be remedied;
>
> "(4) The object to be attained;
>
> "(5) The former law, if any, including other laws upon the same or similar subjects;
>
> " * * * * "

When the legislature recognized the need of authorizing tax levies in excess of per capita limitations to municipalities having iron ore deposits subject to tax assessments and levies, it included all cities and villages where more than 50 percent of the assessed valuation consisted of iron ore. Section 275.11, Subd. 2. We believe the legislature intended the 1957 amendment, Chap. 710, to be coextensive to the provisions in Section 275.11, Subd. 2, in its application. Consequently, any city or village where more than 50 percent of its assessed valuation consists of iron ore, may levy a tax in excess of the per capita limitation, an amount in accord with the formula prescribed by Section 275.11, Subd. 2, and in cases where the assessed valuation of a city or village consists of more than 25 percent and less than 50 percent of iron ore, an annual tax in excess of the per capita limitations of $54.00 may be levied, in accord with the formula prescribed by Chap. 710.

If the legislature did not intend that cities should be entitled to make an annual tax levy under the provisions of Chap. 710, then there was no need nor necessity for including "In cities," the first two words occurring in the amendment.

Furthermore, we believe that our conclusions are in accord with the principles of law applied by the court in construing statutes so as to make effective the legislative intent. The rule of reasonable rather than strict construction should be observed in the instant case.

We believe that any holding by the court inconsistent with the reasonable rule of construction was set at rest by the decision in the case of **Governmental Research Bureau, Inc. v. Borgen**, 224 Minn. 313, 28 N. W. 2d 760, when the court on p. 319 said:

> " * * * Cooley in his work on Taxation (4th ed.) (Vol. 2) Section 505, after pointing out the distinction to be made between penalty or forfeiture provisions and those relating to the assessment and collection of the tax, says at p. 1123:
>
> " ' * * * Revenue laws are not to be construed from the standpoint of the taxpayer alone, nor of the government alone.' And at p. 1128: ' * * * But there can be no propriety in construing such a law either with exceptional strictness amounting to hostility, or with exceptional favor beyond that accorded to other general laws. * * * The construction, without bias or prejudice, should seek the real intent of the law; * * *.' And at p. 1130: 'The provisions of tax laws, like those of other statutes, are to be given a reasonable construction.'
>
> "The better rule, and the one we adopt, is that statutes imposing taxes and providing means for the collection of the same should be construed strictly insofar as they may operate to deprive the citizen of his property by summary proceedings or to impose penalties or forfeitures upon him; but otherwise tax laws ought to be given a reasonable construction, without bias or prejudice against either the taxpayer or the state, in order to carry out the intention of the legislature and further the important public interests which such statutes subserve."

To the same effect see **State ex rel. County of Hennepin v. Brandt**, 225 Minn. 345, 351, 31 N. W. 2d 5.

The rule of statutory construction which we have applied, is in harmony with the rule stated in Dunnell's Minn. Digest, 3rd Ed., Vol. 17, Section 8985, as follows:

> " * * * In construction of statutes, transposition of words is authorized only where it is necessary to give the statute meaning and avoid absurdity, where it is necessary to make the act consistent and harmonious throughout, where the mistake is obvious, or where it is apparent in the face of the statute that the word or phrase has been misplaced through inadvertence. A statute is not to be defeated because it is imperfectly drawn. It must be assumed that the legislature intended to enact a valid and effective law. **And the duty devolves upon the courts to ascertain the legislative purpose from a consideration of the act as a whole, and to interpret it, if possible, so that it will accomplish the intended purpose. To bring this** about obvious mistakes and omissions may be corrected or supplied; and contradictory expressions, and language of doubtful import should be given a meaning consistent with the legislative intention as disclosed by the act taken as a whole. * * * " (Emphasis supplied)

In the instant case it seems clear that the legislature enacted Chap. 710 for the purpose of affording relief to cities and villages which fall within the category where more than 25 percent and less than 50 percent consists of iron ore.

Although not pertinent to your question, we point out that the first paragraph of M. S. 1957, Section 412.251, in part reads:

> " * * * In calculating such limit property used for homestead purposes shall be figured as provided in Minnesota Statutes, Section 273.13, Subdivision 7 (2) * * * " (Emphasis supplied)

An examination of Section 273.13 discloses that it does not contain Subdivision 7 (2). Such reference should have been to Section 273.13, Subdivision 7a and not Subdivision 7 (2).

In our opinion, the foregoing requires an affirmative answer to your question.

MILES LORD,
Attorney General

VICTOR J. MICHAELSON,
Spec. Asst. Attorney General

Public Examiner.
October 30, 1958.

63-B-20

95

Private Cemeteries—Assessments for local improvements. Lands surveyed and platted, laid out and dedicated as a private cemetery in accordance with M. S. 307.01, 307.02 and 307.09 are exempt from special assessments so long as they remain appropriated to the use of a cemetery. Survey, platting and dedication of original tract for private cemetery is a question of fact. Opinion 408c, July 11, 1955 (1956 Report of Attory General) discusses rules for special assessments.

Facts

"I have a rather urgent request for your written opinion on the matter of assessing the privately owned St. Mary's Cemetery of Sleepy Eye, Minnesota, for water and sewer improvements along Northern Ave., abutting the cemetery. I am enclosing plats, citation, etc. that you may have the information available at this time."

Questions

"1. Do you believe the hereto attached plat of the 4-acre tract and the certification thereon, being it was recorded, are sufficient to exempt the property from assessment?

"2. In 1946 some 11 acres of adjoining lands, to the North and west of the original cemetery, were annexed. If you determine the Statute has been met as to the original tract, would the exemption extend to the annexed part on which there are burials?

"3. Specifically, do you think there is sufficient 'dedication' in view of the fact that in addition to the original plat as certified to and attached, there are several other plats, some very old, that name the cemetery?

"4. While it may be impossible to say more than that 'It is for the determination of the Common Council whether or not the lands are benefited therefrom, which determination is subject to review by the Courts,' would you kindly comment thereon as a guide to the Council, as to what benefits would be derived, and the extent?

"5. Any other comments that may be made on questions that present themselves to you."

The copy of the plat of the so-called 4-acre tract attached to your letter contains this certificate:

"I, George Boock, County Surveyor of Brown County, Minnesota, do hereby certify that at the request of Hyacinth Couturier and Rosalie Couturier, proprietors of the part of Lots 1 and 2 and of the West Half of the Northeast Quarter of Section Twenty-nine (29), Township One Hundred and Ten (110), Range Thirty-two (32) in Brown County, Minnesota, I have surveyed the same and subdivided same into Sublots

numbered from One to Fourteen respectively, and of the sizes as shown on the within plat. That I have fixed stone monuments from which to make further surveys at the following points as shown upon said plat, viz: One stone at the Northeast corner of Sublot One (1), one stone at the center of said Section Twenty-nine (29) and one stone at the Southeast corner of Sublot Eight (8), being at the Southeast corner of Catholic Cemetery, which stone monuments are all designated on the within plat.

Geo. Boock,
County Surveyor of Brown County,
Minnesota"

(Acknowledgment)

On the south, west and north boundary lines of the platted area appear the figures 6.95, 5.35 and 8.21, respectively. The east boundary line bears the following: "N. 22° 23′ 5.35". In the center of such platted area appears the following: "S. 8 4 ac.," while in the southeast corner appears "X Stone Monu.".

Also attached to your letter is a plat or survey of an irregular shaped tract, the courses and distances being shown thereon. In the lower portion of the platted area appear the words "original cemetery" and immediately below and apparently outside of the platted area appear the words "old cemetery."

Opinion

1. M. S., c. 307, relating to private cemeteries, provides:

307.01:

"Any private person and any religious corporation may establish a cemetery on his or its own land in the following manner: The land shall be surveyed and a plat thereof made. A stone or other monument shall be established to mark one corner of such cemetery, and its location shall be designated on the plat. The plat and the correctness thereof shall be certified by the surveyor, his certificate endorsed thereon, and with such endorsement shall be filed for record with the register of deeds in the county where the cemetery is located, showing the area and location of the cemetery. * * * "

307.02:

"When such plat has been recorded, every donation or grant of lands therein to the public, to any religious corporation, or to any individual, shall be deemed a conveyance of such lands, subject to the conditions and restrictions, if any, contained therein. Every conveyance of such lots shall be expressly for burial purposes, and the lands designated on the plat as streets, alleys, ways, commons, or other public uses shall be held by the owner of the cemetery in trust for the uses and purposes thereon indicated."

307.09:

"All lands, not exceeding 100 acres in extent, and in the case of cemeteries owned and managed by religious corporations, or corporations solely owned and controlled by and in the interest of any religious denomination, 300 acres in extent, so laid out and dedicated as a private cemetery, shall be exempt from public taxes and assessments, * * * so long as the same remains appropriated to the use of a cemetery; * * * "

In our opinion the so-called plat and the certificate of the surveyor forming a part thereof, as evidenced by the copy accompanying your letter, satisfies the requirements of Section 307.09 and, if "dedicated as a private cemetery," would be exempt from public taxes and assessments as provided in Section 307.09. Whether there has been such a dedication is a question of fact which is for the determination of the proper public authorities. The use of the platted area for burial purposes is, we believe, a material fact to be considered in such determination. See in this connection opinion O. A. G. 414-D-4, February 23, 1949, printed in 1950 Report of Attorney General as No. 222, copy enclosed.

2. The adjoining 11-acre tract not having been surveyed as a part of, and not having been included in the original plat and certificate, the owner thereof, whether a private person or a religious body, would, in our opinion, be required to again comply with Section 307.01 and dedicate the tract as a private cemetery pursuant to Section 307.09 before it would be entitled to exemption from public taxes and assessments. We do not believe that the initial survey, platting and dedication of the 4-acre tract extends to additions later made thereto.

3. As indicated in "1" above, the sufficiency of a dedication as a private cemetery is a question of fact and we are not in a position to say that any particular fact or facts are sufficient to constitute such a dedication.

It is not a requirement of M. S., c. 307 that the word "cemetery" or words of similar import appear on the plat. But, if such words do appear thereon, they, too, are to be considered in the determination of the question of dedication.

4-5. With reference to your fourth and fifth questions, see opinion O. A. G. 408-C, July 11, 1955, printed in 1956 Report of Attorney General as No. 100, copy enclosed. This opinion discusses the rule and various formulae with reference to special assessments for benefits resulting from local improvements. See also "The New Minnesota Improvement—Assessment Procedure," 38 Minn. Law Rev. 582, 598.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Sleepy Eye City Attorney.
March 3, 1958. 408-C

96

Cities—Funds—Temporary Transfer of—Money may be temporarily borrowed from special fund for benefit of general fund if such money is idle and will not be needed by special fund during loan period, provided it is replaced during same fiscal year from proceeds of current tax levy. No diversion from special fund in such circumstance.

Facts

"Biwabik is a homerule-charter city of the Fourth Class. You and the Secretary of State have copies of the city charter.

"Biwabik, as other Range municipalities, is on a so-called cash basis system, whereby no debts may be carried beyond the end of each calendar year. Claims against it are paid by check and not by warrants. Because it has little or no cash from January 1 of each year until the tax money comes in by advance County Auditor checks in June and August of each year, it has only two sources from which to get operating funds for its general fund; namely,

"1. to issue certificates of indebtedness which in private life, would be promissory notes,

or

"2. transfer temporarily money from some available fund to the general fund and pay it back from the general fund in June and August.

"Source No. 1 above requires the payment of interest on the Certificate of Indebtedness.

"Source No. 2 requires no payment of interest.

"The law for source No. 1 above is M. S. Sec. 275.20.

"I can find no charter, statutory or other type of law for the No. 2 system.

"It is possible at the moment in Biwabik to use the No. 2 system financially (although perhaps not legally), for Laws 1955, Ch. 638, permitted Biwabik to have a Permanent Improvement and Replacement Fund (with an excess levy above per capita limitations of $7.50 per capita) besides the Charter Permanent Improvement Fund of $6000.00 per year, Charter 33 (h). Laws 1955, Ch. 638 has been interpreted as authority for permitting Biwabik to bond for a lump sum to be paid off annually by a levy of $7.50 per capita per annum. This bond money was then put in the city Charter Permanent Improvement Fund where $6000.00 goes annually from the General Fund and where $7.50 per capita goes annually from Laws 1955, Ch. 638, to pay the principal and interest on a ten year bond basis. Some of the money has been spent.

Some has been ear-marked to pay for a street job contract entered into but not yet completed as to the work."

Question

"May Permanent Improvement Fund money be transferred temporarily from the Permanent Improvement Fund to the General Fund to save the necessity of issuing Certificates of Indebtedness between January and June or August?"

Opinion

Aside from authority which the City of Biwabik may have by statute to issue certificates of indebtedness in order to obtain operating funds for the ensuing year, Section 29 of your charter, at page 14, provides authority to do so in anticipation of the collection of taxes already levied. We therefore agree that the City does have such source of operating funds available to it.

Turning to consideration of possible transfers of money from an available fund to the general fund, the well settled rule is that, unless specifically authorized by statute or charter, special funds cannot be used per se by a municipality for general governmental expenses or for any other different purpose. See O. A. G. 624-A-6, May 29, 1953, copy enclosed; McQuillin on Municipal Corporations, 3rd Ed., Section 39.45 and the first paragraph of Section 39.50; and **In Re Settlement of Wrobleski**, 204 Minn. 264, 283 N. W. 399.

Section 33 of the Biwabik Charter provides for a general fund and for certain special funds including the Permanent Improvement Fund, and further provides for transfers from the general fund to the various special funds. There is, however, no language in the charter providing for transfers from the Permanent Improvement Fund or any other special fund to the general fund; nor does L. 1955, c. 638, provide for transfers from the Permanent Improvement and Replacement Fund to the general fund. Thus, it is clear that a permanent transfer to the general fund would here be a diversion of money from the purposes for which intended and would be unauthorized.

It is also the majority view that, unless authorized by statute or charter, a municipality has no power to **borrow** from one municipal fund and use the money for other purposes if the amount borrowed will be replaced out of the **next** tax levy. See McQuillin on Municipal Corporations, 3rd Ed., Section 39.50, and **Welk v. Wausau**, 143 Wisc. 645, 128 N. W. 429.

However, your present inquiry apparently involves a proposal to temporarily borrow from the Permanent Improvement Fund or some other available special fund for the benefit of the general fund and to replace the money during the same fiscal year out of proceeds from the **current** tax levy. In this regard, the case of **People v. Westminister Building Corp.**, 361 Ill. 153, 197 N. E. 573, holds that it is not an unlawful diversion for a municipality to borrow idle money temporarily from one fund for the bene-

fit of another fund when there is a stated and sufficient income to repay the sum borrowed, since the former fund is not thereby depleted; the case of **People v. N. Y. Cent. R. Co.**, 355 Ill. 80, 188 N. E. 807, holds that municipal liabilities accruing in the year for which the tax levy is made may be paid out of money temporarily borrowed from other idle funds generally; and the recent case of **Town of Thornton v. Winterhoff**, 406 Ill. 113, 92 N. E. 2d 163, holds that the practice of temporarily borrowing by one fund from another fund to carry on essential governmental functions is not illegal or unauthorized so long as the borrowed funds are returned and are available when needed. See also **Gates v. Sweltzer**, 347 Ill. 353, 179 N. E. 837, 840.

It is no doubt good business for a municipality to avoid payment of interest when reasonably possible. On the other hand, diversion of money from a special fund cannot be condoned and your question is answered in the affirmative only if the temporary borrowing will not result in a deprivation of or disadvantage to such special fund. If the money to be borrowed is in fact idle money, and if the council reasonably determines that such money will not be needed in the special fund during the period for which borrowed, and if the money will in fact be replaced from the proceeds of the **current** tax levy during the same fiscal year in which borrowed, then there would appear to be adequate protection for the special fund.

See our analogous opinion O. A. G. 469-A-8, February 19, 1957, copy enclosed, authorizing a temporary loan from a permanent improvement fund to pay a judgment against the municipality when the tax to pay such judgment had already been levied but not yet collected, the purpose being to save interest. Cf. also our opinion O. A. G. 52-A-22, November 25, 1935, copy enclosed.

The preferable procedure, of course, would be to issue certificates of indebtedness in anticipation of the collection of taxes already levied, as the framers of the charter contemplated; and it would then be good business to invest idle money in any of the special funds in authorized securities as permitted by both Section 33 (h) of the charter and M. S. 471.56.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.
Assistant Attorney General.

Biwabik City Attorney.
June 3, 1956. 59-A-22

97

Public Records; destruction of by city, authority under M. S. 465.63 as amended Laws 1957, C. 139 and M. S. 138.04.

Facts

"The clerk (city clerk of St. Cloud) has applied to the Council for permission to destroy the following:

"1. Cashier's miscellaneous receipts before January 1, 1950,

2. Assessment receipts before January 1, 1950,

3. Water receipts and connections before January 1, 1954,

4. Cancelled checks before January 1, 1950,

5. Purchase orders before January 1, 1950,

6. Relief purchase orders before January 1, 1950,

7. Water ledger cards before January 1, 1950,

8. Water bill stubs before January 1, 1954,

9. General bills with purchase orders before January 1, 1950,

10. Bank statements before January 1, 1950,

11. Special assessment receipts before January 1, 1950,

12. Election ballots and miscellaneous correspondence pertaining thereto before January 1, 1952,

13. Applications for licenses and permits before 1952,

14. Worksheets before 1956."

Comment

"Section 205.81, M. S. A., covers ballots, but I can find no statute in respect of destroying general municipal records."

Question

"Does the council have power to authorize the clerk to destroy the foregoing listed instruments?"

Opinion

Minnesota Statutes, Section 465.63, as amended by Laws 1957, C. 139, reads as follows:

"Subdivision 1. The officers of any city, and of any board or commission of such city, including the board of directors of trusts of any public charitable hospital, may destroy the following records of the city or such public charitable hospital:

(1) Claims and vouchers paid by the city or public charitable hospital more than seven years prior to such destruction;

(2) Receipts, miscellaneous papers, and correspondence bearing dates more than seven years prior to destruction;

(3) Orders and checks paid more than seven years prior to destruction;

(4) Contracts for the purchase of expendable supplies bearing dates more than seven years prior to destruction;

(5) Payrolls bearing dates more than seven years prior to destruction.

"Subd. 2. The officer having custody of said records shall first obtain written approval of the city attorney, or if the records belong to a board or commission having its own attorney, then the approval of such attorney. The officer having custody of said records shall then request in writing the further approval of the council, board or commission. If the council, board or commission approves the request, the approval shall be in the form of a resolution listing the classes of records authorized to be destroyed and the range of dates of the records in each class. A copy of the resolution consenting to the destruction of such records shall be sent to the Minnesota State Historical Society. If no petition or application requesting the records under Minnesota Statutes 1949, Section 138.04, is received by the city within 30 days after mailing of the resolution, the records shall be destroyed by the officer having custody.

"Subd. 3. This section is supplementary to other statutory or charter authority to destroy obsolete city records and does not prevent destruction of such records at an earlier time or the destruction of other records when authorized by other statutory or charter provision."

The above quoted statute authorizes the destruction of the type of records specified in Subd. 1, Subparagraphs 1 through 5. The records must be at least seven years old. Whether the materials enumerated in your request, which are over seven years old, fall within the purview of the above statute is a question of fact upon which this office does not rule.

In addition to the above mentioned statute, I call your attention to M. S. Sec. 138.04, which reads as follows:

"RECORDS, HOW TRANSFERRED TO SOCIETY. Any public official is hereby authorized, upon the conditions hereinafter provided, to turn over to the **Minnesota state historical society**, such records, files, documents, books, and papers in his custody as are not in current use. The society shall present to such official a petition or application in which such records, files, documents, books, or papers shall be described in terms sufficient to identify the same, which petition shall be approved by the governor, in case of a state officer, by the board of county commissioners, in case of a county officer, and by the governing body of any city, village, or town in case of a city, village, or town officer, which application shall be filed in the office from which the records, files, documents, books, or papers have been turned over to

the society. Sections 138.03 and 138.04 shall not repeal or annul the provisions of section 480.09."

The reference in M. S. 138.04 to the Minnesota State Historical Society should now be read as referring to the State Archives Commission. See M. S. Section 138.043.

Enclosed please find an instruction sheet for preparing the application for disposal of city records, and three copies of the application itself.

MILES LORD,
Attorney General.

ROBERT J. STENZEL,
Spec. Asst. Attorney General

St. Cloud City Attorney.
June 18, 1957. 851-F

98

Cities — Plumbing — Water Softener — City of Robbinsdale is limited by M. S. A. 326.40 as modified by L. 1957, c. 921 amending M. S. 326.38. Cannot permit "installing plumbing" without complying with M. S. 326.40. Can permit installation specified by L. 1957, c. 921.

Facts

"The City Council of the City of Robbinsdale is contemplating adopting an ordinance which would allow any person to do the work necessary to install private water softeners. The City of Robbinsdale has a population exceeding 5,000 and has its own system of water works."

Comments

"Section 326.40 of the Minnesota Statutes requires that cities meeting such requirements shall not allow any person, firm or corporation to engage in plumbing work unless licensed by the State Board of Health.

"I believe your office has previously ruled that the work required to install water softeners is plumbing work. The Honorable Irving Brand made a finding to that effect in the case of Culligan Soft Water Service-Richfield, Inc. vs. Village of Bloomington et al, in a decision issued in December of 1956. A statute was passed in the 1957 session of the Legislature (Chapter 921), which, apparently, provides that some installation of water softeners can be done by persons who are not duly licensed plumbers. The legislation does not appear to be clear with

respect to exactly what installation work of this nature can be done by persons who are not plumbers.

"I believe that some municipalities have adopted ordinances which purport to allow any person, whether a plumber or not, to do all installations of water softeners, so long as a permit for each specific installation is obtained from the municipality."

Question

"Can the City of Robbinsdale adopt an ordinance which would permit any person, firm or corporation to install water softeners, whether or not such person, firm or corporation is a duly licensed plumber, so long as a permit for each specific installation is secured from the City?"

Opinion

M. S. A. 326.40 provides in part:

"In any city or village now or hereafter having 5,000 or more population, according to the last federal or state census, and having a system of water-works or sewerage, no person, firm, or corporation shall engage in or work at the business of a master plumber or journeyman plumber unless licensed to do so by the state board of health. * * * "

and

"In any such city or village no person, firm or corporation shall engage in the business of installing plumbing * * * unless at all times a licensed master plumber, who shall be responsible for proper installation, is in charge of the plumbing work of such person, firm, or corporation."

You have informed us that the city of Robbinsdale has a population exceeding 5,000 and has its own water-works. The city of Robbinsdale falls within the purview of the statute.

This office in an opinion O. A. G. 338-A, May 17, 1949, ruled that the question whether installation of a water softener is plumbing is a question of fact. The following portion of said ruling was quoted in **State v. Finley**, 242 Minn. 288, p. 292, 16 N. W. 2d 776:

"It is manifest that different situations may require different kinds of work. In installing the water softener in one house it may be necessary to cut water pipes, cut lengths of pipe and thread the same. In another situation it may be that all that is necessary is to screw a pipe already threaded into a union or other connection. If all that was required is to screw one pipe already threaded into another, I do not think such work would constitute plumbing but if it is necessary to measure and cut pipes and to thread the same and do other work, I would consider that the employee was engaged in plumbing within the meaning of your ordinance."

I also enclose copies of opinions O. A. G. 338-A, March 31, 1947, and October 24, 1946, dealing with installation of water softeners as plumbing within the purview of the statute. Each installation may involve a separate fact situation but if an installation of a water softener is "installing plumbing" then the person doing such installation in the municipality under M. S. 326.40 must comply with said statute.

M. S. 1953, Section 326.38 provided:

> "Any city or village having a system of water-works or sewerage, or any town in which reside over 5,000 people exclusive of any villages located therein, may, by ordinance, adopt local regulations providing for plumbing permits, bonds, approval of plans, and inspections of plumbing, which regulations are not in conflict with the plumbing standards on the same subject prescribed by the state board of health. No city or village or such town shall prohibit plumbers licensed by the state board of health from engaging in or working at the business, except cities and villages which, prior to April 21, 1933, by ordinance required the licensing of plumbers."

L. 1957, c. 921 amended said section by adding:

> "Any city or village by ordinance may prescribe regulations, reasonable standards, and inspections and grant permits to any person, firm, or corporation engaged in the business of installing water softeners, who is not licensed as a master plumber or journeyman plumber by the state board of health, to connect water softening and water filtering equipment to private residence water distribution systems; where provision has been previously made therefor and openings left for that purpose or by use of cold water connections to a domestic water heater; where it is not necessary to rearrange, make any extension or alteration of, or addition to any pipe, fixture or plumbing connected with the water system except to connect the water softener, and provided the connections so made comply with minimum standards prescribed by the state board of health."

The legislature, by such amendment, authorized certain cities and villages to permit by ordinance **certain types of** water softener installations by persons not licensed as a master or journeyman plumber by the state board of health. Thus, even though such work might have fallen within the purview of 326.40 as "installing plumbing," these specific installations may be permitted without compliance with Section 326.40, by municipal ordinance. This office can be no more explicit than the legislature was in 1957 as to what is permitted, namely, "to connect water softening and water filtering equipment to private water distribution systems" (a) **"where provision** has been previously made therefor and openings left for that purpose or" (b) "by use of cold water connections to a domestic water heater"; and then only "where it is not necessary to rearrange, make any extension or alteration of, or addition to any pipe, fixture or plumbing connected with the water system except to connect the water softener, and provided the

connections so made comply with minimum standards prescribed by the state board of health."

A municipality included within the purview of M. S. 326.38 and 326.40 cannot abrogate the requirements of the state law set forth in M. S. 326.40 except to the extent permitted by the 1957 amendment. The city of Robbinsdale cannot give any person a carte blanche in the installation of water softeners. The city of Robbinsdale is limited by M. S. 326.40, but may permit the specific activities authorized by L. 1957, c. 921, amending Section 326.38.

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.,
Spec. Asst. Attorney General.

Robbinsdale City Attorney.
January 15, 1958. 338-A

99

City planning—approval of plats. Under 471.26-33, adoption of city plan may be by ordinance or resolution and it is not mandatory that official map of city be adopted. Platting regulations of municipality must be consistent with city plan adopted pursuant to 471.26-33 to be valid.

Facts

You have submitted a copy of your City Ordinance No. 172 entitled "An ordinance providing for platting regulations and establishing the procedure and requirements for approval of plats within the City of St. Peter and within two (2) miles outside the corporate limits and providing for penalties."

You state that "this ordinance was passed without the previous adoption by the city council of any general map of the city as required by M. S. 471.28" and that no map of the entire city has yet been prepared and adopted by the city. You state further that a local resident wishes to subdivide an unplatted area within the city limits into lots that will each be less than 2½ acres in area, contrary to the provisions of Section 7 of Ordinance No. 172.

Question

"Can the city rely on the provisions of Ordinance No. 172 in view of the fact that no general map of the city has been adopted?"

You further state that there is an unplatted area of a few acres within the city that has been planned by the city engineer, considered by the plan-

ning commission and adopted by the council, and that the proposed map of such area has been filed with the register of deeds.

Question

"Regarding this area, is it your opinion that our Ordinance Number 172 is controlling?"

Opinion

M. S. 471.28, to which you refer, only authorizes the council to provide for the future widening or extension of existing streets and the future laying out of streets outside of platted territory; and to that end, when the city desires to reserve lands for streets or other public use, it shall prepare a map of the area which when adopted shall be the official map of that portion of the municipality in so far as reservation of lands for streets or other public use is concerned. Such section, therefore, is not strictly applicable to your questions since it amounts to a street plan only and as such constitutes but a part of the over-all municipal planning program.

M. S. 471.26-471.33 comprise one enabling act and are not mandatory in form. Section 471.26 authorizes the municipality to adopt a plan for the regulation of the future physical development of the municipality and also authorizes it to prepare and adopt an official map of proposed alteration of existing lands and the future development of unplatted properties. Such section does not make a planning map of the entire city mandatory.

Section 471.27 authorizes the municipality by formal procedure to make a study of future developments of the municipality and states further that

> "Such plans may be incorporated in resolutions or ordinances, in reports of officers or agents of the municipality or may be shown on formal planning maps **or by a use of these and other methods singly or in combination.**" (Emphasis supplied.)

Section 471.29, which is of primary applicability to your questions, provides that

> " * * * After the adoption of platting regulations **consistent with a city plan adopted pursuant to the provisions of sections 471.26 to 471.33,** approval [of a proposed plat] may be denied if the proposed plat fails to conform to the plan * * * ." (Emphasis supplied.)

and Section 471.323 provides that a certified copy of every ordinance, resolution, map or regulation adopted under the provisions of the act shall be filed with the register of deeds.

It is thus evident that it is the adoption of a program of municipal planning that is important and not merely a general map of the city. Such program may be shown by the adoption of a formal planning map of the city, or it may be shown entirely in another form such as by adoption of resolutions or ordinances, or by a combination thereof, all in the discretion of the council.

It is evident that Ordinance No. 172 was drafted to conform to the provisions of Section 471.29. If, therefore, the city had previously adopted a city plan pursuant to the provisions of 471.26-471.33, whether by resolution or ordinance or otherwise, and if Ordinance No. 172 is consistent with such plan, then the provisions of said Ordinance No. 172 are valid and controlling as to both questions submitted, providing there has been compliance with the provisions of Section 471.323.

Copies of our opinions O. A. G. 477-A, May 9, 1956, and O. A. G. 18D, September 18, 1954, are enclosed for their informational value.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

St. Peter City Attorney.
May 1, 1958. 477-A

100

Cities — Curb Bank Tellers. Pursuant to appropriate ordinance governing body of Anoka may grant permit to abutting bank to install curb bank teller if the facts show that public travel is not obstructed or unreasonably interfered with thereby and that it would benefit public to do so.

Facts

"The City of Anoka has been requested by the banks here to permit them to build certain curb teller slots installations, commonly called curb tellers. These installations would be on the street at the curb, and my understanding is that they would take up about twelve (12) feet or more with the center slot for the deposit which would go under the sidewalk and into the banks. The curb bank teller construction would not be on a trunk highway but would be on city streets. I understand, or at least I am advised, that there are similar installations in cities in various parts of the state."

Question

"Can the City of Anoka legally grant permission to install such installations on the curb?"

Opinion

Anoka is a city of the fourth class operating under a home rule charter adopted pursuant to Article IV, Section 36 of the Minnesota Constitu-

tion and Sections 748 to 758 inclusive, Revised Laws of 1905 (now M. S. 410.04-410.15). In writing this opinion, it is assumed that the interest of the city in the street is that of an easement, as distinguished from ownership in fee, for purposes of public travel, and that the banks in question are abutting landowners.

The established rule of common law is that the abutting landowner owns the fee in the public street to the center thereof, subject to the overriding public easement for travel thereon. **Town of Kinghurst v. International Lumber Company**, 174 Minn. 305, 219 N. W. 172; **Kooreny v. Dampier-Baird Mortuary**, 207 Minn. 367, 291 N. W. 611; McQuillin on Municipal Corporations, 3rd Ed., Section 30.32; and opinion O. A. G. 59-A-53, May 14, 1957, copy enclosed.

A sidewalk is a part of the street. McQuillin, Sections 30.11 and 30.62. Subject to the public easement, an abutting owner has special rights in the street (and sidewalk) not shared in by the public at large. Thus, he may make such use of it as does not obstruct or unreasonably interfere with the public travel thereon or the rights of other abutting owners. McQuillin, Section 30.54; 29 C.J. 548, 549; and citations mentioned supra.

Sec. 30.48 of McQuillin makes this statement:

> "There is no inherent right in private individuals to conduct private business in streets. But it is undoubted that the legislature may permit encroachments on a street within reasonable limits, and subject to the rule that the property rights of others cannot thereby be injured without due compensation. So it is equally well settled that this power residing in the legislature may be delegated to municipalities, subject to the same exception.
>
> "However, certain minor encroachments, not interfering with the rights of other abutting owners, and not seriously or to any considerable extent interfering with the use of the street and sidewalk by the public for travel, are usually permitted, either by an express permit pursuant to ordinance, or by sufferance, partly at least, insofar as many of these minor encroachments are concerned, **on the theory that the public are benefited thereby, either directly by reason of the particular use to which the land is appropriated, or indirectly through the increased convenience with which business might be transacted, or in some other manner.** * * * " (Emphasis supplied.)

and Section 30.74 of McQuillin states:

> "Obviously no absolute rule can be stated concerning what encroachments or obstructions can or should be permitted by the municipality. What the municipality is authorized to permit is to be determined mainly by the proper construction of the applicable local laws. Apart from such consideration, what the municipality should permit is to be ascertained from the viewpoint of the public interest having regard to the local conditions. The final question is: Are the obstructions

or encroachments involved unreasonable and against the public rights and general welfare?"

Whether or not a curb bank teller would obstruct public travel or would unreasonably interfere with such travel or with the rights of other abutting owners, or whether it would in fact be an aid to the flow of traffic or would benefit the public as a business convenience or otherwise, are all questions of fact in each individual case. Since this office cannot determine fact questions, we can give no categorical answer to your question.

If Anoka has, or should enact, an appropriate ordinance authorizing the issuance of permits for curb bank tellers, then the governing body would be authorized to make its factual determination in regard to each individual application and either grant or deny a permit as the case may be upon being fully advised concerning all the relevant facts and circumstances from all available sources including the police department. An appropriate ordinance may contain such reasonable requirements, safeguards, and conditions as the governing body deems proper to protect the interests of the city and its inhabitants.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Anoka City Attorney.
November 1, 1957. 59-A-53

101

Cities—Business Surveys—May be done incidental to advertising resources per M. S. 1957, Sections 465.56, 465.57.

Question

"Does a city of the fourth class have the power under our State law to contract and pay for a survey of business and business development within its immediate area?"

Opinion

This answer is by necessity limited to general statutory provisions applicable to cities of the fourth class because no specific city is mentioned in your letter. M. S. 1957, Section 465.56 provides:

"The governing body of any village, borough, or city of the fourth class may, when authorized by the electors thereof, as hereinafter provided, annually levy a tax of not to exceed one-half mill on all the taxable property within such village, borough, or city, but in no event shall

more than $1,000 be raised in any one year for the purpose of advertising the village, borough, or city and its resources and advantages. Such tax shall be levied in the same manner and at the same time as taxes for other municipal purposes are levied, and shall be collected in the same manner. The proceeds of such tax shall be used only for the purpose of advertising such village, borough, or city and its resources and advantages; provided, that the annual expenditure for such purposes by any such village, borough, or city is herby limited to the sum of $1,000; provided, nothing in sections 465.56 and 465.57 shall permit the levy of any tax in excess of the amount authorized by sections 275.11 to 275.16."

Thus, a city after following the statutory procedures set forth in M. S. Section 465.57 concerning a vote by the electorate is by these sections limited to expend this money "only for the purpose of advertising such * * * city and its resources and advantages."

A city, in order to advertise its resources and advantages, must necessarily know what such resources and advantages are. If, in the reasonable exercise of legislative discretion, the governing body of a city of the fourth class determines that a survey of business and business development within the city is necessary to properly advertise the city's resources and advantages, then money may be expended for such purpose pursuant to M. S. 1957, Sections 465.56 and 465.57. Cf. opinion O. A. G. 59-A-36, July 12, 1957, copy enclosed.

As previously indicated, cities have other powers which are set forth in their charters or in the statutory provisions creating them, or in legislation applying specifically to a community. Thus, there might exist additional authority for surveys of business and business development in specific cities of the fourth class. For your information I enclose copies of opinions O. A. G. 59-A-3, February 8, 1955, and July 17, 1928, printed as No. 7, 1928 Report.

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.,
Spec. Asst. Attorney General.

Commissioner of Business Development.
May 23, 1958. 59-A-22

102

Counties—Alteration of road by county board pursuant to petition under 162.21, subd. 4. Board cannot grant part of the alteration prayed for and reject other part. Entire petition must be granted or denied in so far as beginning, course and termination of road are concerned.

Facts

"A petition was filed under Minnesota Statute 162.21, Subdivision 4, for the alteration of a state aid road in Brown County approximately ten miles in length, the exact description being set out in the petition."

Question

"Assuming that all the requirements set forth in Subdivision 4 are met, could the County Board grant part of the petition and reject the other part? In other words, could they grant five miles of the alteration prayed for and reject the other five, or would the entire petition have to be granted or denied?"

Opinion

M. S. A. 162.21, subd. 4, provides:

"When 24 freeholders of any county **petition the county board** for the establishment, **alteration**, or vacation of any road or of any roads which connect with each other running into more than one town, or partly in one or more towns and partly on the line between one or more towns, or on the line between two or more towns, in such county, or along the shore of any lake wholly or partly in such county, or which constitutes a connecting link between an established highway and any public park, ground, or monument, or into a town or towns and the unplatted part of any village or villages therein, such road or roads not being within a city, or any road wholly within a town, which constitutes a direct connecting link with two or more roads, whether the same be previously connected or not, in the towns adjoining the town in which such road is or is to be located, **setting forth the beginning, course, and termination or the beginnings, courses, and terminations of the road or roads, and the names of the owners of the land, if known, through which the same may pass**, and file the same with the auditor, he shall forthwith lay the same before the board, if in session, and if not, at its first session thereafter. If the petition relate to a road or roads partly in a town or towns, and partly in the unplatted portion of a village or villages, before it shall be acted upon by the county board it shall have attached thereto a certified copy of a resolution of the village council or of each village council, as the case may be, approving the same." (Emphasis supplied)

It should be noted that the petition must state specifically the beginning and termination of the road proposed to be altered and that to enable the freeholders to petition the county board, such road must follow one of the courses with termini as designated in the statute.

M. S. 162.21, subd. 5, provides that if the petition appears reasonable on its face, the county board shall order a hearing thereon, setting the time and place, and shall then appoint from its members a committee to examine the route prior to such hearing. Subd. 6 of such statute provides that the county board may employ a surveyor in such examination; that after ex-

amination the committee shall report to the board the course and distance of the proposed alteration; and that the committee shall make its recommendation as to granting or rejection of the petition.

Subd. 7 of the statute then provides:

> "At the time and place designated, the board shall hear all parties interested as to the necessity for, and as to the amount of, damages to land owners by reason of such establishment, alteration, or vacation and may adjourn such hearings from time to time, if necessary. It shall determine the damages which will be sustained by each owner through whose land such road or roads may pass, and with whom it cannot agree, as hereinafter provided, or who is unknown, specifying the amount of damages, if any, awarded to each land owner and describing each parcel of land separately. If the board determines that the establishment of the road is desirable and of sufficient advantage to warrant the payment of damages assessed, **it shall declare the road** or roads established, **altered,** or vacated **in accordance with the petition; otherwise, it shall declare the petition dismissed."** (Emphasis supplied)

It appears clear, therefore, that the road must either be declared altered in accordance with the petition or else the petition must be dismissed. Consequently, the county board cannot, as proposed in your question, grant five miles of the alteration prayed for and reject the other five miles. The entire petition must be either granted or denied in so far as the beginning, course and termination[1] of the road are concerned.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Brown County Attorney.
November 15, 1957. 377-A-7

103

Counties—Town Boards—Impassable Roads—M. S. 162.24. County board without authority to determine whether road is public or private. Authority of county board under 162.24 covers all roads required to be maintained by town.

[1]Our courts have held that a town board, in acting on a petition for alteration of a town road presented pursuant to § 163.13, may exercise a reasonable discretion in varying the route proposed as public interest may require, provided the board adheres to the point of beginning, the **general** course, and the termination specified in the petition. **Johnson v. Town of Chisago Lake,** 122 Minn. 134, 141 N. W. 1115; **State of Minnesota v. Thompson,** 46 Minn. 302.

Facts

" 'A' made a complaint to the County Board of Carver County, Minnesota, alleging that a certain town road was impassable and requesting that the County Board order the Town Board to make the road passable within a reasonable time and in the event that the Town Board failed to make the road passable the County Board should make the road passable and charge the Township for its work.

"At the hearing a dispute developed as to whether or not the particular piece of road in question was a township road or a private road. The complainants claimed that the township had maintained the road for many years and that the road had been used by others as a public road and that it was a public road established by user. The Town Board denies that it is a public road or a township road."

Questions

1. "Does the County Board have the right to determine whether or not the road in question is a public road or a private road?

2. "Does the County Board have a right to require the township to make the road passable without some determination that it is a township road?"

Opinion

1. We assume that the complaint was made to the county board under the authority of M. S. 162.24, subd. 1, and that the hearing had was one authorized by and conducted pursuant to subd. 2 of that section. The provisions thereof here material are as follows:

Subdivision 1:

"When a complaint in writing to the county board of the county reciting that **a described road** in or on the line of a town therein **is neglected by the town charged by law with its maintenance and repair or that a legally established road in or on the line of the town has not been constructed or opened,** when the cost of opening or constructing such legally established road shall not exceed the sum of $1,000 per mile, and that by reason of such neglect such road is not reasonably passable, * * * the county board shall by resolution fix a time and place when and where it will consider the complaint; * * * " (Emphasis supplied)

Subdivision 2:

"If upon such hearing the county board shall be of the opinion that the complaint is well founded, it shall by resolution direct the town board to do such work or to make such improvements as it shall deem necessary to put such road in a passable condition. Such resolution shall specify generally the work which it is so deemed necessary to do.

* * * "

M. S. 160.19 relates to dedication by user and reads as follows:

"When any road or portion thereof shall have been used and kept in repair and worked for at least six years continuously as a public highway the same shall be deemed dedicated to the public to the width of two rods on each side of the center line thereof and be and remain, until lawfully vacated, a public road whether the same has ever been established as a public highway or not."

Section 162.24 presupposes a **public** road, i.e., one already "laid out", "established"[1] or dedicated. The county board has no jurisdiction under this section to hold a hearing, make a determination that the road is not passable, and direct the town board to put it in passable condition if, in fact, it is not then a public road. The board's function is legislative. Section 162.24 does not expressly or by implication authorize the board to make a determination as to existence of a public road such as will be binding on a party who contends otherwise. The question whether a road has become a public road by user under 160.19 or by common law dedication (see **Anderson v. Birkeland,** 229 Minn. 77, 82; 38 N. W. 2nd, 215) is a question of fact, the determination of which is a judicial function when the facts are in controversy. The duty of making such determination not having been given to the county board is one for the courts. See 16 Dunnell's Digest 3d Ed. Section 8444, citing **State v. Woll,** 51 Minn. 386, 53 N. W. 759; see also 39 C. J. S. "Highways", 945, Section 24.

We therefore answer your first question in the negative.

2. The authority of the county board is not limited to town roads but is broad enough to cover all roads which it is the town's duty to maintain. See O. A. G. 377-B-3, August 27, 1946, printed as No. 109, 1946 Report, copy enclosed.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Carver County Attorney.
September 13, 1957. 377-B-3

104

Counties—Depositories—Substitution of collateral—Under M. S. 118.01, as amended by L. 1957, c. 698, any substituted collateral of authorized depository must first be approved by county board, except when obligations of the United States are substituted they may be approved subsequent to the substitution. Question of authority of county treasurer to sign "instruction" submitted by depository discussed.

[1]To "lay out" or "establish" a road means to fix the course of the road or lay down the whole ground covered by the road and to specify its dimensions. In re Petition for Establishment of Highway, 213 Minn. 314, 316; 6 N. W. 2d 626.

Facts

"The County Treasurer has been requested by a legally designated depository of County funds to sign an instruction to the custodian for safekeeping which contains the following language:

" 'You are to surrender to the Depository any of the securities then held by you as custodian hereunder upon receipt from the Depository of written request so to do, together with securities delivered by the Depository in substitution therefore. The Depository hereby represents and warrants to you that any securities which it may hereafter so deliver to you in substitution for others then held for this account will be eligible as to type, amount, and in all other respects for substitution under the law of the state in which said public corporation is located and the terms of this agreement. Each of the undersigned authorizes you to accept and conclusively rely upon such representation and warranty and agrees that you shall have no liability or responsibility for relying and acting thereon. In the event of such substitution you are to mail to each of the undersigned at the addresses shown below, by registered or certified mail, a receipt describing and identifying both the securities so substituted and those released and returned to the Depository, all in accordance with the applicable law. (This paragraph does not apply to collateral for State funds of North Dakota and Minnesota)'."

Question

"Whether the County Treasurer would be authorized, under M. S. A. Sec. 118.01, in signing the instructions containing the language quoted above."

Comment

"The language in the instructions to the custodian would permit the depository to substitute securities at any time prior to the approval by the County Board. The language of the statute does not make it clear whether the approval of the County Board shall be secured prior to the time the substitution of the securities is made or shall merely be required after the substitution of the securities has been made."

Opinion

M. S. 118.01, as amended by L. 1933, c. 41, Section 1, provided:

"Any bank or trust company authorized to do a banking business in this state, designated as a depository of county, city, village, borough, town, or school district funds as provided by law may, in lieu of the corporate or personal surety bond required to be furnished to secure such funds, deposit with the treasurer of the municipality making such designations, such bonds, certificates of indebtedness, or warrants, except bonds secured by real estate, **as are legally authorized investments for savings banks under the laws of the state** * * *. * * * A depository * * * may from time to time, during the period of its designation,

* * * substitute other collateral for that on deposit or any part thereof. * * * Before any collateral is deposited with the treasurer it shall first be approved by the same authority that designated the depository * * *. * * * all collateral deposited under the provisions of this section shall be approved by the governing body of the municipality making such designation and after such approval deposited with the treasurer of such municipality, unless the governing body of such municipality shall by resolution fix and determine some other place for the safekeeping of such collateral. Such collateral shall not be redeposited in the bank or trust company furnishing the same." (Emphasis supplied)

The statute was not again amended until the 1957 legislative session; and L. 1957, c. 698, Section 1, amending Section 118.01, retained the identical language quoted supra. Thus it is clear that authorized collateral generally, whether original collateral in lieu of bond or collateral substituted therefor, must be first approved by the county board before it can be deposited with the county treasurer or other authorized custodian and before any collateral for which it was substituted can be released. See opinion O. A. G. 140-F-2, November 18, 1953, copy enclosed.

It is also clear from the first underlined phrase in Section 118.01, supra, that obligations of the United States constitute authorized collateral. See M. S. 50.14, Subd. 1 and 2.

However, L. 1957, c. 698, Section 1, also added the following language:

"Any banking corporation pledging such securities, **at any time** it deems it advisable or desirable, **may substitute obligations of the United States of America** for all or any part of the securities pledged. The collateral so substituted shall be approved by the governing body of the county, city, village, borough, town, or school district making such designation **at its next official meeting.**

"**Such** securities so substituted shall, at the time of substitution, have a market value sufficient, together with the market value of the original securities for which no substitution is made, to equal or exceed $110 for every $100 of public deposits.

"In the event of **such** substitution the holder or custodian of the securities shall, **on the same day**, forward by registered or certified mail **to the public corporation** and the depository bank, a receipt specifically describing and identifying both the securities so substituted and those released and returned to the depository bank." (Emphasis supplied)

Being mindful of the pertinent statutes of construction (M. S. 645.16, 645.17 (2), and 645.26, Subd. 1), of L. 1957, c. 698, quoted immediately supra, and of the fact that obligations of the United States already constituted authorized collateral, we construe the said 1957 amendment as creating an exception to the general provision only in the case of substitution of obligations of the United States for other collateral. Therefore, only obligations of the United States may be freely substituted by the authorized depository for previously pledged collateral without the prior ap-

proval of the county board. Such substituted obligations of the United States must, of course, have a market value at least equal to $110 for every $100 of public deposits in the depository, and the "approval" of the county board must thereafter be obtained at its next official meeting.

We believe the foregoing answers the last sentence of your comment. In so far as the "instruction" quoted in your submitted facts is concerned, to the extent that it appears to place all collateral on the same footing as obligations of the United States, such "instruction" is not in accordance with Section 118.01, as amended, and the county treasurer would not be authorized to sign same.

Furthermore, I find nothing in Section 118.01 or elsewhere in c. 118, or in c. 385 relating to the county treasurer, authorizing a designated depository to submit such an "instruction" to a county treasurer for signature or authorizing a county treasurer to execute such an instrument. Manifestly, also, if such an "instruction" is not in accordance with Section 118.01 it is a nullity, and if it is in accordance with the statute it adds nothing. The county treasurer's duties and responsibilities are governed by the statute.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Lincoln County Attorney.
April 28, 1958. 140-F-2

105

Counties—Tax forfeited lands—Memorial Forest.—M. S. 459.06, Subd. 2. After county board has dedicated lands as memorial forest pursuant to statute, dedication cannot be terminated in absence of statutory authority.

Facts

"Clearwater County has some land that has been tax forfeited and which the Board of County Commissioners may be interested in designating as a memorial forest. However, before they so designate and dedicate such lands as a memorial forest it is important that they know and understand this portion of the statute. It appears that the county may by resolution of the County Board establish this memorial forest."

Question

"What procedure would be followed by the County Board to terminate the dedication of this land as a memorial forest at such time as they may wish to so do?"

Opinion

M. S. 459.06, Subd. 2 is derived from L. 1945, c. 347, Section 1 and reads as follows:

> "Any county may by resolution of the county board set aside tax forfeited land which is more suitable for forest purposes than for any other purpose and dedicate said lands as a memorial forest and manage the same on forestry principles. Any moneys received as income from the land so dedicated and set aside may be expended from the forfeited tax fund for the development and maintenance of the dedicated forest."

After the county board has set aside and dedicated tax forfeited land as a memorial forest pursuant to this section, there is an effective dedication thereof to public use and the county board must thereafter exercise its control over the property in conformity with the purpose of the dedication. See 5 Dunnell's Digest 3d Ed., Section 2626. In the absence of statutory authority[1] the board cannot terminate the dedication merely because it may wish to do so. It is not believed that a dedication made pursuant to this statute requires acceptance. See 26 C. J. S. "Dedication", 463, Section 34; Cf. **In re Petition of Schaller,** 193 Minn. 604, 615, 259 N. W. 529.[2]

As far as we can determine, the statute now makes no provision for the board to terminate a dedication of tax forfeited lands made pursuant to the above statute. Hence, there is no procedure which the board can follow to accomplish such termination.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Clearwater County Attorney.
April 14, 1958. 425-C-10

106

Counties—Auctioneer's license, M. S. 330.01. Non-resident auctioneer. H. F. 569, 57th Iowa General Assembly (1957 Iowa Sess. Laws, c. 252) meets certain requirements of M. S. 330.01, Subd. 2 and a Minnesota license may be issued to Iowa resident who otherwise complies with Minnesota law relating to issuance of auctioneer's license.

---

[1]As to the right of the county, where it owns the fee without reversion, to apply dedicated property to other purposes when authorized by the legislature, see 26 C.J.S. "Dedication," 559, § 65; 11 McQuillin Mun. Corp. 3d Ed. 774, § 3374; **State ex rel. Townsend v. Board of Park Commissioners of Minneapolis,** 100 Minn. 150, 110 N. W. 1121.

[2]It has been said that where a municipality dedicates land to the use of its inhabitants, acceptance is implied from the act of dedication. 16 Am. Jur. "Dedication," 358-9, § 13.

Facts

"The County Auditor of Houston County, Minnesota has an application for the issuance of an auctioneer's license under Section 330.01 Minnesota Statutes. This person is a resident of the State of Iowa and is applying for the license under subdivision 2 of the above stated Section.

"Apparently the Iowa Statute has been changed so that the reciprocity provisions in the prior statute have now been amended to include residents of the State of Minnesota. The Iowa law is in Chapter 252 of the Iowa Session Laws."

Question

"Whether or not the Iowa law is broad enough to include Minnesota residents, and if so, if the County Auditor of Houston County may now issue the license to the Iowa resident if he is otherwise qualified to receive such an auctioneer's license."

Opinion

M. S. 330.01 provides:

"Subdivision 1. The county board or auditor may license any voter in its county, as an auctioneer. Such license shall be issued by the auditor and shall authorize the licensee to conduct the business of an auctioneer in the State of Minnesota for the period of one year. It shall be recorded by the auditor in a book kept for that purpose. Before such license is issued the licensee shall pay into the county treasury a fee of $10.

"Subd. 2. A resident of another state which issues auctioneer's licenses to residents of Minnesota on the same or similar basis as to residents of such state, may be licensed as an auctioneer in Minnesota upon complying with the laws of the State of Minnesota relating to the issuance of auctioneer's licenses."

House File 569 of the 57th General Assembly of the State of Iowa (1957 Iowa Session Laws, c. 252), so far as here material reads as follows:

"Section 1. Section five hundred forty-six point one (546.1), Code 1954, is repealed and the following is hereby enacted in lieu thereof:

'The county board of supervisors may license any person in its county as an auctioneer for hire, which license, while unexpired, shall be effective any place in the state of Iowa. Such license shall be issued by the county auditor and shall authorize the licensee to conduct the business of an auctioneer for hire for a period of one (1) year. Before such license is issued the licensee shall pay into the county treasury a fee of ten dollars ($10.00). Provided, that a resident of another state may be licensed as an auctioneer in Iowa upon complying with the laws of the state of Iowa relating to the issuance of auctioneers' licenses.'

"Sec. 2. Section five hundred forty-six point two (546.2), Code 1954, is hereby repealed."

Inasmuch as the Iowa law provides for the issuance of an auctioneer's license to a Minnesota resident on the same or similar basis as to residents of Iowa, it meets the requirements of 330.01, Subd. 2. It is therefore our opinion that the county auditor of your county may issue an auctioneer's license to an Iowa resident who otherwise complies with the laws of Minnesota relating to the issuance of an auctioneer's license.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Houston County Attorney.
April 14, 1958. 16-C

107

Counties—Taxation—Auditor's plat pursuant to M. S. 272.19. If surveyor makes surveys, etc., with reference to each lot within area to be platted, he should compute costs accordingly, which charges can be added to next tax on each lot. In absence of such, board should determine fair method and direct auditor to add to each lot its proportionate share of costs. Surveyor is responsible for accuracy required in platting.

Facts

"It has been proposed that an Auditor's Plat of the Village of Longville be made.

"Section 272.19 M. S. A. is the law governing this matter. There are approximately 85 irregular tracts in the Village to be platted. Proper notice will be given to the owners of the tracts as provided by law.

"It is assumed the owners of the properties involved upon notice will not have the survey and plat made and the County Auditor will make a request to have the survey made by a registered land surveyor who is maintained by the Village of Longville, Minnesota.

"There are approximately 85 of such irregular tracts, ranging in size from .13 of an acre to 18.50 acres and in between of varying sizes such as .17 acres, 1.00 acre, etc.

"The law requires that after the plat is approved the cost of survey and plat shall be paid by the county and the amount added to the tax of the next year as a special assessment."

Questions

1. "How is the cost to be equitably allocated to the various irregular tracts as a special assessment when there is such a great variation in the size of the tracts, there being a great difference in size and value of each tract?

2. "In final acceptance of such Auditor's Plat by the County Auditor from the registered land surveyor who is responsible for the accuracy and survey of said plat?"

Opinion

1. M. S. 272.19, so far as here material, provides:

"Where any tract or lot of land is divided into parcels of irregular shape, which cannot be described except by metes and bounds, the owners thereof, upon notice thereof being given by the county auditor * * * shall have such land platted into lots, a survey being made when necessary, and the plat recorded, and a duplicate filed with the county auditor. If the owner fails so to do within 30 days after such notice, the county surveyor, upon the request of the county auditor, shall make such plat. * * * When the owners fail to comply with this section the costs of surveying, platting, and recording shall be paid by the county upon allowance by the county board and the amount thereof added to the next tax upon such lots * * * provided, however, that whenever the county board shall determine that it is for the best interests of the county to have any particular tract of land platted into an auditor's plat, and shall adopt a resolution so stating, it may direct the county auditor to have such work done. * * * Whenever any plat is made pursuant to a resolution of the county board, all expenses incurred in connection with such plattings or revisions shall be paid by the county and not by the land owners."

Notice to plat is directed to each owner of a lot or lots within the area requested by the auditor to be platted. If such owner fails to comply therewith, it becomes the duty of the county surveyor, upon request of the county auditor, to make the plat from the records of the register of deeds and necessary survey. If the surveyor, in performing his duties, will consider and make determinations and necessary surveys with reference to each lot within the area to be platted, we believe he can and should, compute his charges and submit his statement for platting and surveys on the basis of each lot. M. S. 504.04 prescribes the fee for recording the plat on the basis of each lot designated therein. The county board will determine the reasonableness of the charges of the surveyor.

It is therefore our opinion that after the surveyor has completed his work and the county board has allowed the costs of surveying, platting and recording on the basis of each lot, such board under 272.19 is authorized to cause to be added to the next tax upon each lot, the costs of its inclusion in the platting, including necessary survey, as shown by the surveyor, plus the prescribed recording fee as provided by Section 504.04. This practice,

we are told, prevails in some Minnesota counties having a considerable number of auditor's plats.

In the absence of a computation of the costs of platting, surveying and recording made in the above manner, the county board should determine upon a fair and reasonable method of apportioning the costs and direct the county auditor on the basis thereof to add to the next tax on each lot its proportionate share thereof.

In connection with the costs of platting and surveying, we direct your attention to those portions of Section 272.19 which provide that whenever the county board shall determine that it is for the best interests of the county to have any particular tract of land platted into an auditor's plat and shall adopt a resolution so stating, it may direct the auditor to have such work done, in which event all expenses incurred in connection therewith shall be paid by the county and not by the land owners. We also invite your attention to Section 272.191-272.196 as amended by L. 1957, c. 371, which permit the auditor to install a code system to describe irregular tracts of land for taxation purposes.

2. The manifest purpose of Section 272.19 is to simplify the description of land on the tax books for the convenience of the taxing officials. An auditor's plat made pursuant thereto should be distinguished from a proprietor's plat prepared pursuant to M. S., c. 505. If the auditor's plat is not correct, it cannot be amended except to subdivide a portion thereof as provided by Section 272.19. The surveyor has the duty to note variations, stating in his certificate the extent thereof, and the action taken by him to reconcile the differences. It would thus appear that the surveyor is responsible for the accuracy required in the preparation of the plat. See in this connection opinion O. A. G. 18-D, June 27, 1956, copy enclosed.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Cass County Attorney.
January 17, 1958. 18-D

108

Counties—Weed Control—County not authorized to spend county funds to broadcast program of weed control.

Towns—Weed Control—Town not authorized to spend town funds to broadcast program of weed control.

Facts

"Recently there was a meeting held which was attended by the county weed inspectors and other interested persons from approxi-

mately seven or eight adjoining counties in this area. At this meeting it was proposed that the interested counties together sponsor a fifteen minute daily radio program for a period of approximately four months. This program would be broadcast by a local station within this area and would disseminate latest information on weed control measures, seed, fertilizer and other related matters. It was proposed that the costs of such a series of daily broadcasts be apportioned among the seven or eight counties in this particular area."

Questions

1. "Does the County Board have authority to expend county funds for such a program?

2. "Do the town boards within the various counties interested have authority to expend township funds for such a program?"

Opinion

1. No. The counties 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 their express powers. **Cleveland v. County of Rice,** 238 Minn. 180, 181, 56 N. W. 2d 641; 5 Dunnell's Digest 3d Ed., Section 2281.

The expenditure of county funds for the radio broadcast of a program of weed control as proposed, is not a power expressly granted to counties by statute, nor is it a power that can be implied as necessary to any express power granted to them.

Not only do counties lack such express or implied power but the legislature, by M. S., c. 20, has delegated certain powers and duties to the Minnesota commissioner of agriculture in connection with the control and eradication of noxious weeds. M. S. 20.07-20.09 require the eradication and destruction of all noxious weeds as defined in Section 20.01 by various owners and public officials. Sec. 20.15 relates to the publication and service of notice for the control and eradication of noxious weeds. These and other provisions of said c. 20 repel the inference that the county has authority to expend county funds for the dissemination of information regarding noxious weeds in the manner suggested in your inquiry.

2. M. S. 365.03 provides:

"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."

The authority to expend town funds for radio programs relating to weed control is not among the powers expressly granted by law to towns and such authority is not necessary to the exercise of any power given it.

We therefore answer your second question in the negative.

MILES LORD,
Attorney General.
HARLEY G. SWENSON,
Assistant Attorney General.

Sibley County Attorney.
March 5, 1958. 322-B

109

Counties—Payment of employee's group insurance premium by county, authorized by M. S. 471.61, as amended by L. 1957, c. 321, should be made out of same fund from which employee's other compensation, including salary, is paid.

Facts

"Chapter 193 of the Laws of 1955, Minnesota Statutes Ann. 471.61, provides authority for a governmental unit to pay premiums or charges on insurance or protection for its employees. The Act further provides 'that any such payment shall be deemed additional compensation paid to such officers or employees'. The workers on the Welfare Staff are paid out of the welfare funds, the Highway Engineer office employees are paid out of the Road and Bridge funds, whereas the remainder of the county employees are paid out of the general revenue fund."

Question

"Are the insurance payments which are authorized in the above section to be paid out of the same funds from which their salary is paid or is the entire insurance premium paid out of the general revenue fund?"

Opinion

M. S. 471.61, Subdivision 1, has been amended by L. 1957, c. 321, but the language pertinent to this opinion remains unchanged and still provides:

"Any such governmental unit, * * * may pay all or any part of the premiums or charges on such insurance or protection and **any such payment shall be deemed to be additional compensation paid to such officers or employees.**" (Emphasis supplied)

This office in its opinion O. A. G. 125A-28, August 31, 1955, copy enclosed, held that the premium payment by the county shall be deemed to be compensation paid to the employee in addition to his present salary. See also opinion O. A. G. 125-A-28, January 5, 1956, copy enclosed.

I see no reason why this additional compensation should not be paid out of the same fund from which the employee's other compensation, including salary, is paid.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Carver County Attorney.
May 24, 1957. 125-A-28

110

Counties—State Free Public Employment Service established by Department of Employment Security—Section 268.14 construed—County may not establish its own employment service but may contribute to maintenance of state employment office in county.

Facts

"The County Commissioners of Pope County, State of Minnesota, on April 4, 1956 passed a Resolution authorizing and directing the County Auditor to pay $25.00 monthly payments from the County Revenue Fund toward the establishment of a county employment service. The Public Examiner for the State of Minnesota states in his report 'we are aware of no statute which is authority to the County Board to appropriate or expend public funds for the purpose stated'."

Questions

"1. Is there any authority for such expenditures?

"2. Is there any way that the County can set up an employment service if the answer to No. 1 is no?"

Opinion

L. 1953, c. 603 (now M. S. A. 268.12, Subd. 1), created the Department of Employment Security as successor to the Division of Employment and Security, which was abolished as a division of the Department of Social Security. Since the passage of such act M. S. 268.03-268.24 have been administered by the commissioner of employment security, and Subd. 1 of Section 268.14 provides in part material:

"A state employment service is hereby established in the division of employment and security. **The director in the conduct of such service shall establish and maintain free public employment offices, in such number and in such places as may be necessary for the proper admin-**

istration of sections 268.03 to 268.24, and for the purpose of performing such functions as are within the purview of the act of Congress entitled 'An act to provide for the establishment of a national employment system for the cooperation with the states in the promotion of such system and for other purposes,' approved June 6, 1933, as amended. The provisions of such act of Congress are hereby accepted by this state and the division of employment and security is hereby designated and constituted **the agency of this state** for the purposes of such act. * * * "

The term "free public employment offices" therein is construed to mean employment offices free to the public. It does not mean free offices for the purpose of finding employment with the state or a political subdivision thereof, since Section 268.04, Subd. 12 (6) (g) specifically provides that the term "employment" as used in Sections 268.03-268.24 shall not include service performed in the employ of the state, or any of its political subdivisions.

M. S. 268.14, Subdivisions 3 and 4, provide:

"Subd. 3. The director may enter into agreements with any political subdivision of this state or with any private organization or person, and **as a part of any such agreements,** may accept moneys, services, or quarters **as a contribution to the maintenance of the state system of public employment offices or as reimbursement for services performed.** All moneys received for such purposes shall be paid into the employment and security contingent fund provided for in section 268.15, subdivision 3."

"Subd. 4. **The commissioner may establish auxiliary employment offices** and may, notwithstanding any other law to the contrary, employ individuals as agents or as employment security representatives on a part time or temporary basis to perform services in such offices and for related purposes, **compensate such individuals for such services,** and reimburse such individuals for necessary expenses incurred by them in the performance of such services. Such individuals shall serve at the pleasure of the commissioner.* * * "

The statute thus establishes a comprehensive free state employment service system, empowering the commissioner of employment security to establish and maintain free public employment offices in such number and in such places as is necessary for the proper administration of c. 268, and to establish auxiliary employment offices.

M. S. 459.01 authorizes any city of the first class to establish and conduct an employment bureau, but there is no statutory authority of which we are aware authorizing any other governmental subdivision of the state, including a county, to establish its own employment service; and Vol. 5 Mason's Dunnell's Minn. Dig. (3rd Ed.), Section 2281, states:

"Counties have only such powers as are expressly granted by statute or are implied as necessary to the exercise of the powers so granted. The maxim expressio unius est exclusio alterius is applicable.

Its implied powers include such as are necessarily incident to those specified, or are essential to the purposes and objects of its corporate existence. * * * "

Nor can we imply any power on the part of the county to establish its own employment service since Section 268.14, Subd. 3, expressly refers to the state system of public employment offices, to the maintenance of which the county, as a political subdivision of the state, may contribute by agreement with the commissioner of employment security. The county may, therefore, by agreement contribute $25.00 monthly toward the maintenance of a state employment office in such county. But attention is called to the provision of Subd. 3 that all moneys so contributed shall be paid into the employment security contingent fund, and the provision of Subd. 4 that the compensation of employment security representatives is paid by the commissioner.

Your specific questions are therefore answered in the negative.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Pope County Attorney.
March 18, 1957. 125-B

111

Counties — Register of Deeds—Tract Index—If cost of existing tract index exceeds $2000, county board must comply with M. S. 375.21, subd. 1, including advertising for bids. In absence of statutory authority, county cannot pay interest on unpaid balances of purchase price. No authority exists for issuance of bonds to provide funds for purchase of tract index.

Facts

"The Register of Deeds of Wadena County receives no salary and has never received a salary. His compensation has always been on a fee basis. He has for years supplemented his income by preparing abstracts of title. In this connection, he prepared a tract index which he has kept up to date. He has offered to sell this tract index to the county for the sum of $40,000.00. This figure appears to be about 60% of its actual value. There was no tract index maintained by the Register of Deeds office before the present Register of Deeds took office.

"The proposal for sale of the tract index by the Register of Deeds to the county is for the sum of $40,000.00 in monthly installments of $300.00 each plus interest on unpaid balances at the rate of 2% per annum."

Questions

1. "Is this tract index the property of the Register of Deeds personally?

2. "Assuming the answer is in the affirmative, may it be purchased by the county without taking bids for preparation of a tract index, or the furnishing to the county of a complete tract index?

3. "May a county board acting on behalf of the county enter into a contract for purchase of a tract index with terms as above set forth as to payment?

4. "If the answer is in the affirmative, should the question be submitted to the voters of the county as to terms of payment?

5. "If a call for bids is necessary for the furnishing of a tract index, and the Register of Deeds should not be the low bidder, can bonds be issued to provide funds for the payment?"

Opinion

1. The question of the ownership of this tract index appears to be essentially one of fact, to be determined from a consideration of all relevant facts, among which might be those relating to the manner in which the index was prepared, whether the register of deeds was paid fees for indexing therein as provided by M. S. 386.05, the extent to which it has become indispensable in the discharge of the duties of the register of deeds, and the intention of the parties involved. See 45 Am. Jur. "Records and Recording Laws," 422, Section 7; **Polk County v. Parker**, 178 Ia. 936, 160 N. W. 320, L. R. A. 1917B, 1176; **Robison v. Fishback**, 175 Ind. 132, 93 N. E. 666; and Anno: L. R. A. 1917B, 1183, Ann. Cases 1913B, 1274.

The above cases and others cited therein indicate a difference of opinion as to the ownership of property where the above factors may be involved. The question is apparently an open one in Minnesota. That being so and because the amount involved is quite substantial, it is our thought that the question of ownership should be determined by court action.

2. Assuming that the county does not own the existing tract index, the county board has authority under M. S. 386.05 to purchase it. If the cost will exceed $2000, the board, in our opinion, must comply with the requirements of 375.21, subd. 1, which includes advertising for bids. See opinion O. A. G. 373-B-22, December 13, 1954, copy enclosed. Under 386.06 the board is empowered to have a tract index made.

The fact that this tract index might be of a "non-competitive" type does not, in our opinion, dispense with the requirement of 375.21, subd. 1. This subdivision contains no exceptions. M. S. 471.36 relates to 471.34 but is without application to 375.21. It is not believed that the purchase of this tract index falls within any of the recognized exceptions to the requirements of bidding statutes[1] of this kind. Cf. **Griswold v. County of Ramsey**, 242

[1]Even when not required by statute to do so, it is sometimes considered a commendable practice to advertise for competitive bids. Griswold v. County of Ramsey, supra.

Minn. 529, 534, 65 N. W. 2d 647, and authorities cited under notes 3 and 4; **Coller v. City of St. Paul**, 223 Minn. 376, 388, 26 N. W. 2d 835.

proposed. Cf. opinion O. A. G. 59-A-16, August 26, 1952, copy enclosed.

3. In acquiring this tract index the county must secure complete title to it. It cannot enter into a conditional sales contract of purchase whereby its default in the timely payment of an installment might defeat its title and deprive the county of the property. Debt and other limitations must be adhered to. See opinion O. A. G. 125-A-40, May 3, 1934, printed as No. 237, 1934 Report, copy enclosed. Furthermore, the county can pay interest only when the statute authorizes it. We are unable to find any statutory authority for the payment of interest on unpaid balances in the manner proposed. Cf. O. A. G. 59-A-16, August 26, 1952.

4. In view of the foregoing answer, your fourth question does not require answer nor comment.

5. The purposes for which the county may issue bonds are specified by statute. M. S. 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."

Neither the foregoing nor any other statute which has come to our attention appears to authorize the issuance of bonds to provide funds for the purchase of a tract index. We therefore answer this question in the negative.

You will note that some counties are specifically authorized by statute to issue bonds for the purpose of providing funds with which to pay the cost of acquiring a tract index. See M. S. 386.10—386.12. It would appear that this is a proper subject for further legislative action.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Wadena County Attorney.
April 24, 1958. 373-B-23

112

Register of Deeds—Destruction of Records. L. 1957, c. 77 inapplicable to chattel mortgages of Federal Government and its agencies; under c. 77, register of deeds is not authorized to destroy from contract or lease

containing chattel mortgage clause. If language of seed grain note makes it a chattel mortgage its destruction is permitted under c. 77.

Facts

"Pursuant to the authority contained in Chapter 77 of the Laws of 1957 Regular Session, the County Board of Renville County passed and adopted a resolution authorizing the Register of Deeds to destroy:

1. All Satisfactions of Chattel Mortgages and Releases of Conditional Sales Contracts filed for record more than 10 years.

2. All unsatisfied Chattel Mortgages and unreleased Conditional Sales Contracts ten years after maturity; and if no maturity date is shown, then ten years after the date of the filing of the instrument."

Questions

1. "Since obligations to the Federal Government appear never to become outlawed by any Statute of Limitations and there are hundreds of such obligations in the form of Chattel Mortgages filed with the Register of Deeds of Renville County, Minnesota, does the Register of Deeds, under Chapter 77 and under the authorization contained in the resolution passed by the County Board, have authority to destroy Chattel Mortgages running to the Federal Government or any of its agencies, where such Chattel Mortgage secures a debt owing to the Federal Government or any of its agencies.

2. "Would the term 'Chattel Mortgages' as used in Chapter 77, include expired Farm Leases or Farm Contracts containing a Chattel Mortgage Clause?

3. "Thirdly, would Seed Grain Notes constitute Chattel Mortgages under the term 'Chattel Mortgages' as used in Chapter 77, so as to permit the destruction of such instruments?"

Opinion

1. L. 1957, c. 77 (M. S. 386.47) so far as it relates to your question provides:

"Section 1. Obsolete records, destruction. Any county board or the governing body of any municipality may by resolution authorize the destruction of the following instruments filed in the office of the register of deeds of the county or clerk of the municipality;

* * *

"(b) All unsatisfied chattel mortgages and unreleased conditional sales contracts ten years after maturity; if no maturity date is shown, then ten years after the date of filing."

M. S. A. 511.06 provides in part as follows:

"* * * Every such instrument so filed shall be notice to all persons of the existence and terms thereof. The lien of any mortgage so filed shall continue until the debt secured thereby is paid or barred by statute; but as against creditors of the mortgagor and purchasers or mortgagees of the property in good faith it shall not continue more than six years from the date of filing, unless the indebtedness is not then due and payable by its terms, in which case it shall so continue for two years after the maturity of the debt and no longer."

In our opinion, c. 77 is without application to chattel mortgages filed by the federal government or its agencies, it being the rule that—

"'* * * the sovereign authority of the country is not bound by the words of a statute unless named therein, if the statute tends to restrain or diminish the powers, rights, or interests of the sovereign.' U. S. v. Herron, 87 U. S. 251, 255, 22 L. ed. 275; Academy of Fine Arts v. Philadelphia County, 22 Pa. 496.

"While that rule was born of common law notions of kingly prerogative, the reason for applying it in our representative government is equally cogent, for so applied it has the 'same ground expediency and public convenience.'" (Citing cases)

Nelson v. McKenzie-Hague Co., 192 Minn. 180, 182, 256 N. W. 96.

"The government, whether federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute, however general and comprehensive the language of act may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication.

"This general doctrine applies, or applies with special force, to statutes by which prerogatives, rights, titles, or interests of the government would be divested or diminished, * * * " 82 C. J. S 554, Sec. 317.

See also **United States v. United Mine Workers**, 330 U. S. 258, 91 L. Ed. 884, 67 Sup. Ct. 677, cf. M. S. 645.27.

The manifest purpose of clause (b) is to rid the office of the register of deeds of unsatisfied chattel mortgages (and unreleased conditional sales contracts) which have become obsolete because the debts secured thereby have been paid or are barred by statutes of limitations. (M. S. 511.01, 511.05). However where a debt is not paid or is not so barred, the chattel mortgage securing it is not obsolete; and the filed copy should not be removed or destroyed. The register of deeds should not destroy an instrument "which has vitality". See in this connection *opinion* O. A. G. 851-F, April 25, 1947, copy enclosed.

2. If the farm lease or contract contains a so-called chattel mortgage clause it is a chattel mortgage in so far as it acts as security for any indebtedness owing by the cropper to the landowner, and is entitled to be filed. **Nelson v. McDonald**, 153 Minn. 474, 191 N. W. 264. However, as the chattel mortgage clause is but a part of a document which, aside from such

clause, is not a chattel mortgage, the register of deeds under c. 77 does not have authority to destroy such lease or contract.

3. A chattel mortgage is a transfer of the title to personal property as security for the payment of a debt, or the performance of some other obligation. A right of redemption in the mortgagor is an essential element of a mortgage. 3 Dunnell's Digest, 3d Ed., Sec. 1424. Whether a seed grain note is a chattel mortgage so as to come within the purview of c. 77 depends upon the particular language of such note. If it contains language transferring title to grain as security for the payment of a debt arising by reason of such transfer and there is a right of redemption, the document might constitute a chattel mortgage and come within the provisions of c. 77, and its destruction would be permitted. See **Minnesota Linseed Oil Co. v. Maginnis**, 31 Minn. 193, 20 N. W. 85 and cf. **Wallace v. Palmer**, 36 Minn. 126, 30 N. W. 445.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Renville County Attorney.
October 22, 1957. 851-F

113

County Attorneys' Expenses—Reimbursement—not limited to one annual state convention as prescribed by M. S. 382.29—may be reimbursed for necessary expenses incurred in business of county on approval of district judge per M. S. 388.14.

Question

Whether "a county attorney [can] attend a national convention of county and prosecuting attorneys at the expense of the county out of his contingent fund."

Opinion

This office in an opinion O. A. G. 121-A-8, May 17, 1951, ruled that L. 1951, c. 322, coded M. S. A. 382.29 which provided that "Any elective county officer may be reimbursed for expenses incurred in attending one annual convention of the state organization of such officers" did in no manner repeal M. S. 388.14 applying only to county attorneys and their expenses, and county attorneys are not so limited. M. S. 388.14 authorizes a county board to set apart a certain sum of money "as a contingent fund for defraying necessary expenses not especially provided for by law, in preparing and trying criminal cases, conducting investigations by the grand jury, and **paying the necessary expenses of the county attorney incurred in the busi-**

ness of the county. All disbursements from such fund shall be made upon written request of the county attorney by auditor's warrant, **countersigned by a judge of the district court."** Thus, the opinion interpreting the aforementioned section and the reasoning therein apply equally well today.

This office in an opinion O. A. G. 121-A-8, July 29, 1938, printed as No. 134, 1938 Report, ruled that the necessary expenses incurred by a county attorney in the attendance of the annual and semi-annual meetings of the County Attorneys Association constituted a legal claim against the county attorney's contingent fund because it was a "necessary expense that the county attorney incurred in the business of the county", and that M. S. 388.14 should not be given a narrow technical meaning. The opinion stated that these conventions were beneficial to the county legal advisor, the county attorney, as they enabled him to better handle the legal problems of the county. The opinion pointed out the value of county attorneys discussing mutual problems and thus enabling themselves better to handle duties common to all.

During the almost two decades since the aforementioned ruling, the duties of county attorneys have involved more and more interstate problems. This has been the result of the increased mobility of the American people and the increased legislation of an interstate nature. An example of such legislation is the Reciprocal Enforcement of Support Act—M. S. 518.41—52. All states have enacted some form of reciprocal support legislation. See 40 Minn. Law Review 283 and 29 Tul. Law Review 512 and 513 cited therein.

In an opinion O. A. G. 121-A-8, September 7, 1932, the Attorney General ruled that under the circumstances enumerated therein the county could pay the expenses of an assistant county attorney in attending a national tax conference.

Reimbursement by the county of the county attorney's expenses incurring in attending conventions is not limited to annual state conventions as provided in 382.29 but can be made out of the contingent fund provided by M. S. 388.14 if they are a necessary expense that the county attorney incurred in the business of the county. Whether such expenses are reimbursable under the aforementioned section involves a question of fact and the legislature has specifically provided that a judge of district court must approve or disapprove such expense, and thus the Attorney General should not in any way interfere with that authority so explicitly conferred upon the district judge. See opinion O. A. G. 121-A-8, July 27, 1951.

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.,
Spec. Asst. Attorney General.

Washington County Attorney.
August 6, 1957. 121-A-8

114

Incompatible Offices—County commissioner and member (or clerk) of district Hospital Board under L. 1955, c. 227 or M. S. 397.06. These offices are incompatible.

Facts

"A Hospital District was created in Chisago County, Minnesota, pursuant to Chapter 227 of the Laws of Minnesota for 1955, which laws were later repealed by Chapter 640 of the Laws of Minnesota for 1957. The hospital was built and is being operated. The Clerk of the Hospital Board was elected as County Commissioner for Chisago County at the last General Election."

Questions

"1. Are the offices of Clerk of said Hospital Board and of County Commissioner incompatible?

"2. Are the offices of Hospital Board Member and County Commissioner incompatible?"

Opinion

1-2. The clerk is elected by the members of the hospital board among themselves. (M. S. Section 397.07) As the clerk is also a board member, your questions may be considered together.

L. 1957, c. 640, Section 8 (M. S. Section 397.102), in repealing L. 1955, c. 227, provides that the repeal shall not affect the validity of the organization of any hospital district created thereunder, and further, that after the enactment of c. 640, all such districts shall be governed by the provisions thereof.

L. 1957, c. 640, Section 2 (M. S. Section 397.06), provides that the board or boards of county commissioners may authorize and direct the construction and equipment of a district hospital to be constructed, equipped and operated under the supervision of a district hospital board comprising one member from each city, village and town in the district. Such members are not chosen by the county board and hence M. S. 375.09 is without application. L. 1955, c. 227, Section 3 made similar provision for the authorization of such a hospital by the county board and provided that it should be operated under the supervision of a district hospital board similarly elected, but for a term of two years instead of three, as now provided by said c. 640, Section 2 (M. S. Section 397.06).

Under Section 397.08-09 the county board is authorized to levy taxes to the extent necessary, and to make appropriations for the expense of operating the hospital; and under Section 397.09 the duty is imposed upon such board to examine and approve or take necessary remedial action with reference to the receipts and disbursements shown by the books and records of the district hospital. M. S. 397.08 also provides that the hospital board

may agree to repay to the county any sums appropriated by the county board for the expense of operation of the hospital, subject to such terms as may be agreed upon. Section 397.101 makes provision for approval of requests for annexation to the hospital district by both boards.

Thus, it is apparent that the county commissioner, as a member of the hospital board, will participate in the action of such board in considering and determining the requirements for the construction, equipment and operation of the hospital and will also take a part in the negotiations for and the making of an agreement with the county board as to repayment of certain sums appropriated by the latter. As member of the county board, he would be called upon to consider and determine the necessity for appropriations for the hospital and the amounts thereof, and to participate in negotiations leading up to and in the making of an agreement with the members of the hospital board for repayment of the appropriated sums of money referred to above.

The rule relating to incompatibility in public office is stated in 15 Dunnell's Digest, 3d Ed., Section 7995, as follows:

> "Incompatibility does not depend upon the physical inability of one person to discharge the duties of both offices. The test is the character and relation of the offices; that is, whether the functions of the two are inherently inconsistent and repugnant. If one is not subordinate to the other, and no necessary antagonism would result from an attempt of one person to discharge the duties of both offices, there is no incompatibility. Public offices are 'incompatible' when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both. * * * "

When the foregoing facts and circumstances are tested against this rule, it becomes apparent that the office of clerk of the hospital board or of hospital board member and the office of county commissioner are incompatible, and we so hold. See in this connection opinion O. A. G. 358-A-3, August 10, 1951, copy enclosed.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Chisago County Attorney.
December 18, 1958. 358-A-3

115

County Commissioners' Expenses—National Convention Cannot be paid by county.

Questions

1. "Is the county authorized to pay for the costs of a county commissioner joining the **National Association** of County Commissioners?

2. "Is the county authorized to pay for the expenses of a county commissioner attending the convention of the **National Association** of County Commissioners?" (Emphasis supplied.)

Opinion

M. S. A. 382.29, enacted by L. 1951, c. 322, provides in part:

"Subd. 1. Any elective county officer may be reimbursed for expenses incurred in attending the annual convention of the **state organization** of such officers."

M. S. A. 375.163, enacted by L. 1955, c. 364, provides:

"The county board of any county may appropriate out of its general fund money to pay the annual dues of the county for membership in the **State Association** of County Commissioners and the actual necessary expense of delegates designated by the county board to attend meetings of the league." (Emphasis supplied.)

See also opinion O. A. G. 124-B, February 3, 1956, copy enclosed.

The above laws refer to state conventions. Prior to these laws the Attorney General's office had consistently ruled that members of the county board were not entitled to reimbursement for expenses incurred in attending the state convention of county commissioners. See opinions O. A. G. 124b, January 3, 1940 and March 22, 1946, copies enclosed. The reasoning in these opinions is applicable to your question concerning national conventions and without specific authorization by the legislature the county cannot pay the expenses outlined in your question. They are both answered in the negative.

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.
Spec. Asst. Attorney General.

Mower County Attorney.
March 5, 1958. 124-B

116

County Officers and Employees—Hospitalization, etc., coverage under M. S. 471.61, as applied to various officers and employees.

Facts

"Pursuant to M. S. A. 471.61 as amended by the Laws of 1955, Chapter 193, the Board of County Commissioners of Ramsey County insured its officers and employees under a group insurance program covering life insurance, hospitalization and medical and surgical benefits effective January 1, 1957, whereby the County pays the premium for such insurance coverage.

"The Board of County Commissioners intended to cover all officers and employees receiving at least half of their earned income from the County or who devote at least half of their working hours to County business."

Questions

"1. Having in mind your opinion dated August 23, 1956, directed to the Kandiyohi County Attorney relative to court reporters in a multiple county judicial district not being considered employees of the county for the purposes of M. S. A. Section 471.61, Ramsey County being a single county judicial district, are the court reporters in a judicial district comprising Ramsey County considered as employees of the County so as to be automatically included in the insurance program?

"2. The Ramsey County probation officer and the employees of the Ramsey County Probation Office are appointed pursuant to M. S. A. Section 636.09 and Section 636.10 and are compensated pursuant to Sections 636.20 and 636.21. Are the Ramsey County Probation Officer and the employees of the Probation Office considered as employees of the County so as to be automatically included in the above insurance program?

"3. The Ramsey County Home Schools are operated pursuant to M. S. A. Section 260.14. Are the employees of the Ramsey County Home Schools considered as employees of Ramsey County so as to be automatically included in the above insurance program?

"4. The Ramsey County Public Defender is appointed and compensated pursuant to M. S. A. Section 611.13. Usually he is engaged in private law practice in addition to his duties as public defender. Is the Ramsey County Public Defender considered such an officer or employee of Ramsey County so as to be automatically included in the above insurance program?

"5. The Clerk of Juvenile Court of Ramsey County is appointed and compensated pursuant to Chapter 653 of the Laws of Minnesota for 1951. Is the Clerk of Juvenile Court considered as an employee or officer of Ramsey County so as to be automatically included in the above insurance program?

"6. The Ramsey County Examiner of Titles and his deputy are appointed and compensated pursuant to M. S. A. Section 508.12. Are the Ramsey County Examiner of Titles and his deputy considered as

officers or employees of Ramsey County so as to be automatically included in the above insurance program?

"7a. Are the Ramsey County Probate Judge and the Clerk of Ramsey County Probate Court, who is appointed by the Ramsey County Probate Judge, such officers or employees of Ramsey County so as to be automatically included in the above insurance program?

"7b. Is the Ramsey County Probate Court Reporter such an officer or employee of Ramsey County so as to be automatically included in the above insurance programs?"

Opinion

In Ramsey County, district court reporters (L. 1923, c. 77, Section 1, amended by L. 1951, c. 542), county probation officers (M. S. 636.09, 636.10, 636.20), and the examiner of titles and his deputy (M. S. 508.12), are appointed and are removable by and at the discretion of the judges of the district court who fix their compensation, subject in some cases to specific maximums, payable from county funds. The district judges have power of approval of appointments and removals by the probation officer of his deputies, assistants and employees and their salaries (M. S. 636.09, 636.10, 636.20). The clerk of juvenile court is appointed and removable for cause by the district court judge presiding over the juvenile court; and the clerk's salary, not exceeding $5500 per annum, is fixed by the board of county commissioners (L. 1951, c. 653; L. 1955, c. 703, Section 3). The judges of the district court having the power of appointment and removal, such appointees are not county but state officers. (Op. O. A. G. 141-D, March 25, 1933, printed as No. 682, 1934 Report.) **Claseman v. Feeney**, 211 Minn. 266, 268, 300 N. W. 818, Mason's Minn. Dig. Section 2758. These appointees who perform their duties at the direction and under the supervision of the court are not county officers or employees within the meaning of M. S. 471.61, and the benefits therein provided are not available to them.

As to district court reporters, see Op. O. A. G. 129, August 23, 1956, June 24, 1931, July 7, 1943, and March 12, 1947. Cf. (129) June 24, 1931, PERA[1]. The same conclusion applies to district court reporters whether the district comprises one or more counties. Therefore, the rationale of our opinion of August 23, 1956 is applicable.

Similarly, the public defender of Ramsey County, an officer of the district court, is not a county officer or employee within the meaning of Section 471.61. He, too, is appointed by the judges of the district court who fix his salary (M. S. 611.13). He is not supervised by the county board. Again, it is not controlling that his salary is paid wholly by the county. Therefore Section 471.61 does not apply to the Ramsey County public defender.

The Ramsey County home schools are operated under M. S. 260.14, which provides in part:

---

[1]District Court reporters are members of PERA only because of special provision contained in M.S. 353.01, Subd. 2, and originating in L. 1933, c. 374, § 1 (1).

" * * * the plans, location, equipment, and operation of the county home school shall in all cases have the **approval of the judges of the district court. There shall be a superintendent or matron, or both, appointed for such home, who shall be probation officers of the juvenile court, and shall be appointed and removed by the district judges. The salaries of the superintendent, matron, and other employees shall be fixed by the judges of the district court,** subject to the approval of the county board. * * * " (Emphasis supplied)

The rationale stated above in reference to the specified officers and employees applies equally to employees of the Ramsey County home schools, in view of the statutory powers of the district court as emphasized above. Accordingly, in my opinion they are not within the purview of Section 471.61. The benefits of that statute are not available to them. The legislature may, of course, extend the application of Section 471.61[2].

Upon authority of Op. O. A. G. 331-B-1, August 31, 1944, that probate judges are public employees and county officers within the meaning of the Public Employees Retirement Act (M. S. 353.01, Subd. 2), this office has ruled O. A. G. 347, June 13, 1956, that judges and employees of the probate court are within the coverage and entitled to the benefits provided by Section 471.61. This conclusion is similarly applicable to the reporter of the probate court.

MILES LORD,
Attorney General.

WILLIAM M. SERBINE,
Spec. Asst. Attorney General.

Ramsey County Attorney.
January 10, 1957. 125-A-28

117

Counties—County Board—County Superintendent of Schools—Where office of county superintendent is terminated by resolution of county board pursuant to L. 1957, c. 816, office is terminated as of end of term of incumbent. Resignation of incumbent subsequent to adoption of resolution and prior to end of term does not terminate office but creates vacancy in existing office which shall be filled by county board by appointment for balance of term pursuant to M. S. 375.08.

---

[2]Cf. Ramsey County Civil Service Law, L. 1955, c. 355, § 6, which provides: "The unclassified service shall comprise: * * * (b) Judges, * * * examiner and assistant examiner of titles, public defender, * * * clerk of probate court * * *. (i) District court and probate court reporters, and officers and employees of county probation offices, county boys' farms, and county girls' schools."

Facts

"Pursuant to the provisions of Chapter 816 of the Laws of Minnesota for 1957 our Board of County Commissioners has adopted a resolution providing for the termination of the office of county superintendent of schools at the expiration of the present term of the incumbent of said office, that is, December 31, 1958. It now appears that the present incumbent of the office may resign prior to the expiration of his term in order to accept other employment."

Question

"[In view of] the provisions of the statute quoted does the County Board have the authority to appoint someone to complete the balance of the present term?"

Opinion

We assume that L. 1957, c. 816, is applicable to your county. Sec. 1 of such act provides:

> "The county board in any county having ten or less common school districts in operation and having no unorganized territory may by resolution duly adopted at least six months before the end of the term of office of the county superintendent of schools, declare the office terminated as of the end of the term of the incumbent. **If such resolution is adopted, no person shall be elected or appointed to the office of county superintendent of schools so long as such resolution remains in effect.** The county board by resolution adopted at least six months before the date of any general election may rescind its action terminating the office. If such action is taken a county superintendent of schools shall be elected at the next general election according to law." (Emphasis supplied.)

You are apparently asking whether, in the situation presented, the **office** of county superintendent of schools will terminate at the time of resignation of the incumbent before the expiration of his term; and it would appear that it is the language of the act emphasized above that causes the question to arise.

We are of the opinion that implicit in the emphasized sentence is the phrase "from and after the end of the term of the incumbent," and that the first sentence of the act means exactly what it says. The manifest intent of the legislature was that the office itself would, pursuant to resolution, only terminate **as of the end of the term** for which the incumbent was duly elected pursuant to M. S. 382.01. The fact that the resolution must be duly adopted at least six months before the end of the term of office would indicate that the legislature desired to provide sufficient time in which to wind up the business of such office in an orderly manner.

Because the act contemplates the termination of such office at a specific predetermined time, and because the resolution in the instant situation pro-

vides for termination of the office at a specific time in accordance therewith, it follows that resignation of the officeholder subsequent to adoption of the resolution and before that time has arrived will create a vacancy in the still existing office. See **State v. Billberg,** 131 Minn. 1, 154 N. W. 442, which holds that resignation of a county superintendent of schools during the term for which elected creates a vacancy in office. See also M. S. 351.02 (2).

Pursuant to M. S. 375.08, such vacancy shall be filled by the county board by appointment and the person so appointed, after qualifying, holds the office for the remainder of the unexpired term. See also M. S. 382.02.

Your question is therefore answered in the affirmative.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.
Assistant Attorney General.

Sibley County Attorney.
December 23, 1957. 399

118

Counties—Contracting for Library Service—Pursuant to M. S. 134.12, county board has discretion to contract with city in adjacent county to receive bookmobile service from such city even though there be a free public library in county. M. S. 375.33, Subd. 3, being now permissive, does not bar application of Section 134.12 in such situation.

Facts

"Our county is interested in establishing a county library system and in doing so, contracting with the city of Moorhead in Clay County for use of their service in connection with this system. Wilkin County has one city, Breckenridge, which already has its own library system but it is felt that between the city and county it would not be feasible to establish a bookmobile system which is the primary purpose of setting up this system. The city of Moorhead and Clay County already have a bookmobile which is not being used full time and could be used in our county. It is my understanding that there have been a number of recent Attorney General opinions concerning these joint library systems and I am particularly interested in your opinion No. 285-B dated October 23, 1957. I would appreciate it if you could send me copies of these.

"I do have one question, however, and that is with regard to your opinion 285B dated November 10, 1939. In this opinion it was held that

the commissioners of the city [county] of Waseca could not contract for library service for their county through cities located outside of their county as long as a city within the county has a library system. Apparently the basis of this opinion was the wording of the statute which existed at that time and particularly with the word 'shall' which was held to be mandatory. Apparently the wording of this statute has now been changed and it now reads 'may'. * * * I would appreciate your feelings on it inasmuch as it would appear to me that the particular opinion would not be effective in view of the present wording of the statute."

Question

Under present Minnesota statutes, may the Wilkin County Board contract with the City of Moorhead, located in Clay County, to receive such city's bookmobile service, even though there is a free public library in Wilkin County?

Opinion

At the time our opinion O. A. G. 285-B, November 10, 1939, was written, M. S. 375.33, Subd. 3 (then coded as Mason's Minnesota Statutes of 1927, Section 673, par. 3) provided:

> "If there is a free public library in the county, the board of county commissioners **shall** contract with the board of directors of such library * * * for the use of such library by all residents of the county * * * ." (Emphasis supplied.)

The conclusions reached in the 1939 opinion, supra, as well as in our opinion O. A. G. 285-B, March 6, 1942, were based on such mandatory language. However, M. S. 375.33, Subd. 3, was subsequently amended by L. 1943, c. 94, to change "shall" to "may," and the statute now provides as follows:

> "If there be a free public library in the county, the county board **may** contract with the board of directors of such library for the use of such library by residents of the county, and may place the county library fund under the supervision of such library board, to be spent by such board for the extension of the free use of the library to residents of the county. If there be more than one such free public library in the county the county board may contract with one or all of such library boards for such free service if in its judgment advisable." (Emphasis supplied.)

Manifestly, the changed language of the statute supersedes the said two opinions in regard to contracting with free public libraries for library service to the county.

M. S. 134.12 provides:

> "Subdivision 1. **Any board of directors** may admit to the benefits of its library persons not residing within the municipality under regulations and upon conditions as to payment and security prescribed by it.

"Subd. 2. **The board may contract with** the county board of the county in which the library is situated or **the county board of any adjacent county**, or with the governing body of any neighboring town, city, or village, **to loan books of the library, either singly or in traveling libraries, to residents of the county**, town, city, or village.

"Subd. 3. **Any such county board** or governing body **may contract with the board of directors of any free public library** for the use of the library by the residents of the county, town, city, or village who do not have the use of a free library, upon the terms and conditions as those granted residents of the city or village where the library is located, and to pay such board of directors an annual amount therefor. Any such county board or governing body may establish a library fund by levying an annual tax of not more than two mills on the dollar of all taxable property which is not already taxed for the support of any free public library and all taxable property which is situated outside of any city or village in which is situated a free public library." (Emphasis supplied.)

Wilkin County is adjacent to Clay County, in which the City of Moorhead is located. Therefore, on the basis of Section 134.12 and particularly Subd. 2 and 3 thereof, your question is answered in the affirmative, taking into account the fact that Section 375.33, Subd. 3, is now permissive rather than mandatory and thus does not bar the application of Section 134.12 to the instant situation.

Pursuant to your request, we enclose herewith a copy of our opinion O. A. G. 285-B, October 23, 1957, which, although it does discuss Sections 375.33 and 134.12, deals principally with the creation of joint libraries rather than with service contracts as in the present situation.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.
Assistant Attorney General.

Wilkin County Attorney.
July 18, 1958. 285-B

119

Counties—Municipalities—Hospital Districts—L. 1957, c. 640, Section 1 construed. If requisite voters in municipality sign referendum petition, election is held only in such municipality. If adverse vote, county board may still create hospital district composed of two or more municipalities whose resolutions are before it, provided that each municipality within proposed hospital district is contiguous to at least one of the other municipalities therein.

Facts

The village of Adrian and surrounding townships have been considering the formation of a hospital district under L. 1957, c. 640, Section 1 [coded as M. S. A. 397.05].

Questions

"1. If the requisite number of voters in any municipality sign a petition for an election, then is the election held only in that municipality or is the election one involving the entire district?

"2. If the election involves only the municipality and such vote is against forming a hospital district, then does this void the entire proceedings or may the County Board create a hospital district composed of the remaining municipalities?

"3. If the County Board may create a district out of the remaining municipalities, then what would be the effect upon forming such district if the municipality voting against the district left the remainder not composed of contiguous territory?"

Opinion

L. 1957, c. 640, Section 1, (Section 397.05) provides:

"The board of County commissioners of any county, or two or more boards of county commissioners acting jointly, may, when requested so to do by resolutions of the governing bodies of two or more of the cities, villages and towns within the county or counties, by resolution create a hospital district comprising the entire area of such cities, villages and towns, provided that no city, village or town shall be included therein unless it is contiguous to one or more of the others; and provided further that each resolution hereafter adopted requesting the creation of such a district shall be published in the official newspaper of the city, village or town concerned, and if within ten days after such publication a petition shall be filed with the governing body, signed by qualified electors of the city, village or town, equal in number to ten percent of the number of such electors voting at the last preceding election of officers thereof, requesting a referendum on the resolution, the same shall not become effective until approved by a majority of such qualified electors voting hereon at a general or special election."

(1) Under the statute, the governing body of a city, village or town may adopt a resolution requesting the county board to create a hospital district. This resolution must be published in the official newspaper of the municipality. It is effective ten days after adoption and may then be presented to the county board. However, if a proper petition is filed with such governing body, signed by the requisite number of qualified electors of such municipality, within such ten day period requesting a referendum on the resolution, then such resolution cannot become effective and hence cannot

be submitted to the county board until approved by a majority of the electors of such municipality voting thereon at a general or special election.

Specifically answering your first question, the election is held only in such municipality and does not involve the entire contemplated district.

(2) (3) The county board, when it receives such resolutions from the governing bodies of two or more contiguous cities, villages and towns, may then by resolution create a hospital district comprising the area of such municipalities. Manifestly, the county board cannot include a municipality within such hospital district if, due to failure of the local referendum, there is no resolution of the governing body of such municipality before it. But that does not mean the county board may not create such a hospital district comprised of the area of two or more municipalities whose resolutions are before it, provided that each municipality within such proposed hospital district is contiguous to at least one of the other municipalities therein.

Specifically answering your second and third questions, an adverse vote in one municipality does not void the entire proceedings so long as there are resolutions of at least two contiguous municipalities before the county board. If, by the said adverse vote, each remaining municipality is not contiguous to one or more of the others, then it would be impossible for the county board to create a hospital district under L. 1957, c. 640, Section 1.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Nobles County Attorney.
September 11, 1957. 1001-B

120

Counties—Hospitals under Section 376.01 et seq.—Construction of Addition Thereto—If federal funds will pay all costs of addition in excess of cost previously authorized by voters, no new election need be held to authorize expenditure of such additional funds. Section 376.07.

Section 376.08 is applicable to county hospital and authorizes maximum appropriation of $65,000 from general revenue fund yearly to aid in improvement of hospitals in county. County board may transfer moneys from other county funds to aid in construction of hospital addition without special authorization therefor by voters. Transfer of funds and issuance of warrants discussed. Section 375.18, Subd. 7.

Facts

"Clearwater County Memorial Hospital desires to build an addition to their hospital and in accordance therewith an election was held

authorizing them to build such an addition at a sum not to exceed $75,000.00. This hospital was at one time owned jointly by the Village of Bagley and the County of Clearwater but the village's interest was recently purchased by the County of Clearwater, and therefore, the hospital now belongs to the County of Clearwater and is operated by the hospital board under a County Board Resolution. Under this resolution a hospital improvement fund has been set up but as yet no payments have been made into this fund. The hospital current fund has approximately $25,000.00 in cash which could be used for building this addition. The hospital board is desirous of financing this addition without the sale of bonds if possible. Recently an application was made to Hill-Burton for federal aid and they imposed certain requirements on the building construction which will raise the cost of the building over and above the $75,000.00 authorization before they would contribute any funds towards this building."

You ask certain questions which are answered seriatim:

Question

1. "Will a new election have to be held for authorization by the voters to build an addition that exceeds their prior approval of $75,000.00 if Hill-Burton funds will provide payment of any excess over and above the original $75,000.00 authorization?"

Opinion

It is our understanding from discussing the matter with you over the telephone that at the time the voters authorized the construction of an addition to the county hospital pursuant to M. S. 376.04, for "a sum not to exceed $75.000.00," it was not contemplated that federal funds would be available to aid in such project. Consequently, the voters could only have intended to authorize the county to obligate itself to the extent of $75,000 for such addition. Obviously, that portion of the total cost which is contributed by a federal grant does not become a financial burden or obligation of the county. See opinion O. A. G. 1001-B, May 18, 1949, copy enclosed, which holds that the language "at a cost not to exceed," included in the question submitted to the voters should be construed to mean only that portion of the total cost which the county is obligated to pay.

If, therefore, federal funds will in fact pay all costs in excess of $75,000, no new election need be held. The county board will not, in such situation, be expending any county funds in excess of $75,000 so as to require authorization of the voters therefor in either of the two forms set forth in M. S. 376.07. This question is answered in the negative.

Question

2. "Does Minnesota Statutes Annotated, Section 376.08, authorize the Board of County Commissioners to appropriate from the General Revenue Fund a sum not exceeding $65,000.00 in each and every year

for hospital additions to a County Hospital constructed under the provisions of M. S. A. Section 376.02 et seq?"

Opinion

M. S. 376.08 provides in material part:

"The board of county commissioners in any county in this state having 30,000 inhabitants, or less, is hereby authorized to appropriate from the general revenue fund of such county a sum **not exceeding $65,000 in any one year** to aid in the acquisition of lands for hospital purposes, the erection, construction, **improvement**, alterations, equipment and maintenance of hospitals within such county." (Emphasis supplied.)

Our opinion O. A. G. 1001-B, September 20, 1950, also printed as No. 90 in the 1950 Report, copy enclosed, held this section to be applicable to county hospitals constructed under the provisions of Section 376.02 et seq., thus superseding prior opinions to the contrary. The attorney general has consistently followed and affirmed this construction of the statute ever since 1950. See opinions O. A. G. 1001-B, September 27, 1955, and O. A. G. 125-B-17, March 31, 1958, copies enclosed.

The statute authorizes a maximum appropriation of $65,000 per year from the general revenue fund of the county to aid in the improvement of and alterations to hospitals in the county, including the county hospital. Clearwater County contains less than 30,000 inhabitants. Therefore, since the construction of an addition to the county hospital clearly constitutes an improvement thereof, this question is answered in the affirmative.

Question

3. "(a) May the county board transfer money from other county funds to the Hospital Improvement Fund for the purpose of paying for the construction of such addition without special authorization for such transfer by the voters?

(b) If so, what limitations are there on such transfers by the county board?"

Opinion

(a) M. S. 375.18, Subd. 7, provides:

"Each county board may transfer by unanimous vote any surplus beyond the needs of the current year in any county fund to any other such fund to supply a deficiency therein, except in counties having over 75,000 inhabitants."

This statute answers part (a) of your question in the affirmative. See analogous opinions O. A. G. 107-A-12, January 25, 1955 and August 9, 1948, copies enclosed. The county board's vote must be unanimous, but there is no requirement that special authorization for such transfer be given by

the voters. It is sufficient that the voters have previously authorized the construction of the addition to the county hospital pursuant to M. S. 376.04.

(b) Sec. 375.18, Subd. 7, provides that only moneys over and above the needs of the current year may be transferred from one county fund to another. To that extent, for example, moneys in your Hospital Current Fund could be transferred to the Hospital Improvement Fund for the purpose of constructing the hospital addition. The latter fund need not be entirely depleted before such transfer is made. See opinion of August 9, 1948, supra.

Attention is also called to Section 376.02, which authorizes the county board to pay for the construction and improvement of its hospital buildings "out of any moneys in the county treasury not otherwise appropriated." This statute also authorizes the county board to "issue therefor the warrants or bonds of the county in payment therefor." If necessary, the county's warrants for this purpose may be registered (see M. S. 385.31) or provision could be made for temporary loans or transfers between funds to pay the warrants (see M. S. 385.32). If, of course, the county board fixes the time and terms of payment of its warrants, then the electors must authorize their issuance in the same manner as the issuance of bonds. See M. S. 475.51, Subds. 2 and 3, and 475.58, Subd. 1.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Clearwater County Attorney.
July 17, 1958. 125-A-27

121

Counties—Hospital Districts—L. 1955, c. 400, L. 1957, c. 3. Any mileage and expenses to which county board members are entitled on account of official duties performed pursuant to L. 1955, c. 400 should be paid out of county general revenue fund and not out of special fund under c. 400, Section 3.

Facts

"Pursuant to the provisions of Chapter 400, Laws of Minnesota, 1955, and Chapter 3, Laws of Minnesota, 1957, the Rice County Board of County Commissioners have been meeting from time to time for the purpose of proceeding with the construction and erection of a district hospital which is called Rice County Hospital District No. 1. The board has been meeting as a whole many times at special meetings."

Question

"Should the mileage and expenses that the board has for these meetings be charged as against the general revenue fund of the County or as against the funds of Rice County Hospital District No. 1 when the board meets to consider the various problems pertaining to the construction and erection of a community hospital pursuant to the above laws."

Comment

"It seems to me that as long as the County Board is acting as the County Board and is charged with the responsibility; that the same mileage and expenses as allowed to the board in other special meetings of the board should be likewise allowed when they are meeting as a board in regard to the district hospital problems, and that the expenditures so made should be taken from the revenue fund of the County because they are acting as the County Board even though the effect of their meeting is to benefit primarily the district rather than the County as a whole."

Opinion

L. 1955, c. 400 applies to certain counties and authorizes the creation of hospital districts therein and the construction, equipment and operation of district hospitals in such counties and the issuance of bonds in the financing thereof. Sec. 2 provides that the board of county commissioners may create a hospital district; Sec. 3 empowers such board to authorize the construction and equipment of a district hospital in such district to be operated under the supervision of a district hospital board appointed by the board of county commissioners. Said Section 3 then provides:

"The expense of operation of any such hospital shall be paid from the revenues derived therefrom and, to the extent necessary, from ad valorem taxes to be levied solely upon the taxable property situated within the district. **All revenues so received and taxes so levied shall be segregated in a special fund** by the county treasurer **and disbursed only upon orders signed by the chairman of the hospital board and countersigned by the county auditor, pursuant to resolutions of said hospital board.** All contracts with reference to the construction, equipment and operation of such hospital shall be approved by the county board and executed in the same manner as other county contracts, and the county board shall at least annually examine and approve or take any necessary remedial action with reference to the receipts and disbursements shown by the books and records of each district hospital, and levy such tax in accordance with this section as may be necessary for the operation thereof in the succeeding year." (Emphasis supplied.)

Sec. 4 provides that the construction and equipment of the district hospital may be financed by the issuance of general obligation bonds and that proceedings for their issuance shall be instituted and completed by the county board.

We construe the above quoted language of Section 3 to mean that not only are the expenses of operation of the district hospital to be paid from the special fund, but that such special fund shall only be used to pay such expenses of operation.

It will be observed that the powers and duties of the county board under c. 400 relate to creation of the hospital district, the construction, the equipping and financing of the district hospital, and the appointment of a district hospital board, and that the powers and duties of the hospital board are limited to the operation of the hospital. Manifestly, the mileage and expenses of members of the county board in connection with the powers and duties of the county board are not an "expense of operation" of the district hospital.

We therefore concur in your views as expressed in the foregoing comment, and, consistent therewith, it is our opinion that any mileage and expenses to which county board members are entitled on account of official duties performed by them under and pursuant to said c. 400, should be paid out of the general revenue fund of the county and not out of the special fund authorized by Section 3 of said chapter.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Rice County Attorney.
April 15, 1958. 1001-B

122

Counties—County Hospitals under Sections 376.01—376.06—"Maintenance of hospitals" in Section 376.08 does not include "operation of hospitals" within its meaning. Such statute not available to appropriate funds to aid in operation of county hospital. However, warrants issued in connection with operating such county hospital are general county obligations.

Facts

"The Pine County Memorial Hospital located at Sandstone, Minnesota, is owned and operated by the County of Pine. The hospital does its banking at the Sandstone State Bank, Sandstone, Minnesota.

"On January 31, 1958, the Sandstone State Bank held unpaid registered warrants on the County Hospital Operating Fund."

It is our understanding from prior opinions to your county that the said hospital was erected in accordance with the provisions of M. S. A. 376.01-376.06, and this opinion is written on that assumption.

You call attention to Section 376.08.

Questions

"1. Under M. S. 376.08, does the word 'maintenance' mean that the funds so appropriated under that section can be used for the operation of the hospital and the payment of outstanding registered hospital warrants on the County Hospital Operating Fund?

"2. Are the registered warrants on the County Hospital Operating Fund payable only from the revenue of the hospital, or are they the general obligations of the County of Pine?"

Opinion

1. Section 376.08 provides in material part:

"The board of county commissioners in **any** county in this state having 30,000 inhabitants, or less, is hereby authorized to appropriate from the general revenue fund of such county a sum not exceeding $65,000 in any one year **to aid in** the acquisition of lands for **hospital** purposes, the erection, construction, improvement, alterations, equipment and **maintenance of hospitals** within such county." (Emphasis supplied.)

Although the Attorney General had previously held otherwise, ever since our opinion O. A. G. 1001-B, September 20, 1950, also printed as No. 90, 1950 Report, copy enclosed, it has been held that the quoted provisions of this section were applicable to county hospitals constructed under the provisions of Sections 376.01-376.06, for the purposes mentioned therein. See opinion O. A. G. 1001-B, September 27, 1955, copy enclosed.

One of the purposes mentioned in this section is "maintenance of hospitals", but there is no reference to the "operation" of hospitals such as is found further in Section 376.08 with regard to appropriations to aid a rehabilitation center and school for the education and rehabilitation of crippled children and adults. If the legislature had intended the quoted paragraph to include expenses of operation of such a hospital, it would have said so.

We are therefore of the opinion that the meaning of the word "maintenance", in the context in which found, comes squarely within its definition as found in Black's Law Dictionary, Third Edition, page 1143, as follows:

"Maintenance. The upkeep, or preserving the condition of property **to be operated.**" (Emphasis supplied)

Since "maintenance of hospitals" in Section 376.08 does not include "operation of hospitals", we answer your first question in the negative.

2. Section 376.06 provides:

"The county board of any county having so purchased, erected and constructed buildings for hospital purposes may operate these buildings as such hospital, appoint a superintendent therefor for a term to be fixed by it, fix his salary, and at pleasure remove him, prescribe his powers and duties, **provide for the management and operation of the hospital, and shall operate, control, and manage the hospital.** If the board determines that it is in the interest of the public so to do, it may appoint a hospital board of not less than three, nor more than nine members, who shall serve without compensation, and who shall be resident freeholders of the county. **Subject to its supervision,** the county board may commit the care, management, and operation of the hospital to such hospital board and may provide for the organization of such hospital board, its duties and the duties of the members thereof, and such further regulation in reference thereto and to the management, operation, and control of the hospital as are proper, necessary, or desirable. * * * " (Emphasis supplied)

There is no language therein or anywhere in Sections 376.01-06 requiring the expense of operation of the county hospital to be paid, either in whole or in part, from the revenues derived therefrom.[1] Therefore, since by law the county board is charged with the ultimate operation, control and management of the county hospital, warrants issued in the operation of the hospital are general county obligations and the county board is obliged to provide funds for their payments when necessary.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Pine County Attorney.
March 31, 1958. 1001-B

123

Drainage Ditches—Repairs—M. S. A. 106.471, Subd. 2 (b), applies only to routine repairs made by board without petition. It does not authorize repairs on ditch on county line but only when ditch or part thereof is within county. County Board may not repair ditch on county line and each county contribute $2,000 toward expense.

You have called attention to M. S. A. 106.471, Subd. 2 (b)

Question

"Where a judicial ditch system is on a county line and in need of repair does this allow each of the two counties to spend $2000.00 on

[1]Such as is found, for example, in § 397.08 relating to a district hospital.

the repair or is the sum of $2000.00 considered in the aggregate to be spent by both counties?"

Opinion

M. S. A. 106.471, Subd. 2 (b), Laws 1957, c. 329, reads:

"If the board finds that the estimated cost of such repairs will be less than $2,000, it may have such work done by day labor without advertising for bids or entering into a contract therefor. The county board is limited in the expenditure of money therefore as herein provided. In one calendar year the board shall not spend or contract to be spent for repairs or maintenance on one ditch system a sum greater than 20 percent of the cost of construction thereof in that county, except as provided in subdivision 4. In case there are sufficient funds to the credit of the drainage system to make such repairs, such funds may be expended by the county board for such purpose without further assessment."

You will note that the reference to the county board is in the singular. Only one county board administers the law with reference to a repair. The board has authority under Subd. 2 (a) to maintain a ditch **within the county**. This is not authority to the county board of one county to maintain a ditch on the county line because that ditch lies in two counties. It is my understanding that the county board may conduct this maintenance work under authority of paragraph (a) only when the work of repair is confined to one county.

It is my opinion that the authority of the county board found in Subd. 2, paragraph (b) to spend $2,000 for maintenance of a drainage ditch relates to the work authorized in paragraph (a) of that section. You will note that the language is "If the board finds that the estimated cost of **such repairs** will be less than $2,000 * * * ". This language all refers to what a single county board may do. It is only one county board that is engaged in making these repairs. It is only when the ditch or the part of it to be repaired lies within the county that the board may proceed. And it is only in those cases where the board is proceeding without a petition that the provisions of paragraph (b) apply.

It is my opinion that your question requires a negative answer.

Repair proceedings may be conducted under Subd. 4.

"(a) Upon the filing of a petition by any party or corporation, municipal or otherwise, interested in or affected by a drainage system * * * with the clerk of the district court having jurisdiction over said ditch in the case of a drainage system affecting **two or more counties,** therein setting forth that the drainage system is out of repair, it shall be the duty of the * * * clerk in the case of a drainage system affecting two or more counties, to present the petition to the judge of the court within ten days from the filing thereof." (Emphasis added.)

Then follows a statement of the procedure.

MILES LORD,
Attorney General.

CHARLES E. HOUSTON
Solicitor General.

Norman County Attorney.
May 16, 1957. 602-J

124

County Board—Drainage Proceedings. Board member attending board meeting or hearing under M. S. A. 106.011-106.661 entitled under 106.431, subd. 1, as amended by L. 1957, c. 556, to $10 per day.

Facts

"Laws 1957, Chapter 556 (3) provides in part that each of the county board shall be paid the sum of $10.00 per day for each day actually employed in drainage proceedings and for each day employed in the inspection of any drainage system, if appointed as a committee for that purpose.

"A special session of the county board was called for the purpose of considering ditch proceedings and a day was consumed in such hearing."

Question

"Are county board members entitled to a per diem of $10.00 for performing such service under Laws 1957, Chapter 556 (3) ?"

Opinion

The general powers and duties of the board under the Minnesota Drainage Law (M. S. A. 106.011-106.661), are specified under 106.021, subd. 1, as follows:

"The county boards of the several counties, and the district courts are authorized to make all necessary orders for and cause to be constructed and maintained public drainage systems; to deepen, widen, straighten, or change the channel or bed of any waterway following the general direction thereof, and when practical, terminating therein; to extend the same into or through any municipality for the purpose of securing a suitable outlet; and to construct all needed dikes, dams, and control works and power appliances, pumps, and pumping machinery."

Other provisions of the chapter prescribe specific duties of the board and either direct or authorize the holding of various types of hearings[1] before the board.

There is no express reference to a "special session" of the board. We therefore assume that the so-called "special sessions" (even though so designated by the board), are either hearings before or meetings of the board in the performance of its duties under the drainage law.

L. 1957, c. 556 amended M. S. A. 106.431, Subd. 1 (L. 1947, c. 143, Sec. 43), so that the portions thereof to which your letter relates now read as follows:

> "The following fees and expenses shall be allowed and paid for services rendered under this chapter:
>
> " * * *
>
> "(3) Each member of the county board shall be paid the sum of $10 per day for each day actually employed in drainage proceedings and for each day employed in the inspection of any drainage system, if appointed as a committee for that purpose, and in addition thereto, his actual and necessary expenses incurred therein. **Such per diem shall be in addition to all sums and fees allowed by law.**" (Emphasis supplied)

A county commissioner attending and participating in a meeting of, or hearing held before the board pursuant to the drainage law is manifestly employed in drainage proceedings, and being so employed he is entitled to compensation at the rate of $10 per day for each day actually employed, in addition to other compensation fixed and allowed by law. In this connection see O. A. G. 124-C, March 31, 1922, printed as No. 138, 1922 Report, copy enclosed.

Accordingly we answer your question in the affirmative.

Section 106.471, Subd. 2 provides that:

> "(a) * * * The board shall cause such drainage system to be annually inspected, either by a committee thereof, or a ditch inspector appointed by the board, * * * "

When 106.431, subd. 1, clause (3), as amended, is read in connection with the foregoing it becomes apparent that the expression "if appointed as a committee for that purpose" in 106.431, has reference only to inspection

---

[1]The following sections provide for hearings:
106.081, subd. 4 (Limitation of survey); 106.101 (Preliminary hearing); 106.171 (Final hearing); 106.241 (Hearing on petition for reconsideration of order establishing ditch); 106.291 (Contractor's petition for additional partial payments); 106.311 (Application for reduction of contractor's bond); 106.331 (Engineer's report upon completion of contract); 106.471 (Levy of assessment for repairs, hearing thereon optional with board); 106.471, subd. 4(a) (Drainage system out of repair, petition for examination, and report of engineer); 106.471, subd. 7(a) (Inclusion of added lands); 106.491 (Obstruction of ditch, order to show cause for removal of obstruction); 106.492 (Alteration in drainage system affecting trunk highway); 106.501, subd. 2 and 4 (Improvement of public drainage system, petition by affected resident land owner); 106.511 (Improvement of outlet); 106.521 (Petition for laterals); 106.531 (Petition for use of existing ditch as an outlet); 106.561 (Diversion of drainage); 106.661 (Abandonment of ditch).

of the drainage system and that members of the board, for services other than inspection, need not be appointed as a committee in order to be entitled to fees under 106.431, subd. 1 as amended.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Public Examiner.
October 3, 1957. 124-C

125

Payments to counties in lieu of taxes provided for by M. S. A. 97.49, Subd. 3 to be paid by the Department of Conservation for lands acquired for certain wild life purposes construed to exclude payments upon trust fund and tax-forfeited lands so acquired.

Facts

"During the year 1953, the State of Minnesota by its Attorney General commenced an action against several parties including the County of Kanabec. This action was venued in Kanabec County and related to the condemnation of certain lands in this County for state game refuge and public hunting grounds purposes. A breakdown of the acreage located in Kanabec County involved in those proceedings is as follows:

	4844.14	acres of tax forfeited land (We have been paid during the year 1953 in the sum of $8,809.00 by State Warrant)
	640.	acres of trust fund lands
	810.44	acres of individually owned lands purchased by State
Total	6294.58	acres

"Since 1953, the County Board of Kanabec County has passed a resolution each year in accordance with Sec. 97.49 Minnesota Statutes, electing to take the 15c statutory payment made reference to therein for all of the acreage above set forth, except the 640 acres of trust fund lands. It has been and is the position of our county that we were entitled to 15c per acre on the 4844.14 acres since we interpret the statute to read that the 15c payment shall not apply to tax forfeited lands when such forfeited lands were **not purchased** for game refuge and public hunting ground purposes. It appears clear that these condemnation proceedings are included within the concept 'condemnation proceedings'

since our Supreme Court in Minnesota Reports No. 167 page 456 stated —'The taking of land in condemnation proceedings is in a legal sense a purchase and sale and the vendee in the contract, being the equitable owner, must be considered as the vendor in such forced sale'. There is further no question but that the land in this county was purchased in this county for game refuge and public hunting grounds purposes since the proceedings are all entitled 'In the matter of the condemnation of certain lands for state game refuge and public hunting ground purposes.' "

Question

"Would you please advise us as to whether or not we are correct in our position of asking for 15c per acre on 4844.14 acres of tax forfeited lands and if we are correct in that position would you please advise us as to what we should do to effect payment?"

Opinion

The only question is whether or not the county may be entitled to the optional payments provided in M. S. A. Section 97.49 in the case of tax-forfeited lands condemned for game refuge and public hunting ground purposes. M. S. A. Section 97.49, Subd. 3 provides:

"Subd. 3. Not less than 50 percent of the moneys received from the sale of licenses to take small and big game by hunting and trapping, together with all income received from the sale of timber, hay stumpage, right of way leases, home site and resort leases, or other special use permits of lands **acquired** for public hunting grounds and game refuges, shall be used for the acquisition and maintenance of public hunting grounds, game farms and game refuges, and the improvements of natural propagation and breeding grounds, or other game conservation uses: **provided, however, that a sum equal to 35 percent of the gross receipts from all special use permits of these lands or 15 cents per acre on purchased land actually used for public hunting grounds and game refuges** shall be paid out of the game and fish fund annually to the county in which said lands are located, to be distributed by the county treasurer among the various funds of the county, the respective towns and school districts wherein such grounds and refuges lie, on the same basis as if the payments were received as taxes on such lands, payable in the current year, **but this provision shall not apply to tax-forfeited or state trust fund lands or any other state lands not purchased for game refuge and public hunting ground purposes.** The county board shall elect for the ensuing year whether to receive the 35 percent of the gross receipts or the 15 cents per acre as above provided and shall so notify the commissioner of conservation on or before January 1st of each year." (Emphasis added)

A study of the foregoing subdivision leads to the conclusion that the use of the connective "or" is in the disjunctive sense in enumerating the excluded categories and that therefore the county is not entitled to payments for lands acquired by the Department of Conservation coming within the following categories: (1) tax-forfeited lands, (2) state trust fund lands, (3)

any other state land not purchased for game refuge and public hunting ground purposes. These are three separate and distinct excluded classes.

The provisions of M. S. 1945, Section 97.49, Subd. 3 excluded from payment only state trust lands. The present language to broaden the exclusion to include tax-forfeited lands was added by L. 1953, Ch. 741, Sec. 38 F Item 7 which also added the optional plan of receiving 15c per acre on purchased land.

The moneys earmarked for the purposes of this subdivision are receipts from various sources resulting from lands "acquired" for public hunting grounds and game refuges. The word "acquire" means to become the owner of property and in this subdivision refers to the lands that the Department of Conservation becomes the owner of for these purposes. To qualify for payment, two conditions must be met. First, the lands must be acquired, and, second, the lands acquired must not be in an excluded class. Here the lands were acquired but the second condition is not met. Lands which are tax-forfeited or state trust fund lands or any other lands not purchased for game refuge and public hunting ground purposes are excluded. There is much land in the state acquired by the department for other purposes than public hunting grounds and game refuges. Conversely, there is much land in the state that is used by the Department of Conservation for public hunting grounds and game refuge purposes which is not acquired by the department. For example, pursuant to the provisions of M. S. A. Section 282.01 the county board may by resolution declare tax-forfeited lands classified as conservation lands as suitable for being devoted to conservation uses and may submit such resolution to the Commissioner of Conservation who, after investigation, may accept the same on behalf of the state for conservation purposes. This procedure, however, does not mean that the department has acquired ownership of these lands, for at a subsequent time the conservation use may be changed and the lands may be again sold and placed on the tax rolls. Such lands are not acquired and are thereby excluded from coverage. Reading Section 97.49, Subd. 3 as a whole indicates an intention on the part of the legislature to compensate the counties for the loss of tax revenue which occurs in some cases when lands are acquired for public hunting grounds and game refuge purposes. Tax-forfeited and trust fund lands do not bring in tax revenue.

This problem has been given very careful and lengthy consideration by this office, particularly in view of the fact that you have indicated a contrary conclusion, and I am not unmindful of the importance of the question to various counties in the state. Hence, there has been some delay in answering your question. However, we believe the conclusion herein expressed is the correct one, and this is in accord with the administrative determination given thereto.

MILES LORD,
Attorney General

MELVIN J. PETERSON,
Deputy Attorney General.

Kanabec County Attorney.
January 6, 1958. 983-G

126

Drainage—Lands assessed for benefits and used for residence purposes may drain the overflow from septic tanks into a public ditch.

Facts

"McLeod County Ditch No. 18, a tile ditch as originally constructed many years ago, was intended to drain lands that were devoted exclusively to agricultural purposes.

"Now, however, there are areas of the land that was originally assessed for benefit on the ditch being platted and many homes are being constructed and the over-flow from the septic tanks of homes now constructed and many to be constructed is or will be drained into County Ditch No. 18."

Questions

"1. Can the County Board entirely prevent connecting the overflow of the septic tanks into the County Ditch?

"2. If the Board can prevent this what powers do they have with regard thereto?

"3. Since the land upon which the residences are constructed were originally assessed for benefits do the owners of such residences have the right to make such connection with regard to the septic tank overflow without permission of the County Board?

"4. Would the County Board have the right to make any additional assessments against the owners of the residences for the outlet for the septic tanks assuming that the lands on which the residences are located were originally assessed?"

Opinion

1. I assume that the petition for the ditch stated that the proposed ditch would improve the public health. That is one purpose for which drainage ditches are made. On the preliminary hearing, the board or court must find from the evidence "that it will be of public benefit and promote the public health". M. S. A. 106.101. On the final hearing, before the board or court establishes the proposed ditch, it must find from the evidence that it "will promote the public health". 106.201, Subd. 2.

An opinion O. A. G. 148-A, November 9, 1948, of which a copy is enclosed, states "Although in this state it may, perhaps, be said that the greatest single use made of drainage ditches is to enhance the value and utility of agricultural land, by no means may it be said that such is the exclusive purpose of drainage ditches."

In my opinion your first question requires a negative answer.

2. The facts stated show no ground upon which the board may deny the use of the ditch to the owners of land assessed for benefits. I know of no statute which gives them that authority.

3. This question is answered in the affirmative.

4. The answer to the fourth question is "no".

MILES LORD,
Attorney General.

CHARLES E. HOUSTON,
Solicitor General.

McLeod County Attorney.
March 26, 1958. 602-H

127

Bridges and Culverts—Road law and drainage law distinguished.

Question

"Do the provisions of Section 160.241 require the County Board to give to the adjoining landowner an approach culvert in every case where he does not have a reasonable access at the present time?"

You comment that

"We have many situations in our county where approaches to adjoining land have been cut off by ditches and other means and no suitable approach provided. Must we now provide approaches under the provisions of 160.241 in every case where the landowner asks for it?"

Opinion

M. S. A., c. 160, relates to roads. Chap. 106 relates to drainage ditches. You will note upon reading Section 160.241 that it does not apply when the easement of access has been acquired. You will further notice that it applies where access is reasonably necessary for approach upon the highway from abutting land. So before the county board orders that suitable access shall be furnished at public cost from land abutting a county road or a county-state highway and a substantial culvert shall be installed on the request of the abutting owner, the county board must determine that the access and culvert are reasonably necessary for approach upon such highway from abutting land. Without such determination by the board, the expenditure of public money for that purpose is unauthorized. It is not the owner's application, but the board's determination on the application that brings the statute into play.

I consider that this section applies to roads not involving drainage ditches. When drainage ditches are involved, the law relating to ditches, c. 106, applies. In many ditch cases the landowner was paid damages which included the cost of construction and maintenance of a crossing from the highway to the land. So we cannot pass upon the right of the landowner where a drainage ditch is involved without knowing the precise facts in respect to his case. In some ditches, the crossings are specified as a part of the ditch job. In other cases it is the burden of the landowner to pay for his crossing because he was allowed damages for that very purpose.

MILES LORD,
Attorney General.

CHARLES E. HOUSTON,
Solicitor General.

Wilkin County Attorney.
October 9, 1958. 377-A-3

128

Towns—Town Clerk—Town board cannot appoint a deputy town clerk. Issuance of town orders upon town clerk becoming mentally or physically disabled discussed.

Facts

"A Clerk of a Township has been disabled so that he is unable to recognize anyone or write his name. The township wishes to issue orders in payment of road work which is going on at the present time."

Questions

"1. Can the Town Board appoint a deputy Town Clerk to perform the duties of the Town Clerk?

"2. Can the Town Board, in the absence of the Town Clerk, issue town orders in payment of township obligations?"

Opinion

1. No. The town board has no authority to appoint or employ a deputy clerk to perform the duties of a town clerk. M. S. 367.12 authorizes the town clerk to appoint a deputy. This is the only authority for making such an appointment.

2. M. S. 367.18 provides for the payment of audited and allowed town accounts by the town treasurer "on the order of the town board signed by the chairman and countersigned by the clerk." The town board cannot dispense with the requirement that the town clerk countersign the order, and

issue a valid order or warrant without the signature of the clerk (or his duly appointed deputy) affixed thereto.

In connection with your problem see opinion O. A. G. 12E, November 29, 1945, and February 8, 1952, copies enclosed. These opinions involved the physical and mental disability of a village assessor, and in each opinion it was suggested that if the assessor has so far lost his mental faculties, that he is unable to appoint a deputy, the council may act as though there was actually a vacancy and appoint a successor. In the opinion of November 29, 1945, supra, it was stated that the appointee would be at least a de facto officer and that his acts as such would be valid. See **Fulton v. Town of Andrea**, 70 Minn. 445, 73 N. W. 256.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Pine County Attorney.
July 10, 1958. 442-B-11

129

Towns—Having village powers per M. S. 368.01—Official newspaper must be a legal newspaper of general circulation in village—need not necessarily be published in county—M. S. A. 412.831; 412.191, Subd. 4; 412.221, Subd. 9.

Facts

"We are inquiring for the Town of Denmark, Washington County, Minnesota, about which paper they may publish their building regulations in. They are a town qualifying under M. S. A. 368.01 to enact a building regulation ordinance. There is no paper published in their Township. There is a paper generally circulated in the Town published in H in another County. There is also a paper of general circulation published in Washington County but this paper has very little circulation in this particular Township."

Question

"Can the Town Board designate the H paper as its official paper and proceed to publish this, its first ordinance, in that paper?"

Comment

"Your opinions 441h, July 11th, 1950 and 277b-4, April 27th, 1949, noted under M. S. A. 412.831 would suggest it but we should appreciate your opinion."

Opinion

You have informed us that the town of Denmark falls within the purview of M. S. A. 368.01 which gives to said town certain village powers including those enumerated in M. S. A. 412.191, Subd. 4 and 412.221, Subd. 29. You have reference to action by said town pursuant to 412.221, Subd. 29, authorizing zoning restrictions by ordinance.

In an opinion O. A. G. 441-H, July 11, 1950, referred to in your letter, this office ruled that a town board acting pursuant to 412.221, Subd. 29 must comply with 412.191, Subd. 4, requiring publication of the zoning ordinance "once in the official newspaper." This office in the other opinion referred to in your letter, O. A. G. 277-B-4, April 27, 1949, distinguished the present language of M. S. A. 412.831, referring to "a legal **newspaper of general circulation** in the village," under the village code from the language of the prior statute M. S. 412.22 which required that ordinances be "published once in a **newspaper in the county**, or, if there be none such, post it in three conspicuous places in the village." The aforementioned opinion ruled that the official newspaper of the village need not necessarily be one **published in the county**, but could be a legal newspaper published in another county but which has **general circulation in the village.** This opinion applies equally well to towns having village powers and to the town's official newspaper. The official newspaper of such a town must be a legal newspaper of general circulation in the town but not necessarily published in the same county. If the paper published in H complies with the latter condition it may be designated the official newspaper of the town. Copies of the above opinions are enclosed.

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.,
Spec. Asst. Attorney General.

Denmark Town Attorneys.
January 28, 1958. 277-H

130

Towns—Cartways—On facts submitted, town board must establish cartway along section line over land of "A" to point of intersection with land of "B", but lacks authority to establish or extend cartway over the benefited land of "B".—M. S. 163.15, Subd. 1.

Facts

"B is the owner of the lands consisting of more than 150 acres, which lands the proposed road will serve. A is the owner of the parcel of land lying between B and the County Road to the north. Said road

runs east and west. The proposed road would follow the section line as close as is feasible in view of the swamp or nearly lake area which is on the section line and according to former rulings by your office, the Town Boards are permitted under such circumstances to take the closest feasible route adjacent to the section line in establishing such section line road."

You have also furnished us with a sketch showing the proposed cartway and the lands over which the same will extend. A copy of such sketch is attached thereto.

Question

"May the Township build all the way across the lands of A and up to the building site of B which is just one-half mile in length, this being authorized under said Chapter 874?"

By way of comment you add the following:

"The last paragraph of your opinion recites the proposition or the theory that the cartway is a public road in which the public has a direct interest and it is not to enable a land owner to obtain a private road to his own land to serve only his private purposes."

Opinion

As stated in our previous opinion, O. A. G. 379C-1 (d), April 18, 1958, the mandatory aspect of that portion of M. S. 163.15, Subd. 1, which was added by L. 1957, c. 874, is that the town board, upon a petition meeting the specifications of this subdivision, shall establish a cartway **not more than** one-half mile long on a section line " * * * to **serve** a tract of land consisting of 150 acres or more * * * ". While Subd. 1 specifies that the cartway shall be established on the section line, we concur in your view that there can be some deviation therefrom in order to secure a more feasible route. See **State ex rel. Rose v. Town of Greenwood**, 220 Minn. 508, 514, 20 N. W. 2d 345.

Based on the facts now submitted, it is our opinion that the town board, upon a proper petition, has the duty under 163.15, Subd. 1, to establish a cartway over the land of "A", substantially along the section line between sections 8 and 9, to the point of intersection with the 157-acre tract of "B" in section 8 at the northeast corner thereof. A cartway reaching such 157-acre tract at that point will connect the land of "B", including his land in section 9, with the public road. Consequently, such cartway will "serve" a tract of land of the specified acreage, and when the board has established a cartway to the point of intersection as above indicated, it has fulfilled the mandatory requirement of Subd. 1 and it has no further duty thereunder. The statute does not require that the cartway must be extended for a full half-mile.

You raise the further question whether the board has authority under 163.15, Subd. 1, to extend the cartway **over** the land of "B" to his building site. It should be observed that our cartway statute (163.15, Subds. 1, 2) contains no express provision for establishing cartways over the lands to be

benefited thereby, and it does not appear to us that it contains language from which authority to do so can be implied. Our search has revealed no decisions which hold or even suggest that its purpose is other than to afford access to or an outlet from lands over the land of others.

In view of the foregoing, and when it is also considered that town funds must be spent thereon, as provided by 163.15, Subds. 1 and 3, it is difficult to believe that the legislature intended to grant authority to a town board to establish or extend a cartway over benefited land to the buildings thereon on the petition of five voters and town freeholders. It is basic law that public funds cannot be spent for private purposes. 13 Dunnell's Digest, 3d Ed., Section 6585b.

It is therefore our further opinion that the town board lacks authority under 163.15, Subd. 1, to establish a cartway over the land sought to be benefited by the cartway, i.e., the land of "B" up to his building site.

Regarding the statement in our previous opinion of April 18, 1958, to which the first paragraph of your comment relates, the word "over" should be substituted for the word "to" in the middle of the last paragraph so that such sentence reads: "It is not the purpose of 163.15 to enable a land owner to obtain a private road **over** his own land to serve only his private purpose."

Manifestly, under the facts submitted, the public will have the right to use the cartway up to the boundary of "B's" land. It is a public road to that point. From the boundary of "B's" land to his building site, any road would be a private road, to be built by "B" at his own expense.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Waseca County Attorney.
May 12, 1958. 377-B-1

131

Cartways and Town Roads—Order establishing cartway or town road gives it legal existence. Presumed to exist until abandoned. Abandonment of road a fact question. Road may be opened when there is public need therefor.

Facts

"On April 5, 1896, the supervisors of the Town of Rochester made an order establishing a purported cartway in said Town which was filed in the office of the Town Clerk on the 13th day of May, 1896. There is attached to this request for an opinion as Exhibit 'A', pages 79-82 of the records of the Town Clerk showing such order as set forth on his

records. We also have in our possession, affidavits showing the use of said purported cartway from about 1912 through 1929, copies of which are enclosed as Exhibits 'B' and 'C'.

"There is conflicting evidence as to whether said cartway ever was used all the way through to the west end, so for the purposes of this opinion would you please assume as a fact that said cartway was never used over its entire length but only over a portion of its length.

"On April 30, 1929, a petition was filed by more than eight voters of said Town to alter and widen said purported cartway to a 4-rod road. This petition was filed June 19, 1929, in the office of the Clerk of Town of Rochester. The supervisors of said Town signed a road order dated July 20, 1929, in the office of the Town Clerk and filed by him August 24, 1929, in the office of the County Auditor of Olmsted County. There was also an award of damages made covering property taken for such purported road. We are attaching herewith as Exhibit 'D', the said order of the supervisors of said Town of Rochester establishing said purported 4-rod road and as Exhibit 'E' the award of damages and as Exhibit 'F' the release of damages.

"The only work known to be done on said road at the time of the proceedings to widen it, was that the brush was cleared so that the surveyor could survey. There has been no actual construction work done on this road since it was laid out. Since such time certain homes have been built near said purported road and at least two home owners have constructed fences across said purported road and along the section line which section line runs through the center of said purported road. There have not been any homes or other substantial structures built on said road other than the above fences.

"There are no records concerning the existence of said purported cartway or 4-rod road which have been filed in the office of the Register of Deeds of Olmsted County. Also, from an ordinary inspection of the area there is no apparent evidence at this time of existence of such road. Now, certain property owners abutting on the right-of-way of said purported road as laid out, have requested the supervisors of said Town of Rochester to construct the road along the said purported right-of-way. Certain other land owners in the area abutting said purported 4-rod road have objected to such construction."

Questions

"1. Did a 2-rod cartway exist in the above mentioned situation up through the action to establish the 4-rod road?

"2. Was said cartway properly altered to establish a 4-rod road by the action of the supervisors of the Town of Rochester in 1929?

"3. If a 4-rod right-of-way was properly established by the action of the supervisors of the Town of Rochester in 1929, upon the facts stated above, has this 4-rod road as laid out been abandoned by non-use in the intervening time?

"4. If such 4-rod road has been properly laid out and never abandoned by non-use, may the supervisors of the Town of Rochester at this time properly construct a road across the said 4-rod road as laid out?"

Opinion

1. G. S. 1894, Section 1832 provides in part that the town supervisors have power to lay out[1] public cartways 2-rods wide upon the petition of five freeholders, and that the Town Clerk shall record any cartway so laid out with like effect as other roads are required to be recorded. Sec. 1820 provides that an order laying out any highway shall be prima facie evidence of the regularity of the proceedings prior to the making of such order except in cases of timely appeal.

Proceedings to establish roads are liberally treated and statutes relating thereto are broadly construed. **Anderson v. Board of Supervisors,** 92 Minn. 57, 59, 99 N. W. 420, 421. In addition to the effect given a road order by section 1820, it is the general rule that until the contrary appears it must be presumed that the supervisors acted legally and that the order establishing a road is a valid one. 25 Am. Jur. "Highways", 356, Secs. 29, 30.

The order of April 5, 1896 reads in part as follows:

" * * * it is therefore ordered and determined that a public cartway be and the same is hereby located and laid out and established according to the description last aforesaid, and it is hereby declared to be a public cartway 2-rods wide, the said description above given being the center of said public cartway."

We therefore conclude that the order laid out and established a 2-rod cartway and gave it legal or paper existence. Once established and shown to exist, it is presumed that the road continues to exist until vacated by statutory proceedings or abandoned in the manner hereinafter discussed. See C. J. S. 1066, Sec. 130.

2. M. M. S. 1927, Sec. 2583, subd. 1 (now M. S. 163.13), provided that "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 * * * ". A document designated "final road order" orders and determines "that a road be and the same is hereby altered, laid out and established" according to the description therein contained. Sec. 2583, subd. 7 (M. S. 163.13, subd. 7), like G. S. 1894, Sec. 1820, provides that the order shall be prima facie evidence of the regularity of the proceedings.

In our opinion, again assuming the proceedings to be regular, the town board had authority under Sec. 2583 to widen the cartway so as to be a road 4-rods wide. It would appear to be immaterial whether the cartway had been abandoned prior to 1929 inasmuch as the 1929 order "altered, laid out and **established**" a road. If an existing road or cartway was not thereby altered or widened to a 4-rod road, a new road 4-rods wide was, by such

[1]M.S.A. 613.15, subd. 1, now provides that the town board may "establish" a cartway, etc.

order, established, and such order was in conformance with Sec. 2583. The affidavits, Exhibits B and C, show that the cartway has been used from 1912 to 1929. However, we believe that such use prior to the 1929 order is likewise immaterial.

3. Whether there has been an abandonment of the 4-rod road is a question of fact. It is said that no mere non-user for any length of time will operate as an abandonment of a road. **Parker v. City of St. Paul,** 47 Minn. 317, 319, 50 N. W. 901. But as pointed out in **City of Rochester v. Roadside Corporation,** 211 Minn. 276, 279, 1 N. W. 2d, 36:

> " * * * an estoppel arises where there is long continued nonuser by the municipality, together with the possession by private parties in good faith and in the belief that its use as a street has been abandoned, and the erection of valuable improvements thereon without objection from the municipality, which has knowledge thereof, so that to reclaim the land would result in great damage to those in possession."

To work an estoppel in such cases the party asserting it must have been induced by the acts of the municipality to believe that there was no road and must have changed his position for the worse in reliance thereon. 25 Am. Jur. 412, 413, Section 114. See also **State by Burnquist v. Marcks,** 228 Minn. 129, 36 N. W. 2d, 594. In **Rice v. Town of Walcott,** 64 Minn. 459, 461, 67 N. W. 360, it was said:

> " * * * If, for instance, the public has permitted the abutting owner to occupy a part of the street for an unreasonable length of time, and make substantial improvements thereon, such as the erection of buildings, it might, and probably would, be a case where the doctrine of estoppel by acquiescence should be applied; but we cannot hold that it should be applied in the case at bar, where the improvements consisted merely of the erection of a farm fence and the cultivation of the land enclosed by it."

Because of the fact question necessarily involved we cannot give a categorical answer to this question.

4. The town board, after a road has been laid out or established pursuant to statute, is not required to open it immediately, but may delay the opening until there is a public need for the road; and in the determination of that need, it has a rather wide discretion. Mere delay in opening a highway when public need has not required its use does not constitute an abandonment thereof. 25 Am. Jur. Section 113, 1957 Cum. Supp., P. 65.

M. S. A. 163.15, subd. 3, now provides:

> "Any town board may expend road or bridge funds upon a legally established cartway the same as on town roads, if, in the judgment of such board, the public interests require it; provided, that where any town board has refused to allocate funds for the upkeep of a cartway, then, upon the petition of ten taxpayers of the town, the town board shall present for the approval of the voters, after due notice, at the annual town meeting such petition for allocation of funds, and at such

town meeting the electors of the town shall allow or reject such petition. If the majority of those voting approve the petition for allocation of funds, the town board shall expend the road and bridge funds for such cartway."

The first portion thereof authorizing the expenditure of road and bridge funds appeared in M. M. S. 1927, Section 2585, subd. 3; the balance of the present subdivision was added later.

In our opinion the board may at this time proceed to construct and open a road across the 4-rod road as now laid out if the board, in its discretion, believes that there is now reasonable public need for it.

Any person specially affected who claims that the road has been abandoned has an opportunity to challenge the right of the board to now open such a road. Abandonment being a fact which must be proved, the burden is on the one who asserts abandonment to prove it by clear and satisfactory evidence. 39 C. J. S. 1066, Sec. 130.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Rochester Town Attorneys.
September 6, 1957. 377-B-1

132

Townships—Cartways—Establishment—Town may not establish cartway under Sec. 163.15, Subdivisions 1 or 2, which begins in one township and ends in another township; nor may the said two townships jointly establish such cartway under Sec. 163.15. M. S. 166.01, et seq. is applicable in such situations.

Facts

"The Townships of Munson and Wakefield are adjoining townships having a common boundary which is the west boundary of Wakefield and the east boundary of Munson. Certain residents of Munson Township, Stearns County, Minnesota, own more than five acres of land in said town. At least one of said residents, if not more, is the owner in fee of more than five acres in said town. These residents filed duplicate petitions with the Town Boards of Munson and Wakefield asking for the establishment of a cartway originating at a County road in Wakefield Township, thence crossing the line separating said towns and terminating in a peninsula of Cedar Island Lake in Munson Township. The cartway was to have a width of two rods as provided by Section

163.15. It may be assumed that the petition sought to comply with the provisions of Section 163.15 generally and especially Subdivision 2. The route of the proposed cartway does not at any place follow the town line. The petitions, as stated before, were filed separately and approximately simultaneously with the two Boards. The venue of the petition is as follows:

"State of Minnesota
County of Stearns
Township of Munson
Township of Wakefield

"For the purpose of this inquiry it may be assumed that the petitioners' land may not be reached from a public road excepting over land of others. It may further be assumed that while the route of the cartway taken as a whole connects the lands of the petitioners with a public road, that it does not connect the land of the petitioners with a public road in Munson Township and since no part of the land of the petitioners is in Wakefield Township the proposed cartway therefor does not connect the land of the petitioners with a public road in Wakefield Township."

Questions

"1. Can the affected Town Boards of the two Towns be compelled to act in concert on the petition or petitions?

"2. Can the Town Boards be compelled to act on the petition or petitions separately?

"3. Does either town have jurisdiction to establish the cartway petitioned for?

"4. It is the duty of the towns either jointly or separately to establish the cartway petitioned for?

"5. Is the interpretation of Subdivision 2, Section 163.15 M. S., such that a cartway must be established by the Town Boards acting either separately or jointly under the above conditions?"

Opinion

For convenience, the foregoing questions are answered together.

While the language of M. S. 163.15, Subd. 1, is permissive and it is discretionary with the town board whether it shall grant a proper petition thereunder (see Opinion O. A. G. 377-B-1, May 11, 1954, copy enclosed), the language of Sec. 163.15, Subd. 2, is mandatory. Thus, when a proper petition is presented to the town board for the establishment of a cartway under the provisions of said Subd. 2, it is the duty of the town board to grant such petition. See opinion O. A. G. 377-B-1, November 15, 1951, copy enclosed, and the leading case of **Rose vs. Town of Greenwood**, 220 Minn. 508, 20 N. W. 2d, 345.

Do, then, the duplicate petitions referred to in your submitted facts meet the jurisdictional requirements of the statute so that Sec. 163.15, Subd. 2, is applicable?

Sec. 163.15, Subd. 2, provides:

> "**Any town board shall,** on petition of the owner of a tract of land of not less than five acres in area, who has no access thereto except over the lands of others, **establish a cartway not more than two rods wide connecting his land with a public road;** and, if the petition contains a prayer therefor, the order establishing such cartway may authorize the petitioner and his successors in interest in the lands so connected with a public road to construct and maintain fences along or within the outer limiting lines of the cartway so established; the amount of damages, if any, to be paid by the petitioner to the town before such cartway is opened." (Emphasis supplied)

The proposed cartway would extend from petitioners' lands in one township to a public road in another township. In order, therefore, for one of the said townships to comply with the emphasized portion of the statute quoted above, such township would have to establish a section of the cartway in another township and thus outside of its jurisdiction. The subdivision does not authorize a town to establish a cartway outside of its jurisdiction nor are we aware of any statutory authority for a town to expend its funds for the construction of a cartway in another town. See opinion O. A. G. 377-B-1, November 18, 1954, copy enclosed. Further, **Rose vs. Town of Greenwood,** supra, holds that although the **right** to the establishment of a cartway petitioned for under Sec. 163.15, Subd. 2, is governed by the provisions of that section, the **proceedings** to establish it should be had under Sec. 163.13. It should be noted that Sec. 163.13 provides only for the establishment of a road "in the town" and therefore proceedings to establish the cartway outside of the town would be invalid.

In the instant situation, therefore, each town board could only establish the proposed cartway to its town line. Pursuant to the petition, Wakefield township would be attempting to establish a cartway from a public road to its town line and not to the lands of the petitioners, while Munson township would be attempting to establish a cartway from the lands of the petitioners to its town line and not to a public road, neither of which cartways would be in accordance with the above quoted statute. There is no authorization in Sec. 163.15, Subd. 2, for joint establishment of a cartway by two or more town boards.

Nor does Sec. 163.15, Subd. 1, apply in the instant situation since Munson township could only establish the cartway to its town line and the petitioners, not being freeholders of Wakefield township, cannot validly petition such latter township under Subd. 1.

Since the proposed cartway is incapable of being established pursuant to either Subd. 1 or 2 of Sec. 163.15, your questions are all answered in the negative. Cf. Opinion O. A. G. 377-B-1, December 10, 1942, copy enclosed.

The legislature, however, in M. S. 166.01, et seq., has specifically provided for the establishment of a cartway which begins in one township and ends in another. Under such act the petition is to be made to a Judge of the District Court of the County in which the land of the petitioner or petitioners is situated and must meet the requirements of Secs. 166.01 and 166.02. An extract of our letter, O. A. G. 377-B-1, August 11, 1952, is enclosed for your information.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Wakefield and Munson Town Attorneys.
October 9, 1957. 377-B-1

133

Towns—Authority to Vote on Adoption of Zoning Restrictions— M. S. A. 366.10 construed: Township located in center of county which borders on a county containing city of third class is authorized to follow procedure provided in Section 366.10.

Facts

"Pope County borders on Stearns County which contains a city of the third class. White Bear Lake Township is situated in the center of Pope County and does not border on any county containing a city of the third class."

Questions

1. "Is White Bear Lake Township authorized under this section to follow the procedure set out in Section 366.10 and sections following for the purpose of setting up zoning laws?"

2. "Or does the township concerned have to border on the county containing a city of the third class?"

Opinion

M. S. A. 366.10 provides in pertinent part as follows:

"The board of supervisors of any town in this state located within a county having a population of more than 450,000 and an assessed valuation, exclusive of money and credits, of over $280,000,000, and **the board of supervisors in any town of this state [1] bordering on any city of the first, second, third, fourth class or [2] located within a county bordering on any county containing any city of the first, second, or third**

class, is hereby authorized and empowered to submit to the legal voters of the town for their approval or rejection at any annual town meeting or at any special town meeting called for that purpose, the question as to whether or not such board shall adopt building and zoning regulations and restrictions in the town. * * * " (Emphasis and figures supplied)

It is clear that the emphasized portions of such statute authorize both a town board of any township bordering on any city and a town board of any township located anywhere within a county which borders on a county containing a city of the first, second, or third class to submit to the town voters at an annual or special town meeting the question of whether or not building and zoning regulations and restrictions shall be adopted.

Thus, under the facts submitted, your first question is answered in the affirmative and your second question is answered in the negative.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Pope County Attorney.
April 10, 1958. 441-H

134

Town Zoning—Eminent Domain—Ramsey County and St. Paul acquisition of sites for detention facilities; Real estate acquired pursuant to L. 1955, c. 353, either by eminent domain or purchase, is not subject to town zoning requirements.

Facts

"The City and County Detention and Workhouse Facility Commission of the City of Saint Paul and County of Ramsey contemplates its acquisition by purchase or condemnation of unimproved real estate comprised of approximately 280 acres in New Canada Township, within the confines of Ramsey County, Minnesota, and its development and use of the same as the site of its proposed project, i.e., Joint City and County Detention Facilities and Joint City and County Workhouse Work Farm, authorized by Chapter 353, Session Laws of Minnesota for 1955.

"Said Commission's pertinent plan contemplates its erection of a main public detention building and minor auxiliary buildings of suitable and conventional types within an area representing a comparatively small fractional part of said proposed site, and its development and use of the remainder of the same for dairy and other ordinary farm uses.

"Said New Canada Township, subsequent to the enactment of said Chapter 353, Session Laws of Minnesota for 1955, on the 5th day of April, 1956, enacted the New Canada Township Zoning Ordinance whereunder said proposed site is embraced within F. Farm Residence District thereby established. The said zoning ordinance makes particular provisions in the nature of restrictions upon use of land incorporated in said F. Farm Residence District under Article III of the same, which reads as follows:

'F. Farm Residence District Use Regulations.

'In a Farm Residence District, no building or land shall be used or divided and no building shall be erected, converted, or structurally altered, unless otherwise provided herein, except for one or more of the following uses:

1. Any use permitted in the R-I Residence District.

2. **General Farming or gardening.**

3. Commercial greenhouses and nurseries.

4. Permanent stands for the sale of agricultural produces produced on the premises. (These stands to be constructed according to setback rules and regulations)

5. **Stock raising and dairying.** (Hog raising and handling shall be in accordance with rules and regulations established by the lawful governing body.)

6. Golf courses.

7. Airports, cemeteries, mobile home parks, and gun clubs, any of which shall require a special permit to be issued by the lawful governing body.'

"The said ordinance, by the above quoted and emphasized provisions of the same, expressly permits 'General Farming or gardening' and 'Stock raising and dairying' in said F. Farm Residence District. The same contains no expressed provisions either permitting or prohibiting therein the type of project contemplated to be developed and operated by said Commission on the proposed site."

Questions

"1. If the proposed development and use of said site by said Commission, City and County for the proposed public detention and workfarm purposes be prohibited by the terms of said New Canada Township Zoning Ordinance, could the Commission, City and County nevertheless proceed with said project by condemning said site therefor by eminent domain proceedings authorized by said Chapter 353, Minnesota Session Laws 1955?

"2. In the event that said New Canada Township Zoning Ordinance shall be found to provide, in terms, for restrictions against the use of said site for said public governmental purpose, may the same nevertheless be developed and used therefor by said Commission, City and County on the basis that such development and use would represent exceptions from the operative effect of said Zoning Ordinance, despite the acquisition of the said site by purchase, as distinguished from condemnation?

"3. In the event of the acquisition of said site by said governmental authorities by purchase as distinguished from condemnation and the persistency of effective provisions restricting the development and use of the same for said public governmental purpose, would it be feasible to remove such restrictions by subsequent condemnation proceeding?"

Opinion

L. 1955, c. 353, authorizes the County of Ramsey and City of St. Paul to "Jointly acquire land for, erect, equip, furnish, maintain and operate a joint city and county detention facility or facilities, and joint city and county work house, work farm, or any combination of the foregoing to be used jointly by such county and city." (Sec. 1) The cost of acquiring a site therefore is to be shared equally between the county and the city. (Sec. 2.) The land for the site may not be acquired until the city council has authorized the issuance of bonds therefor, not exceeding $650,000, pledging the full faith and credit of the city therefor, pursuant to Sec. 3. The establishment of a commission to proceed with the erection or acquisition of one or more of such facilities, to be appointed by the city council and the county board, is authorized when the governing bodies have determined that it is practicable to proceed with the erection or acquisition of one or more of such facilities. (Sec. 6.) Procedure for acquisition of sales for the facilities is specified in Sec. 9, et seq.

When the county board and the city council have approved plans for these facilities, as formulated by the commission, the latter is required to select the necessary site or sites and to contract for the acquisition, by gift or purchase, with the owners of the sites, subject to the ratification of the board and the council both as to location and price as reported by the commission. If the governing bodies of the city and the county approve the site or sites but disapprove the prices recommended therefor, the city council and county board are empowered to acquire the property by eminent domain, such proceedings to be instituted in the name of either the city or the county as the governing bodies thereof may determine, subject to the provisions of Sec. 9, et seq.

The zoning power of the Town of New Canada is contained in M. S. 366.10 et seq. On April 15, 1956 (subsequent to the effective date of L. 1955, c. 353) the town board by ordinance purported to restrict the land in question to "Farm Residence District" uses as in said ordinance defined.

The power of eminent domain is an inherent and essential attribute or prerogative of sovereignty. The fundamental idea upon which the right of eminent domain rests is public necessity. The taking of land in condemnation proceedings is, in a legal sense, a purchase and sale. The power must, of course, be exercised only for public purposes and uses. 6 Mason's Minn. Dunnell's Digest, Section 3013; **Northern States Power Co. v. Oslund,** 236 Minn. 135, 51 N. W. 2d 808. The powers granted by the statute to the city and county and to the commission, for the purposes stated in Sec. 1, are governmental in nature as distinguished from those proprietary.

See as to governmental powers: **Bryant v. City of St. Paul,** 33 Minn. 289, 23 N. W. 220 (Board of Health); **Snider v. City of St. Paul,** 51 Minn. 466 (city hall); **St. John v. City of St. Paul,** 179 Minn. 12, 228 N. W. 170 (bathing beach); **Guillkson v. McDonald,** 62 Minn. 278, 64 N. W. 812 (lockup); **Miller v. Minneapolis,** 75 Minn. 131, 77 N. W. 788 **(fire department).** Included among the St. Paul cases are **Dehn v. Brand Coal & Oil Co.,** 241 Minn. 237, 63 N. W. 2d 6 (city dump); **Nissen v. Redelack and City of St. Paul,** 246 Minn. 83, 74 N. W. 2d 300 (swimming pool). 13 Mason's Dunnell's Minn. Digest, Section 6809

A town is a political subdivision of the state **(Great Northern Bridge Co. v. Finlayson,** 133 Minn. 270, 158 N. W. 392), a part of the state government **(Storti v. Town of Fayal,** 194 Minn. 628, 631, 261 N. W. 463), created for the purposes of civil administration **(Dosdall v. Olmsted Co.,** 30 Minn. 96, 14 N. W. 458) whose powers are derived solely from the legislature, and these powers may be enlarged and extended or abridged or entirely withdrawn by legislative action. **Bridgie v. Koochiching Co.,** 227 Minn. 230, 35 N. W. 2d 537.

In reference to sites acquired for the purposes of L. 1955, c. 353, the town zoning requirements are superseded by that statute granting the powers of eminent domain as therein provided. 58 Am. Jur. "Zoning", Section 120, Note 4. See 8 McQuillin, "Municipal Corporations" Section 25.15.

In **State v. Allen,** 158 Ohio St. 168, 107 N. E. 2d 345, it is stated that zoning restrictions cannot apply to the state or any of its agencies vested with right of eminent domain in use of land for public purposes, and hence a state turnpike would not be invalid in passing through zoned territory as constituting use in violation of zoning ordinances. See also opinion of this office O. A. G. 817-F, October 2, 1944, copy enclosed.

McKinney v. High Point, 237 N. C. 66, 74 S. E. 2d 440, declares:

> "In Decatur Park Dist. v. Becker, 1938, 368 Ill. 442, 14 N. E. 2d 490, it was decided that a park district organized by the legislature to establish parks and playgrounds was entitled to condemn certain lands for such purposes under its power of eminent domain, notwithstanding the fact that a city zoning ordinance classified such land as 'A' residence property.
>
> "In State ex rel. Helsel v. Board of County Commissioners, Ohio Com. Pl. 1947, 79 N. E. 2d 698, 705, affirmed 1948, 83 Ohio App. 388, 78

N. E. 2d 694, it is said 'Both principle and authority support the view that restrictions in zoning ordinances of municipalities are ineffective to prevent the use of land by a county for the public purpose for which it has been appropriated.' See also Tim v. City of Long Branch, 135 N. J. L. 549, 53 A. 2d 164, 171 A. L. R. 320, and Annotation, and Carroll v. Board of Adjustment of Jersey City, 1951, 15 N. J. Super. 363, 83 A. 2d 448."

In accord is **State v. Board of County Commissioners** (Ohio), 79 N. E. 2d 698, 705:

"Both principle and authority support the view that restrictions in zoning ordinances of municipalities are ineffective to prevent the use of land by a county for the public purpose for which it has been appropriated."

Our conclusion that the town zoning restrictions are inapplicable to sites acquired for the purposes of L. 1955, c. 353, obtains whether such property is acquired by purchase or condemnation.

Accordingly the first and second questions stated in your inquiry compel an affirmative answer. This disposition requires no answer to your third question.

MILES LORD,
Attorney General.

WILLIAM M. SERBINE,
Spec. Asst. Attorney General.

St. Paul Corporation Counsel.
April 22, 1957. 817-F

135

Villages—Formation—Place for holding elections—Incorporation election must be held within area described in petition. M. S. A. 412.011, subd. 3. Election of first village officers pursuant to Section 412.021 must be held within village limits.

Your letter refers to M. S. A. 412.011, subd. 3, 412.021, subd. 1, and 205.27 and presents these

Facts

"As attorneys for the Town of Oakdale which is in the process of submitting a petition to the County Board to hold an election for incorporation we have certain questions in connection with the place at which both the election to incorporate and the election for officers can be held. The present place of Town meeting and elections for the Town

of Oakdale has been in a fire hall just across the Town line. This fire hall is not within the area prescribed in the petition."

Questions

"1. Can the County Board designate the fire hall as the place where the election to decide for or against incorporation can be held?"

"2. Can the Judges of election designate the place of election for village officials outside of the new Village limits?"

Opinion

1. M. S. A. 412.011, subd. 3, provides in material part:

"If the petition complies with the requirements of subdivision 2, the **county board shall by resolution** fix a day not less than 20 days nor more than 30 days after the passage of such resolution when an election shall be held **at a place designated by the county board within the area described in the petition.**" (Emphasis supplied)

The statute is clear and unambiguous on its face. If, as you state, the fire hall is not within the area described in the petition, the county board cannot designate it as the place for holding the incorporation election.

2. M. S. A. 412.011, subd. 4, provides that after a favorable incorporation election, a document consisting of certified copies of the incorporation petition, the certificate of the judges of the election, and the resolution of the county board shall be filed by the county auditor with the Secretary of State as a public record; and that the incorporation shall be deemed complete upon the date of such filing.

The village would accordingly be then in existence; and M. S. A. 205.27, to which you refer, and which permits certain towns to hold their elections within a designated area outside the township boundaries, would no longer be applicable.

Section 412.021 then provides for a second election for the purpose of electing village officers in the newly incorporated village. Subdivision **1** thereof specifies only that the election judges shall fix a place for the holding of such election, but subd. 2 provides in part:

" * * * If the election occurs in the last four months of the year, no election shall be held **in the village** on the annual village election day that year, * * * " (Emphasis supplied)

and subd. 4 states that "The judges and clerks shall be governed in the conduct of the election, so far as practicable, by the laws regulating the annual village election."

I am unaware of any statutory provision authorizing the holding of a village election anywhere other than within the village limits. Indeed, it is at least implicit in Section 412.021, subd. 2, supra, as well as in Sections

205.03, 205.22, 205.25 and 212.29 et seq., that a village election be held within its incorporated limits.

We therefore also answer your second question in the negative.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Oakdale Town Attorney.
February 4, 1958. 484-E-4

136

Villages—Public Utilities Commission. Easement for access to and from well should run to and operate in favor of village rather than commission. Commission should execute contracts and other documents relating to easement. M. S. 412.361, Subd. 1.

Facts

"The Village of Truman, Martin County, is organized under the regular village laws. At a special meeting of the village council on Dec. 12, 1938, the council determined by motion to establish a Water, Light, Power and Building Commission, pursuant to Sections 1852 to 1860, both inclusive, of Mason's Minnesota Statutes for 1927, which are now incorporated in M. S. A. Sections 453.01 through perhaps 455.25. The Water & Light Commission has built a new well and to gain access to and from it they are anxious to obtain from the School Board an easement. It is, of course, a right in real estate and I am not clear as to whether or not the easement with its benefits and detriments should be executed by the council of the village or the commisison."

Questions

1. "Should this easement run and operate in favor of the Commission or should it operate in favor of the village?"

2. Should the Commission rather than the village council execute the easement?

Opinion

1. The new Minnesota village code, L. 1949, c. 119, effective July 1, 1949, is applicable to the Village of Truman, irrespective of the law under which it was originally incorporated. See M. S. 412.901.

Section 111 of said c. 119 (M. S. 412.921) provides that M. S. 453.01—453.10, 455.23—455.25 shall not apply to villages. Section 110 thereof (412.911) expressly repealed 455.12 and 455.33.

M. S. 412.321—412.391, being Sections 39—49 of said c. 119, as amended, relates to utilities of the village. M. S. 412.331 reads as follows:

> "Any village may by ordinance expressly accepting the provisions of sections 412.331 to 412.391 establish a public utilities commission with the powers and duties set out in those sections. **Any water, light, power and building commission now in existence in any village shall hereafter operate as a public utilities commission under sections 412.321 to 412.391.**" (Emphasis supplied)

M. S. 412.361, Sub. 1, provides:

> "The **commission** shall have power to extend and to modify or rebuild any public utility and to do anything it deems necessary for its proper and efficient operation; and it **may enter into necessary contracts** for these purposes. * * * " (Emphasis supplied)

An easement of the kind under consideration is, as you state, an interest in land. 6 Dun. Dig., 3rd Ed., Section 2851. It can be acquired by grant, Id. Section 2853, and it is within the power of the village to acquire it under the powers contained in M. S. 412.211. If the proposed arrangement involves a monetary consideration to be paid to the school district, payment can, and undoubtedly will, be made out of village funds, whether from the public utilities fund (Section 412.371) or otherwise. The utilities commission is but a department of the village government and not a municipal corporation in its own right. There is no authority in M. S. 412.321—412.391 for the commission itself to possess any right, title or interest in land.

Accordingly, it is our opinion that the easement should run to and operate in favor of the village.

2. We assume you have reference in your second question to the execution of documents in connection with the construction and use of the easement. The public utilities commission having the power to enter into contracts for the purposes stated in 412.361, Subd. 1, should execute all contracts and other documents relating to the easement.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Truman Village Attorneys.
September 22, 1958. 469-B-6

137

Villages—Public Utilities Commission—Council cannot remove member at will but can remove for cause after hearing pursuant to notice. M. S. 412.111; 412.321—412.391. Certain statements in opinion of Feb. 11, 1936 (469b-6) modified.

Facts

"The Water, Light, Power and Building Commission of the Village of Hibbing was created by Chapter 412, Minnesota Laws 1907 (M. S. 453.01 to 453.07) now known as the Public Utilities Commission, and consists of three commissioners appointed by the Village Council, each member serving for a term of three years."

Questions

1. "May the council remove a member of the Commission at will and without a hearing if in its judgment the public welfare will be promoted thereby?"

2. "If the answer is 'No', may the council remove a member of the Commission for cause shown after a hearing pursuant to notice?"

Opinion

1. The leading case of **Village of Chisholm v. Bergeron**, 156 Minn. 276, 194 N. W. 624, held that, notwithstanding the provisions of M. S. 412.19, Subd. 17 (now repealed), which gave the village council power to remove any officer appointed or elected by the council when in its judgment the public welfare will be promoted thereby, the village council had no power or authority to remove at will and without a hearing a member of the water, light, power and building commission. The court stated that a commission created pursuant to C. 412, L. 1907, was clearly intended to be a stable and independent department of the village government responsible only to the people and in no way under the supervision or control of the council.

M. S. Ch. 412 was expressly repealed by L. 1949, c. 119, Section 110. As part of the New Village Code, the legislature enacted M. S. A. 412.111, which reads in pertinent part as follows:

> " * * * The council may, except as otherwise provided, remove any appointive officer or employee when **in its judgment** the public welfare will be promoted by the removal; **but this provision does not modify the laws relating to * * * members of a * * * public utilities commission.**" (Emphasis supplied)

The Village of Hibbing Water, Light, Power and Building Commission was created prior to the enactment of L. 1949, c. 119, Section 43 (M. S. A. 412.331), which states in part:

> " * * * Any water, light, power and building commission now in existence in any village **shall hereafter operate as a public utilities commission under sections 412.321 to 412.391.**" (Emphasis supplied)

In addition, M. S. Sections 453.11 through 453.14 were not repealed by the New Village Code and still apply to the Village of Hibbing. The duties and powers of the commission enumerated in such statutes and in Sections 412.321 through 412.391 clearly emphasize the legislative intent to create a body free from any coercion or control by the village council. Furthermore, such statutes do not provide for the removal of any commission member by the village council.

Although the phrase "in its judgment" contained in Section 412.111 gives the council power of removal of appointive officers at will, it is seen from the statute that the legislature, recognizing the independent status of the public utilities commission and the general rule that officers appointed for definite terms are usually subject to removal for cause only, followed the **Bergeron** case, supra, by rendering the village council's power of removal at will inapplicable to any member of a public utilities commission.

Your first question is therefore answered in the negative.

2. The **Bergeron** case, supra, does not dispose of your second question, for the court specifically stated therein (at p. 280):

> " * * * We are not concerned with the question who may remove a member of a village water, light, power and building commission for cause and upon a hearing. This was an attempted removal at will and without hearing, and we are satisfied that the village council do not possess the power to so remove respondents."

Nor do Minnesota Statutes provide for or prohibit the removal of a member of a village public utilities commission for cause. However, M. S. A. 412.211 states in part:

> "Every village shall be a municipal corporation having the powers and rights and being subject to the duties of municipal corporations at common law."

That a municipal corporation has the common-law power to remove an officer from office for cause cannot be doubted. McQuillin on Municipal Corporations (3rd Ed.), Section 12.230 states:

> "It is a common-law incident of all corporations to remove a corporate officer from office for reasonable and just cause. This doctrine has been settled ever since Lord Mansfield's judgment in Rex v. Richardson. In that case it was expressly held that the power existed although it had not been given by charter, nor was it claimed by prescription. 'We think' said the court 'that from the reason of the thing, from the nature of the corporations and for the sake of order and government, this power is incident as much as the power of making by-laws.'
>
> "In the absence of either express grant or of express or implied limitation of authority, a municipal corporation, as ordinarily consti-

tuted, possesses the incidental power, to remove corporate officers for cause, whether elected by it or by the people. Unless mentioned in the constitution, municipal officers are corporate officers, and not constitutional officers, and the power to remove such officers for just cause, whether so declared in the charter or applicable legislative act, or not, is inherent in municipal corporations."

The fact that the officer is appointed for a fixed term does not alter the rule that the municipality may remove him for cause. See McQuillin, Section 12.232.

The municipal corporation, of course, does not act "at large" but through its governing body, the council. McQuillin on Mun. Corp., Sec. 12.233 states:

"Frequently the power of removal or suspension of municipal officers is given to the council or governing legislative body, and in the absence of law vesting such power elsewhere, it rests, it is generally held, with this agency."

Furthermore, M. S. A. Section 412.341, Subd. 1, provides that the public utilities commission shall consist of three members appointed by the council; and McQuillin on Mun. Corp. Section 12.231 holds the rule to be that, where the officer is guilty of malfeasance or maladministration, it is within the appointing power to remove him unless expressly prohibited by law. Although M. S. A. 412.111, supra, expressly excepts members of public utilities commissions from removal by the village council under such section, the statute relates only to the power of removal by the council at will and does not by its terms prohibit the removal of a member of such commission for cause. Attention is also called to the Minnesota case of **State v. State Board of Education**, 6 N. W. (2d) 251, in which the court said at p. 257:

"* * * The only effect of fixing the tenure by statute is that the appointing power cannot, in such case, remove the official arbitrarily, but only for cause and after due notice and hearing. (Citing cases)

"As the law stood after repeal of Section 2969, the legislature had fixed the term of office of the commissioner of education at six years, Minn. St. 1941, Section 120.06, Mason St. 1927, Section 2962, but had neither expressly conferred nor expressly withheld the power to remove. The legislature cannot, however, be held to have deprived the appointing power of its power to remove the commissioner for cause by merely fixing his term of office. * * * "

It should be kept in mind, however, that the exercise of the power of removal for cause comprehends specific and definite charges justifying action, with proper notice given and a resonable opportunity to be heard, resulting in a finding or judgment on the part of the council based on the evidence adduced. It is a proceeding at least quasi-judicial in character, carried on in a judicial manner. What is a sufficient cause for removal in each case is for the determination of the council, and McQuillin on Mun. Corp. Section 12.234 defines "sufficient cause" as follows:

" 'Sufficient cause,' or 'due cause,' means legal cause as distinguished from discretion, and is a cause which specifically relates to and affects the proper administration of the office involved. The cause assigned must not be a mere whim or subterfuge, but must be of substance, relating to the character, neglect of duty, or fitness of the person removed. It must be reasonable; * * * ".

See also the leading case of **State ex rel. Hart v. Common Council of City of Duluth**, 53 Minn. 238, wherein Justice Mitchell reviewed on certiorari the action of the council in removing a fire commissioner for "cause"; M. S. Section 351.07 relating to a specific cause for removal; and Section 351.02 providing that every office shall become vacant on the happening of any of the events enumerated therein.

Your second question is therefore answered in the affirmative. To the extent that certain statements in our opinion O. A. G. 469-B-6, February 11, 1936, a copy of which you have, may be inconsistent with the conclusions herein reached, such prior statements are hereby modified.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Hibbing Village Attorney.
January 17, 1957 469-B-6

138

Villages—Local Improvements. Petition under M. S. 429.031, Subd. 1, as amended by L. 1955, c. 811, Section 1, need not be signed by not less than 35% in frontage of the real property abutting on each street named in petition.

Facts

"A petition has been presented to the Village Council for the making of local improvements consisting of the construction upon certain village streets, of storm sewers, curbs, gutters and street surfacing pursuant to Minnesota Statutes, Sections 429.011 to 429.111. The streets named in the petition are an east-west street 4 blocks long and 3 north-south cross streets each 2 blocks long.

"The owners of more than 35 per cent in frontage of the real property abutting on all of the streets, except one cross street, have signed the petition. The owners of less than 35 per cent in frontage of the real property abutting on one of the cross streets named in the petition have signed.

"On several of the streets named in the petition there are one or more blocks for which none of the owners, or the owners of less than 35 per cent in frontage, have signed, although considering the entire length of street, the owners of more than 35 per cent in frontage have signed."

Questions

"1. In determining the adequacy and legality of a petition for local improvements to be made pursuant to Minnesota Statutes, Sections 429.011 to 429.111, must the petition be signed by the owners of not less than 35 per cent in frontage of the real property abutting on each of the streets named in the petition, or is it sufficient if the petition is signed by the owners of not less than 35 per cent in frontage of the aggregate frontage on all streets named in the petition?

"2. In determining the adequacy and legality of such a petition, must each block of every street named in the petition be signed for by the owners of not less than 35 per cent in frontage of the real property abutting on that portion of the street, or may one or more blocks of a street named in a petition be included in the petition even though none of the owners of abutting real property within such block or blocks have signed the petition?"

Opinion

1. Those portions of M. S. 429.031, Subd. 1, material to your inquiry, now read as follows:

"The hearing may be adjourned from time to time and a resolution ordering the improvement may be adopted at any time within six months after the date of the hearing by vote of a majority of all members of the council when the improvement has been petitioned for by the owners of not less than 35 percent in frontage of the real property abutting on [each street] **the streets** named in the petition as the location of the improvement. When there has been no such petition, the resolution may be adopted only by vote of four-fifths of all members of the council. * * * " (Emphasis supplied)

This subdivision as originally enacted by L. 1953, c. 398, Section 3, contained the words "each street" (see bracketed portion.) L. 1955, c. 811, Section 1, amended said Subd. 1 by striking out "each street" and inserting in lieu thereof the words we have emphasized. By making this significant change, the legislature, we think, clearly indicated that a petition under the above subdivision need no longer be signed by the owners of not less than 35% in frontage of the real property abutting on **each** of the streets named in the petition.

Accordingly, it is our opinion that a petition for local improvements pursuant to M. S. 429.011—429.111, need not be signed by the owners of not less than 35% in frontage of the real property abutting on each street

named in the petition and that it is sufficient if it is signed by the owners of not less than 35% in frontage of all of the streets named in the petition.[1]

2. What has been said above, we believe, is dispositive of your second question. In view of the change in the wording of said Subd. 1 to which we have alluded, portions or blocks of streets may be included in an improvement proceeding by majority vote of the council even though none of the owners of lands abutting thereon has signed the petition; provided, of course, that the aggregate owners of not less than 35% of the property abutting all of the streets named in the petition as the location of the improvement have signed such petition.

See in this connection "The New Minnesota Improvement-Assessment Procedure", 38 Minn. Law Rev. 582, 586.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Caledonia Village Attorney.
June 9, 1958. 396-G-7

139

Village council meetings—Exclusion of public from informal discussion of village business by individual council members at other than a "regular" or "special" meeting is not prohibited by M. S. 1953, Sec. 412.191, Subd. 2.

Facts

"The Village Council of the Village of Bloomington has asked for the construction of one sentence of M. S. A. 412.191, subdivision 2, which reads as follows: 'All meetings of the council shall be open to the public'."

Questions

"(1) May the Council members meet for informal discussions of Village business and bar the press and the public from such discussion sessions providing that no official action of the Council is taken at such sessions?

"(2) May the Village Council at a regular meeting adjourn into an executive session for discussion and bar the press and public from

---

[1]We have not overlooked **Flynn v. City of Worthington et al.**, 177 Minn. 28, 224 N. W. 254. However, in view of the present language of 429.031, Subd. 1, the difference in the wording of the statutes involved, and the distinction the court makes in this case between a street and an alley, we do not feel that this case (involving an alley) has any bearing on the matter here considered.

that discussion providing that no official action is taken at that executive session?

"(3) May the Village Manager meet with the members of the Council for discussion of administrative policies and personnel and bar the press and public from such sessions providing that no action is taken at such session?"

Opinion

M. S. A. 412.191, Subd. 2 provides in part:

"Regular meetings of the council shall be held at such times and places as may be prescribed by its rules. Special meetings may be called by the mayor or by any two members of the council by writing filed with the clerk who shall then mail a notice to all members of the time and place of meeting at least one day before the meeting. The mayor or, in his absence, the acting mayor, shall preside. **All meetings of the council shall be open to the public.** * * * ." (Emphasis supplied)

Your question turns on whether such meetings are "meetings of the council" within the purview of the statute referred to above.

McQuillin, Municipal Corporations, 3rd Ed., Sec. 13.07 states:

" * * * The fundamental principle is that the affairs of a corporate body can be transacted only at a valid corporate meeting. Its legislative and discretionary powers can be exercised only by the coming together of the members who compose it, or those who are its duly constituted representatives—the legal corporate authorities—and its purposes or will can be expressed only by acts or votes embodied in some distinct and definite form. The existence of the council or governing body is as a board of entity, and the members thereof can do no valid act except as a board. In short, the general legal rule is that, to bind the municipality, the council or legislative body must be duly assembled and act in the mode prescribed by the law of its creation, evidenced by an order entered of record, and such act, if legislative in character, must ordinarily be by ordinance, by-law or resolution, or something equivalent thereto."

Almost the same question came before the Florida court in **Turk v. Richard,** 47 So. (2d) 543, and the court said on page 544:

" * * * Unless, therefore, the members of the council formally come together, in the manner required by law, for the purpose of joint discussion, decision and action with respect to municipal affairs there can be no 'meeting' of this governing body, within the legally accepted sense of the term, for the individual or separate acts of a member or the unofficial agreements of all or a part of the members of the council are ineffectual and without binding force; joint, official deliberation and action as provided by law being essential to give validity to the acts of the council. See 62 C. J. S., Municipal Corporations, Sec. 391, page 749, and cases cited; 37 Am. Jur. 669, Municipal Corporations, Sec. 54

and cases cited; McQuillin Municipal Corporations, 2d Ed., Vol. 3, Sec. 1279, p. 1134.

"The rule being plain as to what is necessary to constitute a 'meeting' under the law pertaining to municipal corporations, it must be assumed that when the legislature of the state enacted a statute providing that 'all meetings of any city or town council * * * of any city or town * * * shall be held open to the public of any such city or town * * * ' it had knowledge of the general law pertaining to municipal corporations and intended the term 'all meetings' to have reference only to such formal assemblages of the council sitting as a joint deliberative body as were required or authorized by law to be held for the transaction of official municipal business; for at no other type of gathering, whether attended by all or only some of the members of the city council, could any formal action be taken or agreement be made that could officially bind the municipal corporation, or the individual members of the council, and hence such a gathering would not constitute a 'meeting' of the council."

McQuillin, Municipal Corporations, 3rd Ed., Sec. 13.08:

"Corporate meetings may be (1) regular or stated, (2) special or called, and (3) adjourned. Regular or stated meetings are usually prescribed by charter. They are sometimes provided for by ordinance, resolution, or motion, under legal authority. Special or called meetings are convened by the mayor or chief executive of the corporation, the presiding officer of the corporate body, or in some other definite way, on due notice to all of the members."

The state legislature has provided that "Regular meetings of the council shall be held at such times and places as may be prescribed by its rules," and "Special meetings may be called by the mayor or by any two members of the council by writing filed with the clerk who shall then mail a notice to all members of the time and place of meeting at least one day before the meeting."

McQuillin, Municipal Corporations, 3rd Ed., Sec. 13.37 states:

" * * * Requirements as to the calling of special meetings are generally held mandatory and jurisdictional, and in case of failure to observe them, especially in the absence of notice as prescribed, the legislative body has no power to transact business."

It appears that if the only defect is failure to give notice, all the council members can waive this by all of them being present and participating in said meeting. **State v. Smith**, 22 Minn. 218; opinions O. A. G. 471-E, April 8, 1946, April 25, 1938, copies enclosed. The right of a council member to receive notice is not like the right of public hearing. The former is personal and can be waived by the person while the latter belongs to the public.

The gatherings outlined in your first and third questions are not meetings within the purview of M. S. A. 412.191 and thus are not prohibited by

law. As to your second question, **McQuillin, Municipal Corporations**, 3rd Ed., Sec. 13.38 states:

> "In the absence of provision to the contrary, when a regular or stated or called corporate meeting is once duly organized at the time and place appointed it possesses the incidental power to adjourn to a future time. And after such adjournment no legal action can be taken by the meeting. * * * ."

Thus, the so-called executive sessions are not council meetings within the purview of the statutory prohibition because they take place between the adjourned regular session and recommencement of the meeting.

It appears the legislature intended that conduct of village business by the council shall be subject to public observation. The spirit of such legislation is that under the democratic process council decisions are to be reached after free and open discussion, debate and clash of opinion. The public should have a right to know not just the decisions of the council—their yeas and nays—but also the council members' reasoning and opinions thereon. While there may be certain decisions in some limited areas which might be better reached without public discussion, the broader public interest in observation of the conduct of public officials would seem to be the overriding consideration. There is nothing in the law which would prevent individual council members from engaging in casual or occasional discussion of public business with all or some other members. The individual members have the right of free speech along with the rest of the community. The village manager has many problems on the administrative level for which an informal discussion might be in the public interest.

The Utah Supreme Court in **Acord v. Booth**, 93 Pac. 734, 33 Utah 279, held that a statute requiring a council to "sit with open doors" required that the public could not be excluded when the council chose to sit as a "committee of the whole." On page 734 of the Pacific reporter, it is stated:

> " * * * The purpose [of the statute] was not that the public might know how the vote stood, but the purpose evidently was that the public might know what the councilmen thought about the matters in case they expressed an opinion upon them. Moreover, the public have the right to know just what public business is being considered, and by whom and to what extent it is discussed. These discussions and deliberations could thus all be taken up in committee of the whole, and the public be excluded from the very proceedings which the statute intended should be conducted with open doors."

Your request has limited this opinion to whether certain conduct is prohibited by law. While the conduct involved does not violate the letter of the law it does raise doubts as to the violation of its spirit. Public officials should avoid any appearance of circumventing the democratic processes. It should be noted that the entire question is discussed in some detail in a recent book, "The People's Right to Know" by Harold L. Cross, with par-

ticular reference to pages 184 to 194. All your specific questions are answered in the affirmative.

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.,
Spec. Asst. Attorney General.

Bloomington Village Attorney.
February 13, 1957. 471-E

140

Villages—Optional Plan A becomes effective on filing of certificates pursuant to M. S. A. 412.551, Subd. 5. Village treasurer, re-elected at the regular annual village election at which electors adopt Optional Plan A, is not re-elected in fact and, after effective date of Plan A, serves only until expiration of present form.

Facts

"At our annual village election held on December 3rd this week, the voters of the village adopted Optional Plan 'A' (M. S. A. 412.541). At the election the village treasurer was a candidate for re-election and her election was voted upon at the same time as the question as to whether or not Optional Plan 'A' would be adopted. The treasurer was re-elected for a two-year term to succeed herself.

"The village clerk of the Village of Grand Rapids has one year before the expiration of his term of office. It is my understanding that next year no clerk will be elected, but two trustees are to be elected and the village clerk will then be appointed by the council, under the provisions of Optional Plan 'A'. Until that election next year, the council shall continue as now constituted until the expiration of the term of the incumbent clerk (M. S. A. 412.571, subdivision 1)."

Inquiry at the office of the Secretary of State discloses that on December 6th last, your village clerk filed with such secretary a certificate stating that in the annual village election of the village of Grand Rapids held on December 3, 1957, the adoption of "Optional Plan A" was submitted to the electors by ballot and that at such election a majority of the votes cast on the adoption of Optional Plan A were cast in favor of the adoption of said plan.

Questions

1. " * * * whether the re-elected treasurer will hold office for the next two years or until the expiration of her term for which she has

just been elected, and that thereafter and under Optional Plan 'A', the treasurer will be appointed by the council as provided in M. S. A. 412.581.

2. "Does the village council continue to operate under the standard plan of village government as they are now operating until the term of the clerk expires, and then operate under Optional Plan 'A' after an election at which no clerk is elected, but at which two trustees are elected? In other words, what is meant by the first sentence of M. S. A. 412.571, subd. 1, which reads as follows:

> 'Council Trustees — When Optional Plan A, B or C is first adopted in any village in which the standard plan of village government is then in operation, the council shall continue as then constituted until the expiration of the term of the incumbent clerk'."

Opinion

1. The filing of the above certificate with the Secretary of State and with the county auditor is a requirement of M. S. A. 412.551, Subd. 5. We assume that the clerk has also filed a similar certificate with the county auditor.

Inasmuch as Optional Plan A was adopted, and became effective upon the filing of the certificates with the Secretary of State and county auditor (see "2" below), the treasurer was not in fact re-elected for another term commencing the first business day of January 1958. She continues to serve after the adoption of Plan A only to the expiration of her present term because Section 412.571, Subd. 2, so provides. She would take office on the first business day of January 1958 (by virtue of the December 5th election), **only in the event the proposition to adopt Optional Plan A failed of adoption,** in which event the standard plan would continue. See opinion O. A. G. 484-E-4, November 17, 1950, which pertains to the election and term of a village clerk in a comparable situation.

2. Sec. 412.551, Subd. 5, provides that whenever the question of adoption of Optional Plan A is submitted and results in a majority vote favoring adoption, the village clerk shall promptly file with the county auditor and with the Secretary of State a certificate stating the date of the election, the question submitted and the vote thereon. The plan goes into effect as soon as such certificate is filed. Opinion O. A. G. 484-E-4, November 8, 1950 and November 17, 1950, supra.

The first sentence of 412.571, Subd. 1, which you quote does not mean that the village will operate under the standard plan until the term of the clerk expires. What is meant thereby is that the **council,** as then constituted, will continue to serve as the council under "Optional Plan A" until the expiration of the term of the incumbent clerk. Cf. opinion O. A. G. 484-E-4, November 22, 1950.

Our conclusions herein are based upon opinions rendered approximately seven years ago which apparently have never been challenged. We there-

fore adhere to them. The writer of the opinion of November 8, 1950 stated that there were no authorities to guide him. Our search has revealed none.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Grand Rapids Village Attorney.
December 17, 1957. 484-E-4

141

Villages—Clerk—Salary. Village clerk's salary and additional compensation for his other village office or position, not incompatible therewith, are fixed by council under M. S. 412.111. Clerk's duties and appointment of deputy governed by M. S. 412.151.

Facts

"The Village of Shoreview is having an election and among the vacancies to be filled is the office of village clerk, which carries a salary of $75 per month. The village also employs a deputy clerk who serves in a dual capacity as deputy clerk and building inspector.

"One of the candidates for the office of clerk has publicly announced that if elected he will be a full-time clerk, thus dispensing with the necessity of a deputy clerk."

Question

"Whether, if elected, this candidate could draw from the village in any capacity a salary exceeding $75 per month?"

Opinion

We assume that the village operates under the standard plan of village government.

The candidate under consideration, if elected to the office of village clerk, can only draw from the village the salary fixed for this office by the village council under the authority granted it by M. S. Section 412.111. A person holding the office of village clerk can be elected or appointed to and qualify for another village office or position not incompatible with the the office of village clerk, and his compensation therefor will likewise be fixed by the council under the authority of the above section. In this man-

ner he could draw compensation out of village funds in addition to his salary as village clerk.

The duties of the village clerk are prescribed by M. S. Section 412.151 and include "such other appropriate duties as may be imposed upon him by the council." The council manifestly will be guided by the provisions of this section relating to the duties of the clerk and appointment of a deputy clerk, rather than by the village clerk's availability for full-time duty.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Shoreview Village Attorney.
November 25, 1958. 470-B

142

Villages—Office of village trustee—Vacancy. Trustee who has ceased to be an inhabitant of village does not have right to maintain such office (M. S. 351.02 (4)) and he has no right to vote for his successor. Council does not have right to appoint or to entertain motion to appoint successor before vacancy created by 351.02 (4) exists. If an appointee accepted the appointment, entered into possession of office of trustee and discharged duties, he becomes a de factor officer and his acts are valid as respects the public and third persons. Right of incumbent to vote on appeal from ruling discussed.

Facts

"At a meeting of the council held on May 19, 1958, Trustee S made a motion to appoint R to fill the unexpired term of Trustee B, who had ceased to be an inhabitant of the Village of Island Park on May 1, 1958. The motion was seconded by Trustee T. Mayor W ruled that the motion was out of order, because Trustee B had not resigned from the council, and therefore, there was no vacancy to be filled. Trustee S then appealed the ruling of the Mayor to the Council and, upon a vote thereon, three voted the motion to be in order, and two voted the motion to be out of order. Thereupon, the Mayor put the question on the first motion, and upon vote thereon, Trustees S, T and B voted yes, and Mayor W and Trustee D voted no."

Questions

"1. Does a Trustee who has ceased to be an inhabitant of the village have the right to maintain his office as trustee?

"2. Does a Trustee who has ceased to be an inhabitant of the village have the right to vote for his successor?

"3. Does the council have the right to appoint, or to entertain a motion to appoint a successor council member, before a vacancy exists?

"4. If the appointment of R to the council is found to be invalid, does this affect the validity of action taken by the council on other matters, while R is sitting as a member of the council?

"5. Did Trustee B have a right to vote on the appeal of the Mayor's ruling of the original motion to appoint R? (If B did not have the right to so vote, the vote on the appeal would have been a two to two tie, and the Mayor's ruling would have been sustained.)"

Opinion

1. M. S. 351.02 provides in part:

"Every office shall become vacant on the happening of either of the following events, before the expiration of the term of such office:

* * *

(2) His[1] resignation;

* * *

(4) His ceasing to be an inhabitant of the * * * village for which he was elected or appointed, or within which the duties of his office are required to be discharged; * * * "

M. S. 212.34, Subd. 1 provides that:

" * * * All officers chosen and qualified as such shall hold office until their successors qualify. Vacancies in office shall be filled for the remainder of the term by the council. * * * "

On the basis of the facts submitted, the village council had the authority to appoint B's successor upon his office becoming vacant despite the fact that he has not resigned or indicated his intention or willingness to do so. If he had resigned, his office would become vacant by reason of (2) above; if he has not resigned, (4) above would have application by force of its own provisions. Such provisions have no reference to, and do not contemplate the resignation of the incumbent.

Because his office becomes vacant upon B ceasing to be an inhabitant of the village, it is our opinion that he has no right to maintain the office of village trustee after he has ceased to be such inhabitant. Whether B has ceased to be an inhabitant of the village is a question of fact to be determined in the first instance by the council. See in this connection opinion O. A. G. 471-M, August 26, 1955, copy enclosed.

---

[1]Referring to "the incumbent."

2. A trustee who has ceased to be an inhabitant of the village does not, in our opinion, have the right to vote for his successor where, as here, the fact of his ceasing to be such inhabitant creates the vacancy. There is no vacancy until he ceases to be such trustee. See opinion O. A. G. 471-M, April 8, 1941, copy enclosed.

3. In our opinion, the council does not have the right to appoint or to entertain a motion to appoint a successor council member before a vacancy in the office, caused by 351.02 (4), exists. As stated, 212.34, Subd. 1 provides that vacancies in office shall be filled by the council. This we construe to mean that the council which has the right to appoint B's successor is the council as constituted at the time the vacancy actually occurs. The action of the council in making an appointment before the office became vacant can only be sustained if there has been no change in the membership of the council between the time of the prospective appointment and the time it is determined that the office has become vacant. See **People v. Dethloff**, 283 N. Y. 309, 28 N. E. 2d 852.

4. If R accepted the appointment, entered into possession of the office of trustee and discharged the duties thereof, he thereby became a de facto officer rather than a usurper even though no vacancy in fact existed. **Fulton v. Town of Andrea**, 70 Minn. 445, 73 N. W. 256. His acts as such de facto officer are valid as respects the public and third persons who have an interest in the thing done. **Fulton v. Town of Andrea**, supra, 452; **Hoff v. Sauer**, 243 Minn. 425, 68 N. W. 2d 252; 3 McQuillin Mun. Corp., 3d Ed., 387, Section 12.106.

5. As indicated, B's term as trustee continues up to the time he ceases to be an inhabitant of the village. As trustee he has the right to vote on matters properly submitted to the council during his term. If the council, prior to the attempted motion to appoint R, had taken no action which could be construed as a determination by it that B had ceased to be such inhabitant, it is our opinion that he had the right to vote on the so-called appeal. All that the favorable vote thereon accomplished was to make possible the submission of the motion to appoint.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Island Park Village Attorney.
June 6, 1958. 471-M

143

Architects, Engineers and Surveyors—Villages. Person registered only as highway engineer cannot practice as civil engineer for village. Village may not employ county surveyor to perform engineering services for village—M. S. 326.02, Subd. 1; 326.03; 326.10, Subd. 3.

Questions

"1. Is it lawful under Sections 326.02 through 326.16, Minnesota General Statutes, and the Rules and Regulations promulgated by the State Board of Registration for Architects, Engineers and Land Surveyors for a person registered by said state board as a 'highway engineer' under said sections and said rules and regulations, to whom has been issued a registration card which states that he is entitled to all of the rights and privileges of a registered professional engineer under the laws of the State of Minnesota, and which person is a duly appointed, qualified and acting county surveyor for the County in which such municipality is located under Chapter 389, Minnesota Statutes, to perform for a Minnesota municipality such duties as may be necessary in connection with the planning, design or supervision of the construction of village storm sewer systems, village sanitary sewer lateral extensions or water main extensions?

"2. Can a Minnesota village employ a person who is the county surveyor for the county in which the village is situated and who is registered in the manner set forth in question No. 1 to perform any and all engineering services required by the village for storm sewers, sanitary sewers, water mains and related matters?"

Opinion

We assume for the purposes of this opinion that the total cost of any such improvement will exceed $2,000.

M. S. 326.02, Subd. 1, provides:

"In order to safeguard life, health, and property, and to promote the public welfare, any person in either public or private capacity practicing, or offering to practice, architecture, professional engineering, or land surveying in this state, either as an individual, a co-partner, or as agent of another, **shall be registered as hereinafter provided.** It shall be unlawful for any person to practice, or to offer to practice, in this state, architecture, **professional engineering,** or land surveying, or to solicit or to contract to furnish work **within the terms of sections 326.02 to 326.16,** or to use in connection with his name, or to otherwise assume, use or advertise any title or description tending to convey the impression that he is an architect, professional engineer (hereinafter called engineer) or land surveyor, **unless such person is qualified by registration under sections 326.02 to 326.16.**" (Emphasis supplied)

And the first paragraph of M. S. 326.03 provides:

> "No person, except an architect, engineer or land surveyor, **registered as provided for in sections 326.02 to 326.15** shall practice architecture, professional engineering, or land surveying, **respectively**, in the preparation of plans, specifications, reports, plats or other engineering or architectural documents, or in the supervision of architectural, engineering, or land surveying work, for any public work or public improvement in this state, excepting any public work or public improvement the total cost of which does not exceed $2,000, provided that plans and specifications for such work or improvement affecting water supply or waste disposal are approved by the appropriate state agency. Public work or public improvement is defined to mean work or improvement the cost of which is to be paid in whole or in part from public funds." (Emphasis supplied)

It is true that these sections speak broadly of "professional engineering" and "engineering." However, the engineer must be registered "as provided in sections 326.02 to 326.15." Section 326.04 creates a state board of registration for architects, engineers and land surveyors, and M. S. 326.10, Subd. 3, provides:

> "The board may make reasonable rules and regulations for **classifying and registering engineers in divisions according to their qualifications to practice different classes of engineering work, and shall, in such case, register qualified applicants in one or more such divisions in which they shall qualify** under the terms of sections 326.02 to 326.16 and shall, in any event, provide one such division for highway engineers." (Emphasis supplied)

Thus, engineers are to be registered in different divisions according to their qualifications to practice different classes of engineering work; and pursuant to this section the registration board has established at least eleven different engineering divisions. A civil or municipal engineer is classified in one division, and a highway engineer is classified in another different and distinct division.

In an opinion O. A. G. 10-A, April 17, 1934, copy enclosed, holding that a person registered only as a mining engineer may not practice as a city engineer, the attorney general construed Section 326.10, Subd. 3, which contained the same language then as now. He held that it was the intent of the legislature in enacting such subdivision that engineers be classified so that their practice would be confined to the class of engineering for which they were qualified. We adhere to this interpretation, for it is apparent that although a person might be qualified to practice highway engineering (a specialized field), it would not necessarily follow that such person is qualified to practice civil engineering. If an engineer were allowed to practice in a division for which he was not qualified, the purpose of the act would be defeated.

In the instant situation, the individual is registered only as a highway engineer and there has been no showing that he is qualified to practice as

a civil engineer. If he, in fact, has such qualifications by training, experience and education, then on application the board would have the right under Section 326.10, Subd. 3, to also issue a certificate of registration to him as a civil engineer, whereupon he could do engineering work for the municipality.

The fact that the person in question is also the county surveyor does not alter the situation, and it is immaterial to your questions whether or not he was appointed or elected, or is or is not registered as a surveyor. Sections 326.02 to 326.16 pertain to three professions; architecture, engineering, which is divided into several subdivisions, and land surveying; and it has long been held by the attorney general and by the registration board that architects, engineers and surveyors may not step out of their profession or class and practice in other branches. See opinion O. A. G. 10-A, May 26, 1943, March 25, 1941, and September 22, 1943, copies enclosed. See also the word "respectively" in Section 326.03, quoted supra, which differentiates the three professions and their duties.

A land surveyor's duties are set forth in Section 326.02, Subd. 4, and a county surveyor's duties are set forth in Section 389.02. There is no provision in either c. 326 or c. 389 authorizing a surveyor to practice in any class or division of engineering. Indeed, the opinion of May 26, 1943, supra, which is also printed as No. 246 in the 1944 Report of the Attorney General, held that a contract between a city and an individual surveyor to do both engineering and surveying work for the city was void in so far as it provided for the furnishing of engineering services to the city by such surveyor, and that the municipality had no authority to pay him for such engineering services.

Since we hold that only an engineer of the class or division entitled to do the contemplated engineering work for the village may be so employed, we answer your questions in the negative.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

La Crescent Village Attorney.
February 11, 1958. 10-A

144

Villages—Council—Vote—Mayor is a member of council and is entitled to vote even though his vote creates a tie.

Question

"There are four members of a council present, including the Mayor. A motion is made by one trustee and seconded by either the clerk or another trustee, and it is put to a vote, there are two votes in favor and one against, may the Mayor create a tie vote by voting on the proposition?"

Comment

"I note in the opinion of the Attorney General, 471H, dated April 19, 1950, it was held 'A mayor of a village was a member of a village council and was entitled to make and second motions and to vote on any matter properly considered by the council at its meetings.' Previous holdings of the Attorney General's office held that the mayors voted only in case of tie votes and then to break the tie.

"I am unable to find the specific answer to the question propounded above and would appreciate an opinion of your office. The importance of the question arises by reason of the fact that the council is missing one member, although there is still a quorum present.

"The question is not whether or not the Mayor may vote on an issue where his vote may either carry or defeat the issue, but the question is may he vote and by so doing create a tie vote?"

Opinion

We assume the village operates under the standard plan.

The mayor may vote and by so doing create a tie vote.

As pointed out in the opinion to which you refer, the mayor is a member of the village council (M. S. A. 412.191) and is entitled to vote upon any matter properly considered by it. The fact that his vote will create a tie does not deprive him of his right to vote. See opinion O. A. G. 471-H, July 16, 1947, and 4 McQuillin Municipal Corporations, 3d Ed. 475, Section 13.25. The village cannot, by ordinance or otherwise, deprive the mayor of his right to vote. See opinion O. A. G. 471-H, March 29, 1957. Copies of these opinions are enclosed, together with copy of opinion O. A. G. 471-H, April 19, 1950.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Ironton Village Attorney.
December 26, 1957. 471-H

145

Villages—When vacancy in office of Mayor is due to resignation, acting mayor performs duties only until council appoints successor. Acting mayor does not become mayor for balance of term unless so appointed by council. Who may be appointed controlled by M. S. 471.46.

Question

"In the event the duly elected and qualified Mayor of the Village of North St. Paul resigns, does the acting mayor become mayor for the unexpired term?"

We are informed that the village of North St. Paul operates under Optional Plan B of village government.

Opinion

M. S. A. 412.561, Subd. 1, provides:

"All laws of the state applicable to a village before the adoption of Optional Plan A, B, or C and not inconsistent with the provisions relating to such plan, shall apply to and govern the village after the adoption of any optional plan."

M. S. 351.02 provides that every office shall become vacant upon the resignation of the incumbent before the expiration of his term. Section 351.01 provides in part:

"Resignations shall be made:

"(1) By incumbents of elective offices, to the officer authorized by law to fill a vacancy in such office by appointment, or to order a special election to fill the vacancy;"

M. S. A. 212. 34 provides that in every village the mayor shall be an elective officer and that **"Vacancies in office shall be filled for the remainder of the term by the council."**

M. S. A. 412.121 provides:

"At its first meeting each year the council shall choose an **acting mayor from the trustees.** He shall perform the duties of mayor during the disability or absence of the mayor from the village **or, in case of vacancy in the office of mayor, until a successor has been appointed and qualifies."** (Emphasis supplied)

This statute is not inconsistent with the provisions of Optional Plan B.

Therefore, it is clear that upon the mayor's resignation, given to the council, the office becomes vacant. The acting mayor thereupon shall perform the duties of mayor only until the council appoints a successor mayor and he qualifies as such. Such appointment is for the remainder of the term.

Your specific question is therefore answered in the negative.

Question

If the first question is answered in the negative, who may the council appoint as mayor for the remainder of the term?

Opinion

The answer to your question is controlled by M. S. 471.46, which provides:

> "No county, city, village, borough, town or school district officer shall be appointed to fill a vacancy in any elective office if he has the power, either alone or as a member of a board, to make the appointment; and his ineligibility shall not be affected by his resignation before such appointment is made. **This section shall not prevent the appointment of a member of a city or village council to a different office on the council.**" (Emphasis supplied)

M. S. A. 412.631 provides:

> "In any village operating under Optional Plan B, the council **shall,** except as provided in section 412.571, be composed of **a mayor and four trustees.**" (Emphasis supplied)

Since the mayor, under the provisions of said statute, is a member of the village council, the council may appoint any council member including the acting mayor (see Section 412.121, quoted supra), or a person not presently a member of the council, to the office of mayor. If a council member is so appointed, another vacancy will exist which must be filled by the council in order to comply with Section 412.631.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

North St. Paul Village Attorney.
January 18, 1957. 478-A

146

Villages—Officers—Incompatibility. Village trustee may file for and seek election to office of town supervisor; acceptance works vacation of office of village trustee; offices are incompatible. Village trustee may voluntarily resign.

Questions

1. "Is it proper for a Village Trustee, subsequent to his election and qualifying as such, to file and seek election as a township supervisor?

2. "If such Village Trustee is elected to and qualifies as a township supervisor, what is his status then as to the respective positions?

3. "In the event of the incompatibility of the positions, has the member any right of election to resign one position and retain the other?"

Opinion

1. A person who holds the office of village trustee has the right and it is proper for him to file for and seek election to the office of township supervisor, assuming, of course, that he is otherwise eligible for the office. The fact that these offices are incompatible (See 3 below) does not affect his eligibility to file and be elected. See **Hoffman v. Downs**, 145 Minn. 465, 467, 177 N. W. 669.

2. If such village trustee is elected to and qualifies for the office of township supervisor, his acceptance of such office works a vacation of the office of village trustee. **State ex rel. Hilton v. Sword**, 157 Minn. 263, 267, 196 N. W. 467; 15 Dunnell's Dig. (3rd ed.), Section 7995.

3. These offices are, in our opinion, incompatible because of the inconsistency of their functions as pointed out in an opinion O. A. G. 358-E-6, February 19, 1947, also printed as Op. No. 117 in the 1948 Report, copy enclosed. The member can, of course, voluntarily resign the office of village trustee any time before he accepts the other. Upon his resignation the office becomes vacant. M. S. A. Section 351.02(2). Obviously he cannot resign the office of township supervisor until after he has qualified for and accepted it.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Aurora Village Attorney.
February 18, 1958. 358-E-6

147

Villages—Village may expend village funds for Salk vaccine for residents.

Question

"Can a Village legally expend Village funds for the purchase of polio vaccine for the children and other residents of the Village?"

Opinion

M. S. A. 412.221, subd. 32 provides in part:

"The village council shall have power to provide for * * * the promotion of health, safety * * * and the general welfare by such ordinances not inconsistent with the constitution and laws of the United States or of this state as it shall deem expedient."

An opinion O. A. G. 611-A-9, February 15, 1935, printed as No. 38 of the 1936 Report of the Attorney General, states:

" * * * This office has heretofore held that immunization, which includes vaccination, is an expenditure incident to a control of communicable diseases and a proper charge against the municipality."

and ruled that if the council finds in the exercise of its best judgment that vaccinations against smallpox and diphtheria are for the preservation of health of the inhabitants of the municipality, the council can make an appropriation for these purposes. While this opinion dealt specifically with smallpox and diphtheria vaccine, it applies equally well to polio vaccine. Poliomyelitis is treated as a contagious disease in the Minnesota State Health Regulations, Nos. 301 and 401. This office in a recent opinion O. A. G. 159-B-7, February 6, 1957, ruled that school boards may provide for free inoculation of students with Salk vaccine if the board finds that this will protect the health of its students and help prevent the spread of disease within the student body. This reasoning applies equally well to municipalities. Proper consent should be obtained. As to compulsory inoculation, I direct your attention to 24 Fordham Law Review 657, p. 666, Note 25.

The village council can expend village funds for vaccination of village inhabitants with Salk vaccine if the council finds in the exercise of its best judgment that such appropriation is for the promotion of health and safety and will protect the health of the village's inhabitants and prevent the spread of poliomyelitis throughout the village.

MILES LORD,
Attorney General.

JOHN F. CASEY, JR.,
Spec. Asst. Attorney General

Babbit Village Attorney.
April 9, 1957. 471-B-1.

148

Villages—Ordinances—Village Park located outside corporate limits. Village may regulate such park by ordinances prescribing penalties for violation thereof. Enforcement of ordinances and arrest powers discussed.

Facts

"We are the attorneys for the Village of LeRoy.

"The Village owns an area commonly referred to as Wildwood Park a few miles outside the Village limits, which has been used for a number of years as a public park.

"There is a present existing ordinance attempting to regulate the activities of the users of the park, violations of which are punishable as a misdemeanor."

Questions

"1. Can the Village regulate the park by ordinance?

"2. If so, is it possible to punish by a misdemeanor provision violations of the ordinance?"

Opinion

1. Prior to the enactment of the village code (M. S. A. Chapter 412), M. S. 448.01 authorized any village to acquire a tract of land for park purposes either within or without the corporate limits of the village not exceeding 80 acres. This section was repealed coincident with the enactment of the village code.

However, Section 412.211 authorizes every village to "acquire, either within or without its corporate limits, such real and personal property as the purposes of the village may require" and to hold, manage and control such property.

Section 412.221, subd. 8, provides:

> "The village council shall have power to provide for, **and by ordinance regulate**, the setting out and protection of trees, shrubs, and flowers in the village **or upon its property.**" (Emphasis supplied)

and Section 412.491 provides:

> "Any village may establish, improve, ornament, maintain and manage parks, parkways, and recreational facilities **and by ordinance protect and regulate their use.**" (Emphasis supplied)

Construing these three provisions of the village code together, and bearing in mind that a municipal park serves a public function[1] and hence is for a public village purpose, it is clear that the village may acquire, establish, maintain and manage a public park outside its corporate limits and is authorized by statute to protect and regulate its use and the trees, shrubs and flowers therein by ordinance. Although as a general rule a municipality has no extraterritorial powers (Dunnell's Minnesota Digest, Section 6683b), there appears to be an exception in regard to municipal parks and recreational facilities located outside the municipality. See the **Booth** case, supra. We have heretofore held that the power to acquire, own and maintain a park

[1]As enunciated in **Booth v. City of Minneapolis**, 163 Minn. 223, 203 N. W. 625; and Dunnell's Minnesota Digest, 3rd Ed., § 6608a.

outside the municipal limits carries with it, even in the absence of statutory authority, the authority to adopt rules and regulations governing the use thereof. See opinions of this office relating to municipal bathing beaches located outside the corporate limits O. A. G. 785-B, August 12, 1944, and O. A. G. 234-B, April 9, 1941, copies enclosed.

2. M. S. A. 412.231 provides that "The village council shall have power to declare that the violation of any ordinance shall be a penal offense and to prescribe penalties therefor." (Emphasis supplied). How, then, shall such park ordinances be enforced?

An arrest may be made upon complaint and warrant, and in that connection M. S. A. 412.861, subd. 1, provides:

> " * * * The warrant and all other process in such cases shall be directed for service **to any police officer, court officer, if there is a municipal court in the village, marshal, or constable of any town, city, or village in the county, to the sheriff of the county, or all of them.**" (Emphasis supplied)

A peace officer may also make an arrest without a warrant when a public offense is committed or attempted in his presence. M. S. 629.34. "Public offense" includes a violation of a municipal ordinance even though it does not amount to a breach of the peace. **State v. Cantieny,** 34 Minn. 1, 24 N. W. 458. The authority of a village police officer as such, however, is normally confined to the corporate limits of the municipality which he serves. It is only pursuant to M. S. A. 629.40, as amended by L. 1955, c. 252, Section 1, that a village peace officer may make an arrest beyond the village boundaries. We have therefore held that a village peace officer may not in his official capacity make an arrest without a warrant for a misdemeanor committed in his presence while beyond the borders of such village. See opinion O. A. G. 785-B, September 12, 1952, copy enclosed.

However, M. S. 629.37 provides that a private person may arrest another for a public offense committed or attempted in his presence; and this office has accordingly held in an opinion O. A. G. 785-B, March 5, 1947, copy enclosed, that if a village police officer saw a public offense being committed while outside the village boundaries, he could make the arrest as a private person.

In summary, therefore, we are of the opinion that, since the village lawfully owns and manages the park in question and has authority to regulate its use, its police officers may as its agents regulate the conduct of persons using the park up to the point of arrest and may eject persons therefrom for improper conduct (see opinion of August 12, 1944, supra); that the village may regulate the park by ordinances prescribing penalties for violation thereof; that its police officers may make arrests as private persons in the park for violation of park ordinances; and that the sheriff or any other officer having jurisdiction may make an arrest if the offense is committed in his presence or if he has a warrant.

Your questions are therefore both answered in the affirmative.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

LeRoy Village Attorneys.
September 4, 1957. 785-B

149

Villages—Water System—Sewer System—May be extended beyond village limits. M. S. A. 429.02 (2) and (5); 412.321, Subd. 3; 444.075, Subds. 1 & 3. Village act by ordinance or contract.

Questions

"1. Does the village of Hawley have the authority to extend its water mains beyond the village limits so as to permit property holders owning property outside of the village limits but not abutting thereto to connect with such water system?

"2. Does the Village of Hawley have the authority to permit a person owning property outside of the village limits but not abutting thereto to connect on to the sewer system of the Village of Hawley?

"3. If the Village has the authority to do either of the above mentioned acts, must it be done by ordinance and must a contract be entered into between the village and the parties so connected up with the sewer or water systems?"

You call our attention to the fact that M. S. Section 456.32 has been amended so as to eliminate all reference to villages, and you state that Section 444.075, Subd. 4, appears to give the village authority to permit a person or company owning property outside the village to connect on to the existing sewer system.

Opinion

L. 1949, c. 119, Section 111, coded as M. S. A. 412.921, provides that certain statutes, including M. S. Section 456.32, shall not apply to villages, and that the revisor of statutes, in preparing the next edition of Minnesota Statutes, shall delete from such statutes, including Section 456.32, all reference to villages. Manifestly Section 456.32 now has no application to villages and is of no assistance in the solution of your problems.

We believe that L. 1953, c. 398, coded as Sections 429.011—429.111, provides the answers to your first and second questions.

Section 429.011, Subd. 2, defines a municipality so as to include "any village". Section 429.021, relating to local improvements and the powers of the council, grants to the village council the power

> "(2) To construct, reconstruct, extend and maintain storm and sanitary sewers and systems, including outlets, treatment plants, pumps, lift stations, service connections, and other appurtenances of a sewer system, within and **without the corporate limits.**
>
> "(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.**" (Emphasis supplied)

See, in this connection, opinion O. A. G. 59-B-13, June 23, 1953, wherein it was ruled that by virtue of the statutes above cited that city was authorized to extend its water system beyond its corporate limits. Copy of cited opinion enclosed.

M. S. A. 412.321, Subd. 3 (L. 1949, c. 119, Section 41) provides:

> "Any village may, except as otherwise restricted by this section, extend any such public utility outside its limits and furnish service to consumers in such area at such rates and upon such terms as the council or utility commission, if there is one, shall determine; but no such extension shall be made into any incorporated municipality without its consent. * * * "

M. S. A. 444.075 provides in part as follows:

> "Subdivision 1. Any city, except cities of the first class operating under a home rule charter or any village is hereby authorized and empowered to build, construct, reconstruct, repair, enlarge, improve, or in any other manner obtain storm sewers, other sewers, sewage treatment plants, sewage treatment systems, or any facilities for disposing of sewage or industrial waste, all hereinafter called facilities, and to maintain and operate the same inside or **outside the** city or **village limits.** The authority hereby granted shall be in addition to all other powers with reference to such facilities otherwise granted by the laws of this state or by the charter of such city." (Emphasis supplied)
>
> "Subd. 3. For the purpose of paying for the construction, reconstruction, repair, enlargement, improvement, or other obtainment and the maintenance, operation and use of such facilities, the governing body of any such city or village shall have authority to impose just and equitable rates, charges or rentals for the use of such facilities and for connections therewith, in the manner prescribed by Minnesota Statutes 1945, Section 443.12, as amended, or to make contracts for such charges as hereinafter provided. * * * "

Section 412.321, Subd. 3, apparently has no application to a sewer system; Section 444.075 contains no authorization with reference to water works.

In view of the foregoing we answer your questions 1 and 2 in the affirmative.

3. We assume your third question relates to the manner in which the village can be paid for water and sewer service furnished to persons and properties outside the village limits, and recover the cost of the extended improvement. Manifestly the village cannot levy assessments against property beyond its limits.

With reference to the extended sewer system, the village, under Section 444.075, Subd. 3, has authority to impose just and equitable rates, charges and rentals for the use of such facilities, and for connections therewith, or to make contracts for such charges. Subdivision 4, to which you refer us, authorizes a village to permit any person, company or corporation located and doing business outside of the village limits to connect with and use sewer facilities upon the payment of such fees and charges as may be prescribed or contracted for by the village, and further authorizes the village to contract with such person, company or corporation for the payment by either of them of a part of the cost of the construction, maintenance and use of such facility. Such contract can bind the parties for a period not exceeding 30 years. Section 444.075, Subd. 3.

Section 412.321, Subd. 3, which pertains to a village water system, empowers the council or utility commission to determine the rates and terms upon which such services shall be furnished outside village limits. See also M. S. 412.221, Subd. 2. However, a contract could not bind the village for an unreasonably long period. 13 Dunnell's Dig. (3rd Ed.), Section 6700.

Whether the village should proceed by ordinance or contract would depend to a large extent upon the particular matter under consideration. It is not limited to either method. In supplying either facility beyond its limits the relation of the village with its customer would be contractual. It is acting in its proprietary capacity. See **City of Staples v. Minn. Power & Light Co.**, 196 Minn. 303, 305, 265 N. W. 58; 12 McQuillin, Mun. Corp. (3rd Ed.) 669, Section 25.34. In **Guth v. City of Staples**, 187 Minn. 552, 237 N. W. 411, defendant city furnished electrical energy to consumers outside the city under a contract arrangement which took into consideration the burden of the city in paying for the cost of installation. See also **Township of Meridian v. City of E. Lansing**, 342 Mich. 734, 71 N. W. (2d) 234.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Spec. Asst. Attorney General.

Hawley Village Attorney.
May 20, 1957. 624D-11

150

Villages—Purchase of Fire Equipment—Under Section 412.221, Subd. 2, the village is authorized to buy equipment through conditional sales contract but not to give chattel mortgage. Difference between conditional sales contracts and chattel mortgages discussed. Seller's only remedy for non-payment is recovery of property sold through conditional sales contracts and village cannot include other property as security. Procedure under M. S. A. 412.301 is preferable in regard to financing purchase of fire equipment.

Facts

"The Village has bought a fire truck and paid for it in full. It now desires to buy equipment for the truck under a Conditional Sales Contract as provided for in Section 412.221, Subd. 2. The equipment will be placed on or attached to the truck."

Questions

"1. Can the truck which is now bought and paid for be included as security in the Conditional Sales Contract for the equipment?

"2. Can the Village give a chattel mortgage on either the truck or the equipment for any purpose? In other words, is the provision as to Conditional Sales Contracts under 412.221 broad enough to include the right to give a chattel mortgage?"

Opinion

1. Dunnell's Minn. Digest, 3rd ed., Section 6684, states:

"Municipalities have such powers only as are expressly conferred by statute or are necessarily implied in those which are expressly conferred. They have no inherent powers."

M. S. A. 412.221, Subd. 2, provides:

" * * * The village may **purchase** property through a conditional sales contract **under which the seller is confined to the remedy of recovery of the property in case of non-payment** of all or part of the purchase price, which shall be payable over a period of not to exceed five years." (Emphasis supplied)

Thus, although the legislature has given villages the power to purchase personal property through a conditional sales contract, the legislature has also seen fit to specify the terms thereof. Under the statute, villages are only authorized to enter into conditional sales contracts which provide that the seller's remedy for non-payment is recovery of the property being sold to the village under such contract. Since the fire truck was separately bought and paid for by the village, your first question is answered in the negative.

2. I am aware of no statute authorizing a village to mortgage personal property, either when purchasing such property or as security for the payment of some other obligation. The power to purchase personal property for village purposes given by M. S. A. 412.211 does not necessarily imply the power to mortgage it; nor does Section 412.221, Subd. 2, supra, give such power. Sections 511.01—511.17 of Minnesota Statutes pertain to chattel mortgages while Sections 511.18 and 511.19 pertain to conditional sales contracts; and thus the legislature recognizes that they are two entirely different, indeed opposite, types of transactions. As a purchaser under a conditional sales contract, the village would only have the right to obtain title if and when it fulfills the condition of payment. As a mortgagor of personal property, assuming arguendo that it had such a right, the village would be conditionally conveying title to property which it already owned as security for the payment of a debt. Black's Law Dictionary, 3rd ed., p. 317, defines a chattel mortgage to be:

> "An instrument of sale of personalty conveying the title of the property to the mortgagee with terms of defeasance; and, if the terms of redemption are not complied with, then, at common law, the title becomes absolute in the mortgagee."

and distinguishes a conditional sale as follows:

> "In a **conditional sale** the purchaser has merely a right to purchase, and no debt or obligation exists on the part of the vendor; this distinguishes such a sale from a mortgage." (Emphasis supplied)

M. S. A. 412.221, Subd. 2, speaks of purchasing by the village and the remedy of a seller if the village fails to pay the purchase price. Therefore, even if the words "conditional sales" were absent from the statute, the plain language of subdivision 2 would make it evident that the legislature intended to authorize villages to only enter into conditional sales contracts as distinguished from the giving of chattel mortgages.

The fact that the second paragraph of M. S. A. 621.21 provides that " 'chattel mortgages,' within the meaning of this section, shall include * * * a * * * contract of conditional sale * * * " is immaterial. Such definition is clearly limited in its application to Section 621.21, which makes it a crime to sell or conceal mortgaged chattels, and has no bearing on Section 412.221, Subd. 2.

Your second question is thus also answered in the negative.

However, your attention is directed to M. S. A. 412.301, which authorizes a village to issue certificates of indebtedness within existing debt limits for the purpose of purchasing fire equipment, such certificates to be payable in five years or less from a tax levy as in the case of bonds. This would appear to be the most desirable procedure to follow if possible, as it would enable the village to pay cash for the fire equipment and thus no doubt make

a more advantageous purchase. Further, and perhaps most important of all, it would avoid the possibility of re-possession of such essential equipment.

MILES LORD,
Attorney General.

O. T. BUNDLIE, JR.,
Assistant Attorney General.

Bigfork Village Attorney.
October 2, 1958. 469A-11

151

Villages—Plan B—Municipal Civil Service under M. S. 1957, c. 44. Village council can provide for pay steps within the same classification and grade if reasonable.

Facts

"The Village of Bloomington has adopted Plan B of Village Government. It has also adopted the merit system provided for in Chapter 44 of Minnesota Statutes.

"Section 44.05, Minnesota Statutes, provides as follows: 'The (merit) board shall * * * grade and classify all positions * * * and allocate each position to the appropriate class * * * . * * * rates of pay shall be fixed according to the grades established in the classifications plan.'

"Section 412.111, Minnesota Statutes, provides as follows: 'The council may * * * appoint such officers, employees, and agents * * * as may be deemed necessary etc. * * *. The council may prescribe the duties and fix the compensation of all officers, * * * employees, and agents when not otherwise prescribed by law.'

"Minnesota Statutes, Section 412.62, Subdivision 2 and 412.651, Subdivision 3, provide for the continuance of the 'Civil Service Commission' (merit board) under Plan B of Village Government.

"The dictionary indicates that 'grade' means a step or degree in rank, quality, order, etc. To 'classify' means to arrange in groups according to a system; put in order; systematize."

Comment

"Based on the above, the merit board has grouped employees doing similar jobs with similar responsibilities, or 'classified' the employees. The merit board has then 'graded' the employees by assigning a number to such classifications, based on responsibility. Within each grade

the council has established a maximum and minimum wage, with various 'steps' between the maximum and minimum. All members of the Village Council agree that certain pay increases, within the same grade shall be automatic and depend solely upon length of service. Some members of the Council feel that all pay increases should be so granted. Others feel that, after a certain number of automatic raises, some employees, in the same grade, by giving better service and thus being more valuable to the community, are entitled to 'merit' increases, (or a 'step' raise) though the employees remain in the same grade and classification. For example, one Clerk II in the four years service may be regarded by the council as being more valuable than other Clerk II with four years service.

Question

"May two persons in the classified service, who are in the same grade and classification, as determined by the merit board, be paid different rates of pay; that is, in the example cited, tenure being the same, may one Clerk II be given a raise in pay if it is not given to another Clerk II? If so would this constitute a promotion and require an examination as required by Minnesota Statutes, Section 44.06, Subdivision 1?

Comment

"I realize that within each grade the council sets the pay scale and steps. I further realize the difficulties that might arise among employees from adopting the proposed system, however, I am concerned only with the legality, not the practicability of the situation.

"I do not believe that the adoption of the merit system eliminated or limited the right of the council to fix the compensation of its employees. My opinion has been, based on 412.111, that the council may fix the compensation of all employees as the council desires. A question arises as to whether the additional phrase in M. S. 412.111, 'when not otherwise prescribed by law' refers to M. S. 44.05. In pay matters the council should not be bound by the classification and grade established by the merit board, otherwise the council does not have the power, or is limited in its power, to fix the compensation of employees as provided by M. S. 412.111. In other words, if a new employee is hired, to do a new job, and the council has adopted a pay scale for a certain grade, and the merit board prescribes that the new employee shall be in that grade, the council should not be thereby compelled to pay that rate. To rule otherwise would mean that, in effect, the merit board, and not the council, may fix the compensation of Municipal employees."

Opinion

The power to fix compensation of village employees is vested in the village council pursuant to M. S. 412.111, "The council may * * * fix the compensation of all officers * * * employees and agents * * * ." This power is not removed or transferred under Plan B. M. S. 412.611 provides in part:

"The council shall exercise the legislative power of the village and determine all matters of policy."

62 C. J. S., Section 723, p. 1467:

" * * * Accordingly, in the absence of bad faith, or of fixation by statute, the governing body of a municipal corporation has power, in the exercise of its judgment and discretion, to fix the salaries of its employees. It has been declared that the general rule ought to be that the salaries of municipal employees should be fixed by the body which raises the funds to pay them, unless there is express legislative direction to the contrary."

The powers of the village manager set forth in M. S. 1957, Section 412.651 do not include the fixing of compensation.

The adoption of municipal civil service under c. 44, M. S. 1957, does not transfer this authority. M. S. 1957, Section 44.05 provides in part:

" * * * rates of pay shall be fixed according to the grades of positions established [by the personnel board] in the classified plan. * * * "

The personnel board established under c. 44 does not have authority to set the compensation of municipal employees. The power resides in the council. Under Firemen's Civil Service Commission, M. S. 1957, c. 420 and the Police Civil Service Commission, M. S. 1957, c. 419, this office ruled that the power to fix the salaries remains in the governing body. See opinions O. A. G. 59-A-41, March 7, 1945, and O. A. G. 688-B, April 30, 1935, copies enclosed.

We then have the question of whether a village council, in fixing the compensation of employees classified and graded under c. 44, M. S. 1957, can provide automatic increases in salary based on seniority only, i.e., increases within the same classification and grade based upon the objective standard of length of service.

M. S. 44.06, Subd. 1 provides:

"Every appointment or promotion to a position in the classified service shall be made after a competitive examination given by the board or under its direction as provided in section 44.07."

M. S. 44.11, Subd. 8 provides:

"The board shall provide by rule for promotion based on competitive examination, supplemented by records of efficiency, character, conduct, and seniority when a passing grade is obtained upon the examination."

An increase in compensation is not, in and of itself, a promotion, so M. S. 46.06 would not prohibit a pay step plan. See opinion O. A. G. 688-B, September 18, 1950, dealing with the Firemen's Civil Service Commission, M. S. 1957, c. 420. It has been treated as a promotion under certain circumstances. See opinion O. A. G. 120, March 2, 1948.

One of the purposes of civil service is set forth in **State ex rel. Coduti v. Hauser**, 219 Minn. 297, p. 305, 17 N. W. 2d 504, Dunnell's Minnesota Digest, Section 6558a:

> " '**The purpose of the civil service statutes** and of other laws prohibiting the discharge of employees without cause assigned, notice, and a hearing, **is to insure the continuance in public employment of those officers who prove faithful and competent, regardless of their political affiliations**'." (Emphasis supplied.)

This purpose should also apply to employees' compensation. The council in providing automatic salary increases based on seniority, all within reasonable limits, of course, would not violate this purpose and such action would be valid.

Now to the question whether the village council under Plan B can provide for different compensation for persons in the same grade and classification under c. 44, based upon merit, and independent of seniority increases.

It is not uncommon for a governing body to set a minimum and maximum salary for a given position and empower the administrator to fix the specific salary within these limits and the budget approved by the governing body. This is not an illegal delegation. There are, however, limits beyond which an illegal delegation would result. See opinion O. A. G. 785-E-2, September 23, 1942, printed in 1942 Report as No. 240, stating that delegation to a mayor of the power to fix the salaries of a police officer with the only limitation being the maximum salary, was an illegal delegation because it left to the mayor's uncontrolled discretion the authority to set the salary up to the maximum. These police officers were under the Police Civil Service Commission, c. 419.

Some civil service statutes go into greater detail than c. 44 and provide for "merit" increases within the same grade, e.g., M.S. 1957, Section 43.11 of the state employees civil service has six pay steps. It should be noted that the state legislature meets regularly only every two years and, with the exception of special sessions, does not have an opportunity to again deal with employees' compensation for another two years. Because of the large number of state civil service employees, the state legislature does not have such familiarity with state personnel as a village council has with municipal employees. In contrast, the governing body of a village meets regularly monthly or even more often and, because of the difference in size, is better able to deal with specific cases. Ch. 44 does not go into great detail, no doubt because it must be adaptable to all the various governmental structures set forth in M. S. 44.02, "Any city of the second, third or fourth class, however organized, any village or any borough * * * ". It would be too rigid and inflexible to say that there cannot be some latitude as to compensation of municipal employees in the same classification and grade based upon merit. As stated before, an increase in compensation does not constitute a promotion. The exercise of this latitude, since it is a product of necessity, should bear a reasonable relationship to the requirements of the employment

structure, considering such factors as the number of total employees, the number in the same classification and grade, etc.

Dunnell's Minnesota Digest, Section 6558a states:

" * * * Civil service rules formulated under city charter are valid even if logic is lacking and injustice may result, provided the Constitution, the state law on the subject, or charter provisions are not violated. * * * "

Such a statement was never intended as a suggestion but rather as an example of how legislative discretion will be upheld by courts.

Some regulations specifically provide classification of

"* * * All positions in such service on the basis of equal pay for equal work for each class of position. * * * "

See opinion O. A. G. 120, February 14, 1949. This principle must be kept in mind in dealing with salaries in civil service programs.

A pay step plan which defeats the purpose of civil service would be illegal. A pay step plan must be within reasonable limitations. Whether a specific pay plan does exceed these limits becomes a question of fact. Salary, in most cases, is more important to the average employee than the title or classification of his employment. A pay plan providing for either too broad delegation to the manager or too extensive pay steps within a grade would be legally objectionable.

MILES LORD,
Attorney General.

EDWARD J. PARKER,
Assistant Attorney General.

Bloomington Village Attorney.
June 6, 1958. 120

152

Villages—Purchase of land. Village is only authorized to acquire such land as is needed for village purposes. M. S. 412.211. Under M. S. 459.14 village may acquire such land as is needed for parking purposes.

Facts

"The Village of Spring Grove has the possibility of securing a new United States post office building. The procedure apparently is for the government to secure an option on a lot and then submit plans and specifications to various private individuals who will bid the price of

the building and then finance the cost of it. The owner then proceeds to lease to the government on a long term lease.

"The Village Council in the Village of Spring Grove and the people of Spring Grove are most interested in obtaining a new post office building. There is the possibility of securing a lot in the business district which now has on it some broken down buildings that have been an eyesore in the village for years. It was the thought of the council that the village might acquire the entire lot consisting of 105 feet in width, use 55 feet of it for a parking lot and sell the remaining 50 feet to the successful bidder for the post office building."

Question

"Whether the village has the authority to purchase the entire lot, a part of which will be used for village purposes, and to sell the remainder of the lot at a price which may be less than market value and if so, under what conditions."

Opinion

Under M. S. 412.211, the village has authority to acquire such property as the purposes of the village may require. M. S. 459.14 relates specifically to automobile parking facilities and provides in part:

"Any city of the second, third, or fourth class, however organized, and any village or borough may acquire by gift, lease, purchase or condemnation proceedings any real property within or without the corporate limits, or any interest therein, deemed by its governing body to be needed for improving the municipality's regulation and control of traffic on its streets, alleys and public grounds by providing, regulating and operating on-street or off-street parking lanes or areas, and may acquire by purchase or lease parking meters or other parking or traffic control devices and may devote any property already owned by the municipality and devoted to other purposes to be used as a parking lane or area and may construct, or otherwise provide, equip, maintain and operate automobile parking facilities and may expend municipal funds for these purposes. * * * "

In the purchase of land for a particular public purpose, the village council is limited to the acquisition of only such quantity of land as is reasonably needed for that purpose. It cannot purchase property for resale nor for the purpose of making a gift of all or part thereof to private interests.[1]

"A municipal corporation may purchase and hold property for only such purposes as are authorized by its charter or an applicable statute. It has no power to purchase lands and erect buildings thereon, except

[1]M.S. 465.035 authorizes the village to lease or convey its lands without consideration, or for a nominal consideration, to the United States, for public use when authorized by the council. However, this section is without application where the proposed sale is to a private individual, who in turn will lease to the United States.

for municipal purposes. As expressed in substance in an Illinois case, power to purchase real property for particular purposes is a limitation on the powers of such corporations and excludes, by necessary implication, all purchases for mere speculative profit. Power to purchase real estate for speculative purposes is not among the usual powers bestowed on municipal corporations nor does such power arise, by implication, from any of the ordinary powers conferred on such corporations. However, in the absence of a contrary provision, ordinarily it will be presumed that lands purchased by a municipal corporation were purchased for a purpose authorized by law. It has been held that the purchase of property in excess of that actually needed for the development of a housing project does not constitute a taking the property of one individual to be devoted to the private use of another." 10 McQuillin Mun. Corp., 3d Ed., Section 28.11.

See also 38 Am. Jur. "Mun. Corp.", 163, Section 484; O. A. G. 469A-12, August 19, 1943, copy enclosed.

Accordingly, it is our opinion that the village does not have authority to purchase the entire lot but is limited to the acquisition of only such portion thereof as is needed for village purposes. However, should a situation occur where the village has legally acquired more land than is needed for the particular purpose, it may sell the surplus.[2] The sale should be for the best price attainable.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Spring Grove Village Attorney.
October 8, 1958. 469A-12

153

Villages—Municipal water system. Supply of water to non-residents. Upon expiration of time fixed by contract to furnish water to non-residents, village may discontinue service to them without liability.

Facts

"The Village of Madelia owns and operates the village water system and the water lines have, in the past, been extended to serve both

[2]In opinion O.A.G. 469-A-12, October 16, 1945, copy enclosed, it appeared that the village desired a small portion of a 30-acre tract for park purposes. The owner refused to sell anything less than the whole tract. This office ruled that if it would be cheaper to acquire the larger tract by purchase than to acquire the smaller tract by condemnation, and if it would be for the best interests of the village in its efforts to establish a park, to so acquire the larger tract, the council would have authority to do so. Having acquired more land than was necessary for park purposes, the village could sell the surplus. See also opinion O.A.G. 469-A-12, February 10, 1938, copy enclosed.

business and residential users located outside of the corporate limits. Some of these extensions were originally made by agreement with the owners to supply water which agreements ran for a limited period of time and which time limits have long since expired. During the past few months it has developed that the present supply of water is inadequate and the village is faced with the necessity of digging a new well and constructing a new filter plant at considerable expense. A short time ago the water users located outside of the village were notified of a meeting which was held in December, and at this meeting the water users, who were present, were notified that the village would discontinue the practice of supplying water to users outside of the corporate limits on June 1, 1958, unless before that time such water users would petition to have their land incorporated into the village of Madelia.

"For the purpose of this question we will assume that between now and June 1st such water users would have time to dig individual wells."

Question

"Under the circumstances above set forth, can the Village of Madelia discontinue serving water from the municipal water department to users located outside of the corporate limits of the village and not be responsible for damages resulting therefrom to property owners now being served by the water system."

Opinion

The village has authority to supply water from its water system to non-resident users at such rates and upon such terms as the village council, or the utility commission, shall determine. M. S. A. 412.321, Subd. 3; 38 Am. Jur. "Municipal Corporations" 259, Section 570. It may do so by contract. **Reed v. City of Anoka**, 85 Minn. 294, 88 N. W. 981.

However, the village is not required, by contract or otherwise, to supply water to persons outside its boundaries. See **Guthe v. City of Staples**, 183 Minn. 552, 237 N. W. 441; **State ex rel. Steidley v. Village of Kilkenny et al.**, 170 Minn. 424, 212 N. W. 899. The village water system is under the control of the village. See 16 Minn. Law Rev. 514.

Upon the expiration of the time fixed by the contract for the furnishing of water, no other facts or circumstances appearing, the village council had the right to terminate such supply and treat its obligation at an end, and if it continued to furnish water to the other parties to the contract it acted merely as a volunteer without any further or greater obligations than it had to supply water prior to the contract.

In discussing the right of a municipality to discontinue water service to non-residents, the court in **Richard v. City of Portland**, 121 Ore. 340, 255 P. 326 said:

"The above sections of the statute authorize the city to sell water to people residing outside of its boundaries, to the end that the water system may be operated for the benefit and use of its inhabitants. It is not within the purview of the statute to confer authority upon a municipality to engage in a water business as a public utility beyond its boundaries. Such is a departure from the usual way in which a municipal government functions, and, where it is doubtful whether such power has been conferred, the doubt should be resolved against the grant. Considering in their entirety the charter and statutory provisions applicable to the operation by the city of its water system, we think it is thereby clearly intended that the inhabitants of the city should have superior rights as water consumers over the plaintiffs and others similarly situated.

"The water system was established at the expense of the taxpayers of the city, and a holding that those who have not borne such burden shall have equal rights therein would not be based on sound equitable principles. Authority is vested in the city to dispose of surplus water, but its officials must not barter away that which is in the nature of a public trust. Pikes Peak Power Co. v. City of Colorado Springs, [8 Cir.] 105 F. 1. The water system was constructed primarily to serve those who paid for it. When such projects are undertaken by a municipality, the capacity of the plant is generally in excess of its present use, and it is reasonable to assume that sale of surplus water was contemplated. In 19 R. C. L. 790, it is said:

" 'Nor can it (referring to municipality), without express statutory authority, supply water to premises located outside the corporate limits, and, when it is so authorized, its obligation is a matter of voluntary contract and such authorization does not impose upon it the duties of a public service corporation in the territory which it undertakes to serve'—citing Childs v. [City of] Columbia, 87 S. C. 566, 70 S. E. 296, 34 L. R. A., N. S. 542, which supports the text."

These observations appear to be pertinent to the problem now facing your village. See also in this connection Anno.: 48 A. L. R. 2d 1122; 12 McQuillin Municipal Corp., 3d Ed., Sections 35.34, 35.35. On the basis of the foregoing, we answer your question in the affirmative.

MILES LORD,
Attorney General.

HARLEY G. SWENSON,
Assistant Attorney General.

Madelia Village Attorney.
January 17, 1958. 624-D-17

PUBLIC WELFARE

154

Children—Aid to Dependent—Aid may only be withdrawn from recipient on the basis of unsuitability of the home when the child is living in a foster home with persons other than his own family.

Facts

"This office has been presented with the following question concerning M. S. 256.73 Subdivision 1, paragraph (2)". M. S. A. 256.73 dealing with Aid to Dependent Children reads in part as follows:

"Subdivision 1. Dependent children. Assistance shall be given under sections 256.72 to 256.87 to or on behalf of any dependent child who:

"(2) is living in a suitable home conducted by **a family** having as far as practicable the same religous faith **as the family of the child** and meeting the standards of care and health fixed by the laws of this state and rules and regulations of the state agency thereunder." (Emphasis supplied)

Question

Is such provision applicable when a child is living with his own parent or parents or does it apply only to foster home situations where a child is living with persons other than his own family?

You add that it is your opinion that such provision should apply only in cases where a child is living with persons other than his own family.

Opinion

We agree with your conclusion and hold that assistance under the Aid to Dependent Children program may only be denied or suspended on the basis of unsuitability of the home when the child is living in a foster home with persons other than his own family.

Our Supreme Court has said, "A broad but fair conclusion is to be given statutes having for their end the promotion of important and beneficial objects." **Judd vs. Landin** (1942) 211 Minn. 465, 1 N. W. 2nd 861. The importance of this legislation for dependent children is not open to question, for its fundamental purpose is to assist in keeping the family together in the same household and to secure for such child or children, wherever possible, the personal care and training of the parent or parents. See M. S. 256.85. In considering the language of paragraph (2) it is impossible to conclude that the home there referred to is the home of the parent since reference is made to, "A home conducted by a family having as far as practicable the same religious faith as the family of the child * * * ". Such paragraph should be contrasted with Section 256.73, Subdivision 1, paragraph

(1), relating to applications by, * * * the parent or other relative with whom the child is living * * * ".

We are not unmindful of the wording of M. S. 256.85 which states in effect that the purpose of this program is to enable the state and its several counties to cooperate with responsible mothers or relatives in rearing future citizens, but we do not believe that it was the intention of the legislature to authorize the various county welfare boards to pass on the issue of who was a responsible mother, or that this language was intended to limit the program.

It is important to bear in mind that the legislature has provided an effective remedy for the county and the state if it is clear that the unsuitability of the home is the result of a careless or thoughtless parent unconcerned for the welfare of his child. We refer to procedure under Chapter 260 of the Minnesota Statutes dealing with dependent, neglected and delinquent children. If a lever is needed to bring the alleged irresponsible mother to the place where she accepts her responsibility, the procedure outlined in Chapter 260 should be more effective than the withdrawal of aid needed for the very survival of the family, even if the statutes authorized the latter procedure.

Moreover, under this recommended procedure, the mother or other parent has the immediate protection of the court and the burden of proving dependency and individual irresponsibility rests with the agency. If a contrary conclusion were reached, the consequences would be too startling to contemplate. Aid could then be arbitrarily withheld upon a board's finding of unsuitability, with no further aid given to meet the needs of the children.

While it is true that general relief might be available to the family whose aid to dependent children grant has been suspended or revoked (and even this can be and occasionally is effectively and tragically forestalled and delayed), we recognize no statutory basis for saying in effect, "Aid to dependent children is available only to the proven family unit and general relief to all others even though the parent is a part of this unit". It may be that special child welfare services will have to be extended to a family but this can and should be done whether the family is receiving aid through aid to dependent children or through the general relief program.

MILES LORD,
Attorney General.

DAVID R. LESLIE,
Assistant Attorney General.

Hennepin County Attorney.
July 2, 1958. 840-A-1

155

Old Age Assistance Lien—Land sold under order of the probate court passes free of any encumbrance of OAA lien filed against the land for assistance given an heir but the lien is transferred to the heir's interest in the proceeds.

Facts

D dies in Rice County owning real estate therein. He leaves surviving three brothers [as his heirs], one of whom has been receiving old age assistance. While D's property is being probated, but before an order of license to sell is granted, the Rice County Welfare Board, has caused to be filed pursuant to Section 256.26 M. S. A., intention to claim an old age assistance lien against the interest of D's brother in the said real estate. Thereafter order of license to sell is granted to the administrator of D's Estate and D's land is sold in Probate. The purchaser of D's land in Probate, upon examination of the abstract of title to said land, finds a certificate of the Register of Deeds of Rice County showing the filing of the old age assistance lien against the said brother and his interest in D's land, and refuses to accept title to the property and pay the balance of the purchase price to the administrator of D's Estate, until the old age assistance lien against D's brother is satisfied or released as against the property.

Question

Must the old age assistance lien against D's brother be paid first before D's Estate can give a Probate Deed showing good and marketable title to D's property free and clear of any encumbrance of old age assistance lien to the brother?

Opinion

Your question is answered in the negative.

In the first place, the probate deed to be given the purchaser is not a warranty deed, but in this instance the purchaser need not be concerned with the alleged encumbrance of the property by the old age assistance lien since we hold that the purchaser takes the land free of any claim to the State by virtue of its lien. Our reasoning follows.

Upon the death of D, title to the real estate in question passed by descent to his brothers, but subject to be divested by a sale of the land during the probate proceedings, **Kietzer v. Nelson** 157 Minn. 463; 196 N. W. 641. Thereafter, the sale proceeds stand in place of the land.

It is clear that the probate court having assumed jurisdiction of the estate had the power to authorize sale of the land. When it exercised this power and approved the sale, the purchaser took the land free from any claim thereto on the part of the heirs or anyone claiming under the heirs. Kietzer vs. Nelson, supra.

The probate sale extinguished the lien for old age assistance on the land in issue. At this point the lien was, however, transferred to the deceased brother's interest in the proceeds from the sale of the land. These proceeds will pass to the heir as real estate and not as personal property. (**Ness vs. Davidson,** 49 Minn. 469, 52 N. W. 46, **Kolars vs. Brown,** 108 Minn. 60, 121 N. W. 229, **Guenman vs. McVey,** 126 Minn. 21, 147 N. W. 812.) By appropriate procedure the lien may be enforced against these proceeds.

MILES LORD,
Attorney General.

DAVID R. LESLIE,
Assistant Attorney General.

Rice County Attorney.
May 19, 1958. 521-P-4

156

Discharge of Old Age Assistance Lien—State may acquire land by conveyance from recipient in settlement of Old Age Assistance lien.

Facts

"An old age assistance recipient has expressed his desire to convey his property to Crow Wing County since he is grateful for the help which he has received and he is now no longer able to live on his property. The amount of the old age assistance lien is in excess of any possible amount which might be realized upon a sale of the property. The title to the property is in the name of the recipient and his wife as joint tenants and not as tenants in common. His wife has died and there has been no severance of the joint tenancy. She also had received old age assistance until her death. It is realized, of course, that the recipient cannot effectively convey the whole title until there have been severance proceedings."

Questions

"1. Do the statutes authorize such a conveyance?
"2. If so, to whom should the conveyance run?"

Opinion

Your first question is answered in the affirmative.

I invite your attention to Minnesota Statutes 256.26, Subdivision 10, which reads as follows:

"The recipient, his heirs, personal representatives, or assigns, may discharge such lien at any time by paying the amount thereof to the

treasurer of the proper county who, with the approval of the county agency, shall execute a satisfaction thereof and file the same with the register of deeds of each county where the lien certificate is filed."

While not directly answering the question raised by your inquiry it does, nevertheless, point out that a lien may be discharged by payment of the amount of the lien to the county treasurer. It would seem to follow that the land against which the lien is filed may certainly be conveyed to the state in lieu of payment in money and particularly where, as in this case, its value is less than the lien.

This contention is further fortified by M. S. 256.263, Subdivision 1 which reads:

"When land shall have been acquired by the state under the provisions of Minnesota Statutes 1941, Section 256.26, either by conveyance in settlement of the lien held by the state, or by foreclosure of such lien, it shall be the duty of the county board to manage and lease the real estate while the state continues to own it."

Here it is clear that the legislature contemplated that the recipient of old age assistance could convey his land to the state in settlement of the lien.

Having answered the first question in the affirmative you ask, "To whom should the conveyance run?"

We answer that the conveyance should run to the State of Minnesota. This seems clear from the reading of Minnesota Statutes 256.263, Subdivision 1, above set out, which states: "When land shall have been acquired by the state * * * " and also by Subdivision 2 of the same section which states how the land is to be managed and begins, "While the state owns such real estate * * * ".

MILES LORD,
Attorney General.

DAVID R. LESLIE,
Assistant Attorney General.

Crow Wing County Attorney.
April 17, 1958. 521-P-4

157

Old Age Assistance—Burial. Excepting where a county operates under a township system of relief, general relief funds may be used to supplement statutory amount for funeral expenses of Old Age Assistance recipient in order to provide a decent burial.

Facts

"Under Minnesota Statutes Annotated No. 256.24 which refers to old age assistance recipients, it is stated 'on the death of a recipient,

the County Agency shall pay an amount for reasonable funeral expenses not exceeding $150.00.'

"It is becoming increasingly difficult to obtain a reasonable funeral service for old age assistance recipients for the sum of $150.00."

Question

"Would it be possible for the County to utilize general relief funds and pay more than $150.00?"

Opinion

Minnesota Statutes 1953, Section 256.24 reads in part as follows:

"On the death of a recipient, the county agency shall pay an amount for reasonable funeral expenses not exceeding $150. No funeral expenses shall be paid if the estate of the deceased is sufficient to pay such expenses or if the children, or spouse, who were legally responsible for the support of the deceased during his lifetime, are able to pay such expenses; provided, that the additional payment or donation of the cost of cemetery lot, interment, religious service, or for the transportation of the body into or out of the community in which deceased resided, shall not limit payment by the county agency as herein authorized * * *"

Section 262.14 reads as follows:

"When a person dies in any county, not leaving sufficient means to defray necessary expenses of his burial, nor any relatives therein of sufficient ability to procure his burial, the county board shall cause a decent burial of his remains to be made at the expense of the county."

Section 263.01 reads in part as follows:

"In counties having the town system, the town boards and city and village councils shall be superintendents of the poor. All applications for aid shall be made to such boards or councils, which shall grant such relief as they deem necessary, by paying for the board and care of the applicants, providing transportation to their homes, paying rent, making cash payments, furnishing provisions, clothing, fuel, and medical attendance, and burying the dead * * * *"

Section 263.03 provides that when a person not having legal settlement in a political subdivision operating under the township system of relief dies therein, the political subdivision must give him a decent burial, and it may then recover the cost thereof from the county which may then recover from the political subdivision of such person's legal settlement.

This office has previously ruled that the expense of burial of poor persons having settlement in the state should be paid by the county of settlement if operating under the county system of relief and by the city, village or town of settlement if operating under the township system of relief. (O. A. G. 339-c, March 6, 1940)

The prohibition in the statutes against granting general relief to old age assistance recipients was repealed by Laws 1951, c. 92, Section 1.

Budgetary deficiencies in excess of the $65.00 per month maximum under the old age assistance law must now be met by a grant of general relief.

It is noted that a maximum of $150.00 may be paid for funeral expenses under the old age assistance law while no maximum is specified under the general relief statutes. It would be unreasonable to hold that the legislature, by specifying a maximum that could be paid from old age assistance funds for funeral expenses, intended to provide that old age assistance recipients should be provided something less than the "decent burial" required for poor persons generally.

In my opinion, if the $150.00 plus the cost of the cemetery lot, interment, religious service, and transportation of the body authorized for old age assistance recipients is insufficient to provide a "decent burial" as required by the general relief statutes, and if the circumstances are such that payment of funeral expenses would be justified under the relief statutes previously cited, the deficit should be paid by **the political subdivision responsible** for paying burial costs under such statutes. Whether there is such a deficiency can readily be determined by ascertaining the amount customarily paid in the community for burial of poor persons under the relief statutes.

I am informed that Becker County operates under the township system of relief rather than under the county system. Such being the case, the political subdivision responsible for paying any burial costs of old age assistance recipients in excess of those costs allowed by Sec. 256.24 would be the town, village or city of settlement of such decedent rather than the county. Therefore, your specific question asking whether **Becker County** may pay the excess out of its general funds must be answered in the negative.

MILES LORD,
Attorney General.

DAVID R. LESLIE,
Assistant Attorney General.

Becker County Attorney.
October 4, 1957. 521-J-2

158

Poor Relief—A county giving aid can not recover for said aid from that part of recipient's estate acquired subsequent to the furnishing of assistance.

Facts

"Mr. 'A' is an inmate of the County Farm of Goodhue County, being an indigent person, where he has resided continuously since December 13, 1944. In April, 1957, he inherited a substantial sum of money and a

guardian was appointed of his estate in the Probate Court of Goodhue County. Goodhue County presented a claim for board, care, and medical attention at the County Farm, going back for a period of six years and the guardian desires to pay this claim, plus a reasonable amount for his monthly support from now on."

Question

"May the county recover from the guardian for the care of Mr. 'A' for the past six years and for his future care?"

Opinion

Minnesota Statutes 1953, Section 261.04, Subdivision 1, reads:

"261.04. Subdivision 1. When any person is furnished or provided with support, maintenance, care, or burial as a poor person by any county, city, town, village, or borough the municipality so furnishing such support, maintenance, care, or burial shall have a claim therefor against the person or his estate for the reasonable value thereof, which claim may be presented and prosecuted by such municipality at its option upon discovery of any property belonging to the poor person or to his estate."

Attorney General's Opinion, O. A. G. 339-h, November 15, 1937, which appears as Opinion No. 339 in the 1938 Report of the Attorney General, interprets Section 261.04 and concludes as follows:

" * * * we do not believe that a poor person is liable to the municipality for previous maintenance where such person did not have any property at the time of furnishing poor aid but acquired the same thereafter. We find no language in the statute evidencing any intent on the part of the legislature to permit a recovery against a poor person for aid furnished where such person has ceased to be a charge upon the municipality and become self-supporting, either through property derived from his labor or other sources subsequent to the time of receiving such relief."

That opinion is hereby reaffirmed.

Opinion O. A. G. 125-a-64, July 19, 1955, does not deal with the question of recovery from property acquired **after** the assistance has been furnished. That opinion correctly states the rule that recovery may be had from the estate of a person who has been furnished relief; and the exception to such rule is that no recovery may be had from that part of the estate which the recipient acquired subsequent to the furnishing of assistance.

It follows that the county has no claim against Mr. "A" for the assistance furnished him prior to April 1957, the time he acquired the property. The county may recover, however, for assistance furnished subsequent to April 1957.

Section 262.22 authorizes the county board to enter into contracts for the support and care of persons not paupers at the county poor house. If the Goodhue County Farm comes within the definition of a county poor house, the county board may contract with Mr. "A's" guardian for payment for future care.

Copies of the 1938 and 1955 opinions referred to herein are enclosed.

MILES LORD,
Attorney General.

WAYNE H. OLSON,
Assistant Attorney General.

Goodhue County Attorney.
September 30, 1957. 125-A-64

159

Parole Board Decisions—need not be unanimous.

Questions

1. Is there any statutory provision that Parole Board decisions must be unanimous or may they be by majority vote?

2. Minn. Statutes 637.06 provides that parole for persons serving life sentences for Murder are subject to unanimous consent, in writing, of the members of the Board of Pardons. Is it implied or otherwise indicated that decisions to parole by the Parole Board in these cases must also be unanimous?

Opinion

There is no statutory provision requiring parole board decisions to be unanimous. In the absence of a statutory requirement to the contrary, where authority to do certain acts requiring the exercise of discretion and judgment is conferred upon a board consisting of more persons than one, at least a majority of that board must concur in any decision made. (McQuillin-Municipal Corporations, Vol. 4. Section 13.30) (42 Am. Jur. Public Administrative Law, Section 72) Nor is it to be implied that the statutory provision that the pardon board act only by unanimous vote constitutes a requirement that action by the parole board be unanimous.

MILES LORD,
Attorney General.

JAMES N. BRADFORD,
Spec. Asst. Attorney General.

Chairman, State Board of Parole.
December 1, 1958. 328-A-1

RAILROAD AND WAREHOUSE COMMISSION

160

Public local grain warehouse storage receipts—Grain storage receipts issued pursuant to M. S. A. 232.06 are negotiable and Railroad and Warehouse Commission may not authorize the issuance of non-negotiable warehouse receipts by licensed public local grain warehouses. M. S. A. 227.05.

Facts

"Chapter 232, Minnesota Statutes 1953 as amended, gives this Commission jurisdiction over public local grain warehouses. Section 232.06 thereof, Subdivisions 1 and 2 set forth the conditions under which a legal warehouse storage receipt shall be issued. You will note, however, that this chapter does not specifically state whether the receipt can be negotiable or non-negotiable. We believe, however, that it can be implied that this type of warehouse storage receipt is negotiable.

"Sections 233.03 and 233.06, Minnesota Statutes 1953 as amended, specifically prescribe the form of terminal warehouse receipt, and ' * * * such warehouse receipt at the request of the owner or consignee' may have printed or stamped thereon 'non-negotiable.' "

Question

"In view of the fact that Chapter 232 merely sets forth the provisions that a warehouse receipt must contain but does not state whether it must be negotiable or non-negotiable, is it within the power of this Commission to permit by rule or otherwise the issuance of a non-negotiable warehouse storage receipt by licensed public local grain warehousemen?"

Opinion

Your question is answered in the negative.

Minnesota Statutes, c. 232 deals with public local grain warehouses. M. S. A. 232.06 provides that where grain is stored in a public local grain warehouse a legal warehouse storage receipt shall be issued to the owner or his agent. That section specifies what shall be included in the receipt and it provides a specific warehouse and storage contract which shall govern the transaction. In the contract provided for by statute is this clause:

"Upon the return of this receipt and payment or tender of a delivery charge per bushel of five cents for flax, four cents for soybeans, wheat and rye and three cents for each other grains, and all other stated lawful charges accrued up to the time of said return of this receipt, the above amount, kind and grade of grain will be delivered within the

time prescribed by law to the person above named or his order * * * " 232.06, Subdivision 1.

The receipt is therefore a negotiable receipt. M. S. A. 227.05. The section last cited, in addition to defining a negotiable receipt, also provides that

"No provision shall be inserted in a negotiable receipt that it is non-negotiable. Such provision, if inserted, shall be void."

It is my opinion, therefore, that the commission may not by rule, or otherwise, authorize the issuance of non-negotiable warehouse storage receipts by licensed public local grain warehouses.

You have called attention to M. S. A. 233.03 and 233.06 which sections provide that terminal warehouse receipts may have printed or stamped thereon "non-negotiable". As indicated in our previous opinion O. A. G. 645-b-23, June 23, 1939, copy enclosed, those provisions are an exception and the receipts involved could not be so stamped without such exception.

MILES LORD,
Attorney General.

JOHN R. MURPHY,
Assistant Attorney General.

Railroad & Warehouse Commission.
February 28, 1957. 645-B-23

---

161 RETIREMENT

PERA—Duty of political subdivisions to make employer contributions to fund are obligatory under L. 1957, c. 935, Section 16, Subd. 2, as it does to other contributions under Section 8.

Facts

"Minnesota Session Laws 1957, Section 353.36, Subdivision 2, sets forth that members will have the period from July 1, 1957, to June 30, 1958, in which to purchase back deductions, with interest, covering prior public service previous to affiliation with the retirement system. One portion of the subdivision provides that the employing governmental subdivision shall match all payments made pursuant to said subdivision, while a following provision reads to the effect that any governmental subdivision which desires to make the employer contribution is authorized to appropriate money for such purpose."

Question

"Does the language mean that it is mandatory or is it optional on the part of the governmental subdivision to match the payment made by the member in the purchase of back salary deductions?"

Opinion

L. 1957, c. 935, Section 16 [353.36, Subd. 2], provides:

> " * * * The employing governmental subdivision **shall match** all payments made pursuant to this subdivision. Any governmental subdivision which **desires** to make the employer contribution herein provided, is hereby authorized to appropriate money for such purpose. These installment payments shall be paid in full within five years." (Emphasis supplied.)

In the first of the quoted statutory sentences each employing governmental subdivision is required to make the employer contributions on the basis therein specified. But in the second sentence, reference is made to governmental subdivisions which desire to make employer contributions. Obviously, the two sentences in this respect are inconsistent. However, it is clear from the purpose and pattern of the statute as it relates to employer contributions that the legislature intended that these employer contributions are obligatory, leaving no discretion or option to make the employer matching contributions to the fund. In short, each governmental subdivision is required as a matter of law to make employer contributions to the fund both under Section 16, Subd. 2, and under Section 8, of L. 1957, c. 935. The use of the word "desires" in Subd. 2, is an obvious error, and the words "is required" should be substituted in its place.

This construction necessarily follows from a reading of Sec. 8, Subd. 1, of the same act, containing the statutory requirement that each governmental subdivision must make employer contributions to be paid "out of moneys collected from taxes or other revenue of the governmental subdivision."

The applicable rule of statutory construction is stated in Mason's Dunnell Digest, Section 8986, as follows:

> "And the duty devolves upon the courts to ascertain the legislative purpose from a consideration of the act as a whole, and to interpret it, if possible, so that it will accomplish the intended purpose. To bring this about obvious mistakes and omissions may be corrected or supplied; and contradictory expressions, and language of doubtful import should be given a meaning consistent with the legislative intention as disclosed by the act taken as a whole. * * * "

MILES LORD,
Attorney General.

WILLIAM M. SERBINE,
Assistant Attorney General.

Public Employees Retirement Association.
December 20, 1957. 331-B

162

PERA—Where husband and wife are both members of association and husband dies, widow may not legally surrender rights consequent upon her own membership in the Fund for the purpose of increasing the amount of benefits accruing to her as the surviving spouse.

Facts

"Mr. S became an annuitant of our association as of January 1, 1941, and when he died on March 3, 1957, he was receiving a monthly annuity of $114.16. His wife and sole beneficiary, Mrs. S, also is an annuitant, having retired on April 1, 1945; and her present benefit is $53.00 per month. Further, her birth date is February 12, 1880, and she was *domiciled* with the decedent when death occurred.

"Section 353.21 of the Public Employees Retirement Act as contained in Minnesota Statutes 1953, Chapter 353, as amended by Laws 1955, Chapter 815, provides for payment of survivor annuity to the spouse if the specific requirements are met; and such survivor annuity amounts to one-half of the benefit which the member was receiving when death occurred. Said section 353.21, subdivision 1, clause (5) provides that the surviving spouse may not qualify for a survivor annuity if she is receiving any other benefit provided for by the retirement act. However section 353.11, subdivision 12 of this same law sets forth that a member may have his monthly annuity reduced upon making application therefor."

Question

"Under the Public Employees Retirement Act may Mrs. S. reduce her personal annuity of $53.00 monthly to the point where she will waive the entire benefit, in which case she would be receiving no personal annuity from our fund, and would she then have the right to apply for the survivor annuity of $57.08 per month under said section 353.21?"

Opinion

Your question must be answered in the negative, as we know of no legal authority which would permit a member to surrender rights and benefits arising from her own membership in the Association for the purpose of procuring larger benefits through her husband's membership. The widow's right to benefits is fixed as of the time of the death of the member, and neither the board nor anyone having right to benefits consequent upon the member's death may alter the amount of the benefits prescribed by law.

M. S. 1953, Section 353.11, Subd. 12, as amended, providing that a person entitled to PERA benefits may, upon application and relinquishment of

right to full monthly payments effectuate a reduction thereof, has been repealed. L. 1957, c. 935, Section 27.

MILES LORD,
Attorney General

WILLIAM M. SERBINE,
Assistant Attorney General

Public Employees' Retirement Association.
July 7, 1958. 331-A-1

163

PERA—Optional Annuity—Application therefor must be submitted during member's lifetime. Where member makes payment for previous allowable service so as to qualify later for "10 years certain and life optional annuity", but does not during his lifetime apply for such annuity, he is entitled to the refundment of the amount so paid when it cannot serve as a basis for increasing benefits available to him, his widow or other beneficiary.

Facts

"Under date of January 13, 1958 a letter was addressed to the secretary of the Public Employees Retirement Association by William E. Meier, Personnel Director of Glen Lake Sanatorium in Hennepin County, advising that Dr. Peter M. Mattill, member of the association, had elected retirement effective December 31, 1957.

"Dr. Mattill signed application for membership in the retirement association under date of June 30, 1939 and at that time he made all payments required under the law then in effect to allow him contributory credit dating from July 1, 1931. He so remained a contributing member to January 1, 1958, date of his retirement from public service.

"With his letter of January 13, 1958, Mr. Meier forwarded formal application for retirement annuity which had been signed by Dr. Mattill on December 26, 1957 in the presence of a notary public and two witnesses. Mr. Meier also then sent certificate of department head showing Dr. Mattill's public service rendered at the Sanatorium from February 2, 1924 to January 1, 1958. Further, we had previously received evidence of Dr. Mattill's age in the form of a verifax copy of his birth record indicating that he was born on October 26, 1887. Said application for retirement was filed under Laws 1957, Chapter 935 on a 10-years certain and life basis. This optional annuity based on the contributory credit of the member would have allowed $408.60 per month effective January 1, 1958. To secure such optional annuity, on December 5, 1957 a check for $4,403.20 was forwarded to the retirement association on behalf of Dr. Mattill, of which sum $996.11 represented accumulated

salary deductions from February 2, 1924 through June 30, 1931 together with interest thereon of $3,407.09. Further, said optional annuity at the rate of $408.60 monthly for a period of 10-years certain would have assured benefits totalling $49,032.00, or in the event the member would have lived beyond said original 10-year period, the benefit would have continued at the rate of $408.60 each month throughout the remainder of his life.

"May we call your attention to the fact that on January 10, 1958 the Public Employees Retirement Board met in regular session and at that meeting various applications for annuity were presented for examination and approval, but Dr. Mattill's application was not included on the agenda because of the fact that though the same was duly executed by the member on December 26, 1957, the letter of transmittal from the department head was dated January 13, 1958 and that letter together with application for retirement were received in the office of the association on January 14, 1958. On January 14, 1958 Mr. Meier telephoned the office of the retirement association and advised that Dr. Mattill had died on Sunday, January 12, 1958.

"On January 23, 1958 Mrs. Nora A. Mattill, surviving spouse and designated beneficiary in this case, signed application for survivor benefit requesting allowance at the rate of $408.60 per month based on the 10-year certain and life optional annuity as selected by the member himself prior to his death, which would have allowed payments at the said rate of $408.60 monthly for 10-years certain, or a total of $49,032.00. Her application for benefit was accompanied by evidence of her age indicating that she was born on June 15, 1895.

"At the next subsequent regular meeting of the Public Employees Retirement Board held on February 13, 1958 this case was duly presented. During that presentation the retirement board was apprised of the contents of opinion rendered by you under date of November 14, 1957, addressed to Miss Ona A. Crume, Executive Secretary of the State Employees Retirement Association, with reference to a similar case which occurred in connection with a member of that state association. In such opinion you pointed out that the member had died before any retirement benefit actually was paid to him and that therefore the surviving spouse was entitled to benefit authorized by Laws 1957, Chapter 928, Section 11. Based on the contents of said opinion, and based on the fact that Dr. Mattill had died prior to the time that he could have been actually paid an annuity, the Public Employees Retirement Board at meeting of February 13, 1958 granted a survivor benefit to Mrs. Mattill in the amount of $150.00 per month under Laws 1957, Chapter 935, Section 11, Subdivision 2, inasmuch as she is over 62 years of age.

"However, Mrs. Mattill maintains that because Dr. Mattill, prior to his death, duly signed application for retirement to take effect January 1, 1958 on a 10-years certain and life optional annuity basis, she as the surviving spouse is entitled to benefits of $408.60 per month for 10 years from January 1, 1958 forward, or a total of $49,032.00."

Questions

"1. Based on the review of this case as submitted in this letter and in the light of your opinion rendered on November 14, 1957, do you confirm the action taken by the Public Employees Retirement Board at regular meeting of February 13, 1958, when the said board allowed Mrs. Mattill a survivor benefit of $150.00 per month under Laws 1957, Chapter 935, Section 11, Subdivision 2?

"2. If your answer to the preceding question is in the affirmative, then will the board have the authority to refund to Mrs. Mattill, as the designated beneficiary of the decedent, the sum of $4,403.20 paid on December 5, 1957 and representing back deductions with interest covering the contributory period from February 2, 1924 through June 30, 1931 only, which period preceded his original purchase from July 1, 1931 in view of the fact that the contributory credit of Dr. Mattill from July 1, 1931 was more than sufficient to allow an identical survivor benefit of $150.00 monthly to Mrs. Mattill. This particular question is asked because the amount of $4,403.20 was paid by Dr. Mattill on the basis of setting up his account toward the larger annuity of $408.60 monthly under the 10-years certain and life optional feature."

Opinion

The foregoing resume presents the following controlling facts:

Dr. Peter M. Mattill died January 12, 1958, a PERA member regularly employed at the Glen Lake Sanatorium, Hennepin County, as Associate Medical Director. His membership commenced June 30, 1939, and his allowable service dated from July 1, 1931. He left surviving his widow, Nora A. Mattill, but no dependent children. On December 5, 1957, he paid into the association fund the sum of $4,403.20, of which $996.11 covered his employment from February 2, 1924, through January 30, 1931, together with interest thereon in the amount of $3,407.09. This payment was obviously made preliminary to his anticipated election, not consummated as hereinafter discussed, for an annuity on a 10-years certain basis.

Though the member may not have worked at his employment on or subsequent to January 1, 1958, he had not retired within the meaning of L. 1957, c. 935, Section 11, Subd. 3.

Mr. William E. Meier, Personnel Director of Glen Lake Sanatorium, on January 13, 1958, the day following the death of Dr. Mattill, mailed to the Secretary of the Association, with a covering letter dated January 13, 1958, an application of Dr. Mattill dated December 26, 1957, but received by the association on January 14, 1958, for retirement annuity, designated as a "10-years certain Option Plan." Mr. Meier's transmittal letter of January 13, 1958 stated that Dr. Mattill had "elected retirement as of December 31, 1957. * * * You will note that Dr. Mattill has elected retirement under the Minnesota Statutes 1957, Chapter 935, and has elected the 10 Year Certain Option Plan." But it is important to note that the letter purporting to elect the annuity on behalf of Dr. Mattill and the accompanying application of Dr. Mattill for the optional annuity were actually submitted to the association

after the member had died, and were therefore without effect as if they had never been submitted to or received by the association. Under these circumstances it is not the date the application bears that is controlling, for an application retained and not submitted by or on behalf of a member during his lifetime, and consequently not received by the association until after the member's death, is of no avail as an election for an optional annuity.

However, in making the payment of $4,403.20, as stated above, Dr. Mattill obviously intended that such payment was to serve as a basis for the optional annuity which he intended later to elect.

It is indeed unfortunate that the member had not effectively made application for the indicated optional annuity which would have continued at the rate of $408.60 per month for a 10-year period, but the fact is that an application therefor was not submitted during his lifetime, and the widow's rights to benefits must be determined in the light of the fact that no valid election of the optional annuity had been made.

It is our opinion, therefore, that the widow, who was over 62 years of age when the member died, is entitled to the survivor's benefit of $150 per month, pursuant to L. 1957, c. 935, Section 11, Subd. 2, and that the action by the board on February 13, 1958, allowing such benefit was appropriate.

2. Since the member had paid the sum of $4,403.20 preliminary to an anticipated application by him for the "10-years certain and life optional annuity" but had not submitted to the board his application for such annuity during his lifetime, this payment could not serve or be considered now as a basis for retirement benefits, and should therefore be paid by the board to the duly appointed representative of the estate of Dr. Peter M. Mattill, Deceased; the authority of said representative to be evidenced by certified copy of Letters of Administration issued by the Probate Court.

3. That the widow is not entitled to payments or benefits from the association other than as stated in paragraphs 1 and 2 immediately above.

Accordingly, both questions are answered in the affirmative.

MILES LORD,
Attorney General.

WILLIAM M. SERBINE,
Assistant Attorney General.

Public Employees Retirement Association.
May 14, 1958. 331-B

164

PERA—Where village compulsorily retires employee at age 70 it has obligation to pay contributory cost of PERA contribution, in accordance with M. S. 1953, Section 353.11, Subd. 8, as amended by L. 1955, c. 815 for annuity paid between May 1, 1955 through June 30, 1957 [these statutory provisions were repealed by L. 1957, c. 935 Section 27, effective July 1, 1957], in reference to annuities paid thereafter.

Facts

"On December 30, 1952 the Council of the City of Cloquet passed a resolution which made retirement compulsory on the part of their public employees at age 70. Such resolution went into effect on January 3, 1953. A member of the association from said city retired on May 1, 1955 at age 70 at $71.82 per month. Correspondence has been addressed to the City Clerk in an endeavor to determine whether the member was compulsorily retired. In a letter dated September 2, 1958 the clerk advised that the member had voluntarily retired at the age of 70 and had so indicated the voluntary retirement on his application for annuity. The clerk further mentioned that though the city does have a resolution which makes retirement compulsory at age 70, he is not sure that the resolution could be enforced. The clerk advised that it is his feeling the retirement was voluntary and that therefore the city is not obligated to pay the item of $933.66 which would represent the city's contributory share based on annuities paid from May 1, 1955, through June 30, 1957."

Question

"Whether under these circumstances the association is required to bill the governmental subdivision for contributory share under Minnesota Statutes 1953, Chapter 353, as amended by Laws 1955, Chapter 815 in effect prior to July 1, 1957."

Opinion

Contribution from the city is sought by the Association for one-half of the cost of the annuity paid by the Association to the subject member between May 1, 1955 through June 30, 1957, for the reason that his retirement was involuntary by virtue of the resolution of the city, passed December 30, 1952, effective January 3, 1953, providing for compulsory retirement of city employees upon attaining the age of 70 years. The provision for the contributory share of the retirement cost, under these circumstances, is contained in M. S. 1953, Section 353.11, Subd. 8, as amended by L. 1955, c. 815 [repealed by L. 1957, c. 935, Section 27]. The determinative factor bringing the instant situation within the purview of that statute is the resolution adopted by the city council providing for compulsory retirement of its employees at age 70.

Consequently, the city is required to fulfill its obligation for its contributory share of the member's retirement cost as in the statute provided, upon certification made to the city by the PERA board.

Your question is therefore answered in the affirmative.

MILES LORD,
Attorney General.

WILLIAM M. SERBINE,
Assistant Attorney General.

Public Employees Retirement Association.
December 8, 1958. 331-B

165

SERA — University of Minnesota — Construing L. 1957, c. 928, Section 8, Subd. 5.

Facts

"Laws 1957, Chapter 929, Section 8, Subdivision 5, provides:

" 'Subd. 5. The head of each department or agency shall cause employer contributions to be made to the fund on each payroll abstract at the time each member is paid his salary in an amount equal to the total amount deducted from the salary of each member plus one percent of the salary of each member not exceeding $4,800 in any calendar year. These contributions shall be charged as administrative costs. Each department shall pay these amounts from such accounts and funds from which each department or agency receives its revenue, including appropriations from the general revenue fund and from any other fund, now or hereafter existing, for the payment of salaries and in the same proportion as it pays therefrom the amounts of such salaries. The moneys necessary to provide for the administrative cost as herein provided are hereby appropriated out of such revenue sources to each department and agency in such sums as are required to make the payments herein directed. If there are insufficient moneys in any such accounts or fund or source of revenue to make the payment to the state employees retirement fund required by this act to be made by such department or agency, there is hereby appropriated to such department or agency from any moneys in the state treasury not otherwise appropriated, such moneys as are required to meet such deficiencies. The amount of each appropriation made by these provisions shall be certified by the commissioner of administration to the state auditor at such times as the state auditor shall require.'

"Under date of June 14, 1957, I issued a directive to all state departments and agencies regarding implementation of changes in the

law regarding State Employees Retirement Association deductions which included the following paragraphs concerning budgeting:

" 'Moneys for the payment of the departments' contributions under the new law were not included in the individual appropriations. However, Chapter 928 provides an open appropriation to cover these costs. In pursuance of this appropriation provision, each department will request allotment and make the necessary contributions through their applicable salaries accounts on expenditure classification 43. If allotment requests for this purpose have not been included in your first quarter budgets, submit a supplemental allotment request to cover this period. Subsequent allotment requests should be included in the regular quarterly budgets. Budget finance plans for direct appropriation accounts will be balanced by the inclusion of an estimated amount of additional appropriation shown as a separate item on the income plan side of the finance plan. Prior to April 15, 1958, each department and agency head will certify to the Commissioner of Administration on a form to be provided the actual cost of the department's contributions for the first three quarters of fiscal 1958, the estimated cost for the fourth quarter, the estimated savings accumulated, and the net amount of additional appropriation required. After review of this information, the Commissioner of Administration will certify the amounts needed to the State Auditor, who will transfer the additional appropriations to the applicable accounts. If you have any questions regarding this procedure, please consult with your Budget Examiner.

" 'In those instances where appropriations have been financed from sources other than the General Revenue Fund, the Supplies and Expense accounts contain amounts for the payment of the State's contribution under the prior law. (See Minnesota Statutes 1953, Section 352.04, Subdivision 1, Subsection 4.) These amounts are to be held as reserves on the finance plans of these accounts and will not be available for allotment.'

"The University of Minnesota complied with the directive for the July and first half of August, 1957, payrolls transmitting checks covering the amount necessary to match the total of the employee members deduction for State Employees Retirement Association as well as contributing an additional amount equal to 1% of each employee member's salary.

"On September 12, 1957, I received a letter from Mr. E. C. Jackson, assistant comptroller of the University stating * * * 'I will need your advice as to the documentation you wish as a basis for reimbursement to the University for payments for these purposes.' (The State University is not subject to budgeting.)

"Upon being notified by telephone by an employee in the budget division that the University would be obliged to absorb as much as it could of the 7% employers contribution, Mr. Jackson said the University has interpreted the law to mean that the Commissioner of Administration would certify to the State Auditor the entire amount neces-

sary to pay the 7% employers contribution to the State Employees Retirement Association and that the University had not planned to pay any part of the employers contribution."

Questions

"1. Is the University obligated to pay into the State Employees Retirement Association the 7% employers contribution, or any portion thereof, from the maintenance and improvements account, which includes salaries, and which includes an appropriation from the General Revenue Fund?

"2. Is the University obligated to pay into the State Employees Retirement Association the entire 7% employers contribution from self-supporting University services such as Athletic Fund, Dormitories, Union, Parking, Cafeterias, book store, printery, dairy, laundry, et cetera?

"3. If the University certifies that there is a shortage of funds in the self-supporting University services to pay the State Employees Retirement Association 7% employers contribution, may the state supplement these funds by transfer of state funds from the General Revenue Fund pursuant to Laws 1957, Chapter 928, Section 8, Subdivision 5?"

Opinion

We believe that your questions may be appropriately considered together.

The University of Minnesota is an agency of the state and is governed by the Board of Regents. **State ex rel. University of Minnesota v. Chase,** 175 Minn. 259, 262-264, 220 N. W. 951; State Constitution, Art. 8, Sec. 4; Laws of the Territory for 1851, p. 9, c. 3. Therefore, the University is within the purview of L. 1957, c. 928, Section 8, Subd. 5, which relates to departments or agencies of the state, and which declares that the employer contributions to the fund of the State Employees Retirement Association of amounts equal to three percent plus one percent of salaries not exceeding $4,800 in any calendar year "shall be charged as administrative costs." The subdivision specifically provides:

"These contributions shall be charged as administrative costs. Each department shall pay these amounts from such accounts and funds from which each department or agency receives its revenue, including appropriations from the general revenue fund and from any other fund, now or hereafter existing, for the payment of salaries and in the same proportion as it pays therefrom the amounts of such salaries. The moneys necessary to provide for the administrative cost as herein provided are hereby appropriated out of such revenue sources to each department and agency in such sums as are required to make the payments herein directed."

Certification by the Commissioner of Administration is authorized by the statue only

> "If there are insufficient moneys in **any** such accounts or fund or source of revenue to make the payment to the state employees retirement fund required by this act to be made by such department or agency, there is hereby appropriated to such department or agency from any moneys in the state treasury not otherwise appropriated, such moneys as are required to meet such deficiencies."

The obligation of the University, an agency of state government, to pay the employer contribution to the SERA fund is absolute. Opinion O. A. G. 331-A-4, October 22, 1957, copy enclosed. These contributions must be made "from such accounts and funds from which the University receives its revenue, including appropriations from the general revenue fund, and **from any other fund** now or hereafter existing for the payment of salaries. * * * "

If there are available moneys in the specified revenue producing funds, above the cost of operation of the respective activities named, each of these funds, as well as other funds from which the salaries are or may be paid, are revenue sources for the fulfillment of the University obligation to make the employer contribution under the statute. It is only when there are insufficient moneys in **any** of such University accounts and funds as declared in the statute, that the Commissioner is authorized to certify deficiencies therefor under Subd. 5.

Clearly, therefore, the net revenue of the specified revenue producing activities, together with other available funds of the University, from which the pertinent salaries are or may be paid, must be considered in determining whether there is existent a deficiency which the Commissioner is authorized to certify to the state auditor. In the event of an appropriate certification, the amount of deficiency would be paid, but not otherwise, "from any moneys in the state treasury not otherwise appropriated."

The request for certification, if such action is appropriate in the light of the statutory requirements, should be submitted by the Board of Regents.

MILES LORD,
Attorney General.

WILLIAM M. SERBINE,
Spec. Asst. Attorney General.

Commissioner of Administration.

October 23, 1957. 331-A-4

166

SERA—Construing L. 1957, c. 928, Sec. 11, Subds. 1 and 2, considering problems of (a) refundment, (b) survivors' benefits, (c) deferred annuity, (d) prior designation of beneficiary superseded by statute.

Facts

"Laws 1957, Chapter 928, Section 11, provides that upon the death of a member before retirement who had at least 18 months of credited allowable service there shall be paid to the surviving spouse and dependent children under the age of 18, survivor benefits. Section 12 of this chapter provides that where a member dies before retirement and no survivor benefits are payable or no optional annuity or reversionary annuity is payable, a refundment shall be paid to the beneficiary or legal representative, as the case may be, in an amount equal to the member's accumulated deductions plus interest thereon to the date of death at the rate of 2 per cent per annum compounded annually.

"A deceased member in her lifetime named as her beneficiary her daughter. This member leaves a surviving husband."

Question 1

"Under the provisions of Chapter 928, can refundment be made to the beneficiary named, or must survivor benefits be paid to the surviving spouse? This member left no children under the age of 18."

Opinion

L. 1957, c. 928, which became effective July 1, 1957, provides at Sec. 12, Subd. 1 thereof for refundment in situations therein specified to be made only after the member dies before retirement. The other subdivisions of the section do not apply to the stated facts. Subd. 1 is, therefore, the only provision in the present law providing for refundment, and supersedes designations of beneficiaries made prior to July 1, 1957. Since the member died after July 1, 1957, leaving no dependent children under the age of 18 years, survivors' benefits, under the stated facts, must be paid to the surviving spouse.

Facts

"Laws 1957, Chapter 928, Section 11, Subdivision 2, provides that upon the death of a member before retirement who has had at least 20 years of credited allowable service, the surviving spouse shall be paid a deferred annuity in an amount equal to 75 per cent of the member's annuity computed on the basis provided in Sections 9 and 10, not to exceed $150.00 per month. It further provides that this annuity shall be paid when such surviving spouse reaches the age 62 and shall terminate upon remarriage."

Question 2

"Is a surviving spouse who is over 62 years of age at the time the member dies entitled to an immediate annuity computed under the provisions of Section 11, Subdivision 2?"

Opinion

L. 1957, c. 928, Sec. 11, Subd. 2, provides for the payment to the surviving spouse of a deferred annuity "Upon the death of a member before retirement who had at least 20 years of credited, allowable service." This subdivision further provides: "This annuity shall be paid when such surviving spouse **reaches the age of 62** and shall terminate upon remarriage. The surviving spouse has the option, if qualified, to receive the benefits provided in subdivisions 1 or 2 but not both."

The surviving widow in question had already reached the age of 62 when her husband died. It is difficult for us to conclude that the legislature intended that a surviving widow of the age of 62 years or older should receive a lesser annuity than a widow who was less than 62 years of age when her husband died. The language of Subd. 2 appears to be ambiguous in reference to the problem presented by your inquiry. In that posture of statutory ambiguity the law should be construed favorably to the widow consistent with the statutory language.

As stated in **Mattson v. Flynn,** 216 Minn. 354, 361, 13 N. W. 2d 11:

> "Pension and retirement acts are remedial in nature and as such entitled to a liberal construction to insure the beneficial purpose intended. [cases cited] * * * 'A large construction is to be given to statutes having for their end the promotion of important and beneficial public objects'."

Accordingly, it is our opinion that the surviving widow may elect to take either the survivors' benefits under Sec. 11, Subd. 1, or the so-called deferred annuity under Subd. 2, whichever is greater. Since, however, the widow had already reached the age of 62 years, the annuity, payable monthly, would as to her be immediate.

Question 3

"In the event that a survivor who is receiving a survivor's benefit under Laws 1957, Chapter 928, Section 11, Subdivision 1, or Subdivision 2, should die before he had received in monthly payments an amount equal to or in excess of the sum of the accumulated deductions to the credit of the member at the time of death, would refundment of any remaining balance be made to the beneficiary named by the deceased member?"

Opinion

Payment of the surviving benefits to the person entitled thereto under L. 1957, c. 928, Sec. 11, Subd. 1, commenced prior to the death of the sur-

vivor. We find no provision in the law which authorizes payment to a beneficiary named by the deceased member of a refundment under the stated facts. This conclusion is consistent with our answer to your first question.

MILES LORD,
Attorney General.

WILLIAM M. SERBINE,
Spec. Asst. Attorney General.

State Employees Retirement Association.
October 10, 1957. 331-A-1

167

State Employees Retirement Association—Construing Laws 1957, c. 928, Section 10, Subd. 3 as not restricting benefits thereunder to surviving spouse; and number of beneficiaries thereunder which may be designated by member is not restricted.

Facts

"Laws 1957, Chapter 928, Section 10, Subdivision 3, requires the retirement board to establish optional annuities of retirement which shall take the form of an annuity payable for a period certain and for life thereafter or as a joint and survivor annuity.

"It is our present understanding that the beneficiary under these optional forms of annuities may be any person designated by the member and that the beneficiary is not limited to the surviving spouse as it was in the provision for a reversionary annuity under M. S. 1953, Section 352.11, Subdivision 1 (5) as amended by Laws 1955, Chapter 239."

Question

"Will you please advise whether we are correct in this matter. Will you also advise whether there can be more than one beneficiary."

Opinion

Laws 1957, c. 928, Section 10, Subd. 3 provides in part:

"The retirement board shall establish optional annuities of retirement which shall take the form of an annuity payable for a period certain and for life thereafter; **or as a joint and survivor annuity.** * * * "

The former statute, M. S. 352.11, Subd. 1 (5), as amended by Laws 1955, c. 239, now repealed by L. 1957, c. 928, Section 33, provided for an

optional benefit of a reversionary annuity payable upon the death of the member to his surviving spouse. That provision is not contained in c. 928.

Accordingly, it is our opinion that under c. 928, Section 10, Subd. 3, the beneficiary under the optional forms of annuities need not be a surviving spouse, and that there is no restriction in the law as to the number of beneficiaries which may be designated by the member.

MILES LORD,
Attorney General.

WILLIAM M. SERBINE,
Spec. Asst. Attorney General.

State Employees Retirement Association.
August 1, 1957. 331-A-1

168

SERA—Refundment—When designated beneficiary elects to take amount of refundment in installments and after several installments are paid he dies, the balance should be paid to the estate of the beneficiary.

Facts

"M. S. 1957, Section 352.12, provides for refundment after death and Subdivision 4 of this section provides the beneficiary or surviving spouse of any deceased member or former member entitled to receive a refundment shall have the option of having the amount due him paid in monthly installments in such amounts as may be agreed upon with the State Employees Retirement Board. A similar provision is found in M. S. 1953, Section 352.12, as amended by Laws 1955, Chapter 239, Section 18.

"The beneficiary of a deceased member of the Retirement Association elected to have a refundment repaid in monthly installments of $50.00 per month. Payments were made from October 1955, through October 1957. The beneficiary then died."

Question

"May we have your opinion as to whether the estate of the beneficiary is entitled to refundment of the balance remaining in the Retirement Fund to the credit of the deceased member, or is refundment of this balance to be paid to the estate of the deceased member?"

Opinion

M. S. 352.12 provides:

"Subdivision 1. Where a member dies before retirement and no survivors benefits are payable or no optional annuity or reversionary annuity is payable as provided herein, a refundment shall be paid to his beneficiary or legal representative as the case may be in an amount equal to his accumulated deductions plus interest thereon to the date of death at the rate of two percent per annum compounded annually. * * *

* * *

Subd. 4. The beneficiary or surviving spouse of any deceased member or former member entitled to receive a refundment shall have the option of having the amount due him paid in monthly installments in such amounts as may be agreed upon with the state employees retirement board."

The member left no surviving spouse. He died before retirement. No survivors benefits or optional or reversionary annuity was payable. A refundment, therefore, was required.

The designated beneficiary would have received the full amount of the refundment had he not exercised the option authorized by statute that it be paid to him in installments. This authorization for installment payments was intended to serve merely the convenience of the beneficiary, and does not imply a change of right of entitlement to the amount of the refundment. In other words, upon the death of the member, the full refundment belonged to the designated beneficiary with whom rested the decision to accept that amount in one payment or by installment payments. In either event, the amount of the refundment was owned by the beneficiary when the member died.

Accordingly, the balance of the refundment should be paid to the estate of the deceased's beneficiary.

MILES LORD,
Attorney General.

WILLIAM M. SERBINE,
Assistant Attorney General.

State Employees Retirement Association.
June 10, 1958. 331-A-11

169

Teachers Retirement Association—where teaching service terminated in 1943, under facts stated, teacher is not entitled to annuity under Section 135.49, Subd. 2, but he is entitled to refundment under M. S. 1945, Section 135.10 and M. S. 1957, Section 135.49, Subd. 2.

Facts

"This teacher with more than ten years of credited allowable service as a member in the State Teachers Retirement Fund terminated his teaching service in 1948 in Minnesota in schools to which the law applies before attaining age 55 so as not to qualify for a retirement annuity under the law in effect at that time. He has not withdrawn the accumulated deductions to his credit in the Fund."

Question

"May the subject teacher now qualify for a retirement annuity upon attaining age 65 under the provisions of Minnesota Statutes 135.49, Subdivision 3?"

Opinion

The teaching service of the subject terminated in 1943, and was not resumed. M. S. 1957, Section 135.49, applies only to persons who were in the teaching service on or after its effective date, July 1, 1957 (Ex. Sess. L. 1957, c. 16, Section 21). The law has prospective and not retroactive application; M. S. 1957, Section 645.21; Attorney General's opinions O. A. G. 331-B, May 15, 1958; O. A. G. 175-A, December 19, 1957; (Cf. O. A. G. 331-D, December 18, 1957, where service terminated in 1955, subsequent to L. 1951, c. 481, Section 4).

The subject is within the purview of M. S. 1957, Section 135.55, Subd. 4, which provides:

"Any person who ceased teaching service prior to July 1, 1957, who left his accumulated deductions in the fund for the purpose of receiving when eligible, a retirement annuity in accordance with the law in effect at the date such service terminated, shall have his annuity computed in accordance with the law in effect at the date he ceased teaching service."

The submitted facts are governed by the law in effect at the time of the service termination in 1943. No subsequent law provides otherwise. Nor are the benefits of 135.49 here applicable. This conclusion is in accord with our opinions noted supra.

It appears that the subject was not eligible to any annuity under the law existing on the date of service termination. Neither does he qualify for an annuity under the present law. Accordingly, he is entitled to refundment of the amount to his credit in the fund (M. S. 1945, Section 135.10;

M. S. 1957, Section 135.49, Subd. 2). His right thereto is not affected by the statute of limitations (Section 135.49, Subd. 5).

Your question is answered in the negative.

MILES LORD,
Attorney General.

WILLIAM M. SERBINE,
Assistant Attorney General.

Teachers Retirement Association.
October 9, 1958. 175-K

170

Teachers Retirement Fund—Under facts stated, member of association who has ceased teaching is still a "teacher" for the purpose of entitlement to have interest credited to her account, pursuant to M. S. 135.04, Subd. 5.

Facts

"A teacher now 51 years of age terminated his teaching service in Minnesota, in schools to which the law applies, in 1955 after 28 years of membership in the fund, leaving his savings in the fund to accumulate interest until ready to make application for his annuity upon attaining the age of 55 years or at some time thereafter.

"Interest has been credited to his account in the fund on June 30th of each year including the two years he was not teaching in said schools, as has been the practice since the fund was first established. Accounts of inactive teachers prior to July 1, 1957 have been considered as members accounts, to receive interest credit as provided in M. S. 135.04, Subd. 5.

"Minn. Ex. Sess. L. 1957, Chapter 16, Sec. 11, Subd. 4, provides:

" 'Membership in the retirement association of any person shall terminate upon his ceasing to be a "teacher" whether by resignation, dismissal, or termination of temporary or provisional appointment.' "

Question

"Does Minn. Ex. Sess. L. 1957, Chapter 16, Sec. 20 give authority for crediting interest earnings to open accounts of teachers whose membership in the Teachers Retirement Association has been terminated under the provisions of Minn. Ex. Sess. L. 1957, Chapter 16, Sec. 11, Subd. 4?"

Opinion

Ex. Sess. L. 1957, c. 16, Section 1, Subd. 2 (amending M. S. 135.01, Subd. 2), provides in part:

> "The word 'teacher' includes any person who has rendered, is rendering, or shall hereafter render, service as a teacher, supervisor, principal, superintendent, or librarian in the public schools of the state, located outside of the corporate limits of the cities of the first class * * * ."

The subject teacher remains a member of the Association. As such he is not within the purview of Ex. Sess. L. 1957, c. 16, Section 11, Subd. 4. But he is within the purview of Section 20, Subd. 4, which reads:

> "Any person who ceased teaching service prior to July 1, 1957, who left his accumulated deductions in the fund for the purpose of receiving when eligible, a retirement annuity in accordance with the law in effect at the date such service terminated, shall have his annuity computed in accordance with the law in effect at the date he ceased teaching service."

M. S. 135.04, Subd. 4, requires that his account be credited with interest as therein provided.

MILES LORD,
Attorney General.

WILLIAM M. SERBINE,
Assistant Attorney General.

Teachers Retirement Association.
December 18, 1957. 331-D

171

Teachers Retirement Association—Where facts qualify widow of deceased member for survivors' benefit, that benefit is "payable" within meaning of M. S. 1957, Section 135.46, Subd. 1(a), and she is not entitled to payment of an amount equivalent to accumulated deductions under Section 135.47, Subd. 1, though she has the option of standing by husband's election made prior to July 1, 1957, under Section 135.10, Subd. 3, as authorized by Section 135.55, Subd. 3.

Facts

"The surviving spouse of a deceased member of the Teachers Retirement Association qualifies for the benefit provided in M. S. 135.46, subdivision 1(a).

"The surviving spouse, if qualified, has an option under M. S. 135.46 as provided in subdivision 2 and also an option under M. S. 135.55 as provided in subdivision 3 in the event of such election by the member. Reference Attorney General's opinions number 175-A dated September 4, 1957, and O.A.G. 331-A-1 dated October 10, 1957."

Question

"Does the surviving spouse have a further option to take the deceased member's accumulated deductions plus interest as provided in M. S. 135.47, subdivision 1, in lieu of the survivors benefit, optional annuity, or reversionary annuity notwithstanding the fact that a survivors benefit is payable under M. S. 135.46, subdivision 1(a)."

Opinion

It appears that the member had not retired; that he had at least 18 months of credited allowable service; and, that he left his widow surviving. Hence, there are existent the qualifying provisions for the survivor's benefit under M. S. 1957, Section 135.46, Subd. 1(a), and the widow is therefore entitled to that benefit, unless in accordance with Section 135.55, Subd. 3, she stands on the election made by her late husband, pursuant to Section 135.10, Subd. 3 (repealed by Ex. Sess. L. 1957, c. 16, Section 19). See O. A. G. 175-A, September 4, 1957. Because the survivor's benefit **is payable** to the widow, there can be no payment to her of an amount equivalent to the accumulated deductions under Section 135.47, Subd. 1, which provides:

"Where a member dies before retirement **and no survivors benefit,** optional annuity or reversionary annuity **is payable,** there shall be paid to his beneficiary an amount equal to his accumulated deductions plus interest thereon at the rate of two percent per annum compounded annually." (Emphasis supplied)

Absent legislative authorization—and there is none—for such payment, your question is answered in the negative. The same result obtained prior to Ex. Sess. L. 1957, c. 16, Section 19 (O. A. G. 175-A, October 28, 1953; July 26, 1944). Nothing in the present law justifies a different conclusion.

MILES LORD,
Attorney General.

WILLIAM M. SERBINE,
Spec. Asst. Attorney General.

Teachers Retirement Association.
November 13, 1958. 175-A

172

Teachers Retirement Fund—Construing L. 1957, c. 752, as inapplicable to persons whose elected term plan for retirement annuity has expired.

Facts

"A member began drawing a retirement annuity from the Teachers Retirement Fund pursuant to retirement effective April 1, 1943 under a 15 year term plan, which the member had the right to elect. The retirement annuity in this case was increased by the monthly amount of $25.00 effective July 1, 1957, under the provisions of Laws of Minnesota 1957, Chapter 752, Section 1.

"The quarterly annuity payments under the 15 year term plan elected (60 quarterly payments in all) terminated with the last 60th quarterly annuity payable April 1, 1958. The member is still living."

Question

"Shall the added payments in the monthly amount of $25.00 be continued during the remainder of the member's life, or do such additional monthly payments of $25.00 terminate with completion of payments under the term plan elected?"

Opinion

In our opinion addressed to you, O. A. G. 175-A, June 25, 1957, we stated:

"We are of the opinion, therefore, that the additional benefits of $25 monthly provided by c. 752 must be paid to 'Each **annuitant** who as a member of the fund commenced drawing his annuity under said section [135.10] between August 1, 1931, and June 30, 1953'." (Emphasis supplied)

L. 1957, c. 752, provides:

"Each annuitant who as a member of the fund commenced drawing his annuity under this section between August 1, 1931, and June 30, 1953, but not including his beneficiaries, shall be paid the sum of $25 per month, which payments shall be guaranteed by the state, in addition to the amounts such annuitant is otherwise entitled to receive under the provisions of sections 135.01 to 135.15."

The annuity plan elected by the subject was a 15-year-term plan, payable quarterly, and expired with the last payment which became due April 1, 1958. Upon receipt of the last quarterly payment under that plan, his status as an "annuitant" terminated, which fact likewise terminated his right under c. 752 to an additional benefit of $25 monthly.

The statutory additional benefit is available only to those persons in the limited category who, as annuitants, continue to receive, and only as long as they are eligible to receive, the primary annuitant benefits authorized by 135.01 to 135.15. This conclusion is, we understand, consistent with your administrative determination.

Further, the statutory language discloses no legislative intent that c. 752 is applicable to such annuity term plans as expire subsequent to July

1, 1957, the effective date of the statute, while denying its application to those elected annuity term plans which had expired prior to that date.

Accordingly, it is our opinion that the subject is not entitled to the additional benefit under L. 1957, c. 752.

MILES LORD,
Attorney General.

WILLIAM M. SERBINE,
Assistant Attorney General.

Teachers Retirement Association.
April 16, 1958. 331-D

TAXATION

173

Real estate taxes — homesteads up to $4,000 of true and full value under levy imposed by Laws 1957, Chapter 900.

Facts

"I call your attention to Section 10, Subdivision 1, Chapter 900, Session Laws of 1957, which provides for a tax levy sufficient to produce 1-million dollars, plus interest, to be used for land acquisition relative to the so-called Bethel Airport.

"Chapter 626, Laws of 1949, Section 2, sets up a tax levy for the so-called Mayo Memorial Building Fund as follows:

'for the purpose of providing funds for which to carry out the provisions of this act, the state auditor is hereby authorized and directed to cause to be levied upon all taxable property in the state, in the manner in which other state taxes are levied,' a tax sufficient to produce $550,000, plus interest, for each of the ten years—1949 through 1958.

"Chapter 311, Laws of 1951, Section 2, authorizes a tax levy for the so-called Military and Naval Land Fund as follows:

'to provide money for said fund, the state auditor is hereby authorized and directed to levy upon all taxable property in the state, in the manner in which other state taxes are levied' in each of the taxable years 1952 through 1958, such sums as may be necessary to pay certificates of indebtedness hereafter authorized, but not exceeding $100,000, plus interest, for any one of the said taxable years.

"In accordance with those Chapters, I have regularly spread over the taxable years authorized a tax levy on all non-homestead property.

"Please be advised, also, that the tax levies authorized for the payment of all current building funds, beginning in 1949, with the exception of the Military and Naval Land Fund and the Mayo Memorial Building Fund, both cited above, and the State Veterans Service Building Fund, as set up by Chapter 315, Laws of 1949, Section 6, Subdivision 2, carry the provisions that the tax levy shall be on all taxable property in the State notwithstanding Minnesota Statutes 1953—273.13, Subdivisions 6 and 7, which in fact is the so-called Homestead Exemption Statute.

"Now Chapter 900, Laws of 1957, Section 10, Subdivision 1, says nothing about Homestead Exemptions, but reads as follows:

'for the purpose of providing funds appropriated by the act, there is hereby levied upon all the taxable property in this state, a tax sufficient to produce 1-million dollars, which the state auditor shall cause to be extended and collected in the manner in which other state taxes upon real and personal property are extended and collected to be included in the tax levies spread upon the tax rolls for the years 1959-1983, inclusive, in amounts sufficient to produce the sum of $40,000 in each of the years 1960 to 1984, inclusive,' plus interest.

"You will note that the language of Section 10 is transposed in comparison with the Military and Naval Land Fund authority, the Mayo Memorial Building Fund authority, and the State Veterans Service Building Fund authority, but that in substance it appears to be the same."

Question

"Am I correct in assuming that the $40,000 annual tax levy authorized by Section 10, Chapter 900, quoted above, is limited to Non-Homestead Properties?"

Opinion

In construing Minnesota Statutes, Section 273.13, Subdivisions 6 and 7, in its relation to state tax levies, my predecessor, Attorney General J. A. A. Burnquist, after quoting what is now Minnesota Statutes, Section 272.01, stated in opinion O. A. G. 519, November 22, 1940:

"The 1937 legislature exempted homesteads up to $4,000 true and full value from taxation for state purposes, except for pre-existing state debts. In view of the general definition above quoted, it must be assumed that in making subsequent tax levies the legislature recognizes the homestead exemption, and does not intend any state tax levy to apply to homesteads unless clearly so indicated.

"To hold otherwise would open the door for partial or complete nullification of the homestead tax exemption law every time the legis-

lature might pass a new act levying taxes for state purposes 'on all taxable property in the state.' "

In that opinion, this office held that homesteads up to $4,000.00 in true and full value were exempted from tax levies imposed under Laws of 1939, Chapter 738, Chapter 245, and Chapter 436. No reference was made to the homestead exemption in such laws.

In Laws of 1957, Chapter 900, to which you refer, no specific mention is made of Minnesota Statutes, Section 273.13, Subdivisions 6 and 7, as is usual when the legislature intends that homestead property be included regardless of value in a state levy.

Accordingly, it is the opinion of this office that your assumption is correct. Homestead property up to $4,000.00 in true and full value is exempted from the levy imposed by Laws of 1957, Chapter 900.

MILES LORD,
Attorney General.

State Auditor.
August 26, 1957. 519

174

Ad Valorem Tax Status of Taconite Land. Assessor initially determines whether land is subject to taxation. Conditions which may be attached to the sale of tax forfeited lands. M. S., Sec. 298.25, Sec. 273.17, Sec. 282.03.

Facts

"The Itasca County Board has recently received a request from a mining company to put up for sale approximately 7,000 acres of tax forfeited land to be used for taconite development purposes. The mining company wants the land appraised at a substantially lower price than has prevailed for other tax forfeited land which has been sold for mining purposes. The county board is inclined to agree to some price concession if they can feel justified that the long range public interest will best be served by such action.

"In its present status as tax forfeited land, the property is a potential source of income for the governmental subdivisions through sale of land and timber. Against this, the county board must weigh the advantages to the public if the land should be sold at a reduced price for taconite development. Before these advantages can be properly measured, the county board should have certain information.

"Among other things that they feel they must consider is the tax status of these lands if they should be sold for taconite development purposes. The county board is aware of the tax provisions of M. S., Sec. 298.24. A number of questions arise along this line especially in connection with the interpretation of Chapter 363, Laws of 1957."

Comment

"In giving your opinion on the following questions, please bear in mind that we are only interested in the surface rights of these tax forfeited lands and not the mineral rights, so that M. S., Sec. 93.01 and Sec. 93.02, need not be considered."

Question

"1. The 1957 Enactment or Chapter 363 uses the words 'occupancy' and 'use'. Who determines whether or not the land is so occupied and used? Would it be limited only to the actual site of a taconite plant, on lands not containing taconite, or could it conceivably be applied to the entire 7,000 acres so as to exempt the entire acreage from ad valorem taxes on the surface rights acquired?"

Opinion

The assessor is vested with the duty, in the first instance, of determining whether land is subject to taxation. Minnesota Statutes, Section 273.17, provides as follows:

"In every odd-numbered year, at the time of assessing personal property, the assessor shall also assess all real property that may have become subject to taxation since the last previous assessment, including, . . ."

The Commissioner of Taxation, in the Assessors' Manual 1956, Paragraph 112, Page 39, recognizing this duty instructs the assessors:

"If an assessor is in doubt as to the taxable status of property of any institution or organization or even of the county or any political subdivision, he should place the property upon the tax roll and the owner thereof may then file an application directed to the board of county commissioners and to the commissioner of taxation requesting that the property be placed upon the exempt rolls . . ."

It appears clear, therefore, that the initial determination of whether the land is used for a purpose which will exempt the property from taxation is upon the assessor.

Under the doctrine expressed by the Minnesota Supreme Court in the case of **Christian Business Men's Committee of Minneapolis, Inc. v. State,** (1949) 228 Minn. 549, 38 N. W. 2d 803, if a substantial part of a parcel is used for a purpose which grants exemption, and a substantial part is used for a purpose for which no exemption is granted, such parcel is pro rata exempt and pro rata taxed, according to its separate uses. The "in lieu" provision contained in Laws 1957, Chapter 363, Section 1, reads as follows:

"Except as herein otherwise provided, it shall be in lieu of all other taxes upon such taconite and iron sulphides, or the lands in which they are contained, or upon the mining or quarrying thereof, or the production of concentrate therefrom, or upon the concentrate produced, or

upon the machinery, equipment, tools, supplies and buildings used in such mining, quarrying or production, or upon the lands occupied by, or used in connection with, such mining, quarrying or production facilities."

It follows, therefore, that if part of a parcel is not used for the purposes outlined in the "in lieu" provision that part would be taxable under the rule outlined in the Christian Business Men's case cited above.

Question

"2. (a) What is 'reserve' land as set forth in the new wording of the 1957 act?

"The chapter states, 'Nothing herein shall prevent the assessment and taxation of the surface of "reserve" land containing taconite, etc., etc.' The same chapter states 'Except as herein otherwise provided, it (the tax) shall be in lieu of all other taxes upon such taconite and iron sulphides, or the lands in which they are contained, etc.'

"(b) Do we then in effect have two classes of taconite lands, 'Reserve' and 'Non Reserve', as far as ad valorem taxation of the surface is concerned, and if so, who determines what distinguishes them for such taxation purposes."

Opinion

We have been unable to find a definition of "reserve" land in the statutes. In the absence of a statutory definition of "reserve" we must, therefore, resort to judicial determinations or the rules of construction to determine what the Legislature intended.

Minnesota Statutes, Section 645.08, provides in part material:

"In construing the statutes of this state, the following canons of interpretation are to govern, unless their observance would involve a construction inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute:

"(1) Words and phrases are construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning, or are defined in this chapter, are construed according to such special meaning or their definition; . . ."

"Reserve" has been defined at great length in Webster's New International Dictionary, Second Edition. This definition might be summarized as follows:

"To keep in store for future or special use; to keep in reserve; to retain; to keep, as for oneself.

"To keep back; to retain or hold over to a future time or place; not to deliver, make over, or disclose at once; to defer the discussion or determination of.

"That which is reserved; something kept back or withheld, as for future use; a store; a stock; an extra supply.

"Something reserved or set aside for a particular purpose, use, or reason, as a tree in a part of a wood that is to be felled, or a part of a lode; specif.: a. A tract of land, esp. public land, reserved or set apart, for a particular purpose; a reservation; as, forest reserves, game reserve. b. In exhibitions, a distinction which indicates that the recipient will get a prize if another should be disqualified."

Black's Law Dictionary, Page 1473, citing **Commissioner of Internal Revenue v. Strong Manufacturing Co.**, CCA 6, 124 F. (2d) 360, 363, as authority, defines "reserve" as:

"To keep back, to retain, to keep in store for future or special use, and to retain or hold over to a future time."

In the Mining Directory issued by the University of Minnesota (Bulletin of the University of Minnesota, Mining Directory Issue, Minnesota, 1956, by Henry H. Wade and Mildred R. Alm) Vol. LIX, No. 9, May 1, 1956, Page 1, mining properties are classified as follows:

"Properties that have shipped ore or are about to ship ore are classified as mines; other properties are classified as reserves."

Obviously not all taconite lands in the state are reserve lands, since there is some taconite actually being mined. Question 2 (b) must, therefore, be answered in the affirmative.

What constitutes reserve land is a question of fact which must be determined by applying the definitions set forth above, and any other applicable rule of law, to the facts as presented in each individual case. As pointed out in our opinion to Question 1, the initial determination in each case rests with the assessor.

Question

"3. Is the surface of such 'reserve land containing taconite and not occupied by such facilities or used in connection therewith' as stated in the new wording of the 1957 act subject to ad valorem taxes?"

Opinion

In view of the specific wording of the statute (Laws of 1957, Chapter 363, Section 1) that "nothing herein shall prevent the assessment and taxation of the surface of reserve land containing taconite and not occupied by such facilities or used in connection therewith . . ." your question is answered in the affirmative.

Question

"4. Is the surface of such 'reserve land **not** containing taconite and not occupied by such facilities or used in connection therewith' subject to ad valorem taxes?"

Opinion

Minnesota Statutes, Section 272.01, provides as follows:

> "All real and personal property in this state, and all personal property of persons residing therein, including the property of corporations, banks, banking companies, and bankers, is taxable, except such as is by law exempt from taxation."

I have been unable to find any provision exempting lands not containing taconite and not occupied by such facilities or used in connection therewith. Unless there are other facts which would exempt the land from ad valorem tax purposes, your question is answered in the affirmative.

Question

> "5. If the presence of taconite in such reserve land is the test of whether or not the surface is subject to ad valorem taxes, who is responsible for proving that the land does contain taconite? What proof would be acceptable for the purpose?"

Opinion

Our answers to Questions 3 and 4 dispose of this question.

Question

> "6. Under the provisions of Minnesota Statutes, Section 282.03, may the county board set a time limit for starting to use the land for taconite development and provide that the land shall revert to its tax forfeited status if it is not so used within the period of time stated?"

Opinion

Minnesota Statutes, Section 282.03, provides as follows:

> "There may be attached to the sale of any parcel of forfeited land, if in the judgment of the county board it seems advisable, conditions limiting the use of the parcel so sold or limiting the public expenditures that shall be made for the benefit of the parcel or otherwise safeguarding against the sale and occupancy of these parcels unduly burdening the public treasury."

I know of no other statute authorizing conditions to be imposed in a deed other than Minnesota Statutes, Section 282.03.

It appears clear that the Legislature authorized the county board, in its judgment if it appears advisable, to restrict public expenditures which may be expended on behalf of the property, or uses of the parcel which would burden the public treasury. However, we find no authority which would authorize the county board to impose other restrictions on use, or to compel use for a given purpose within a designated time limit.

It does not appear from the facts stated that the proposed restriction on use comes within the purview of the statute. Your question is, therefore, answered in the negative.

Question

"7. May the county board make a condition of the sale which would provide that the land may not be sold nor leased to a third party prior to its actual use in connection with a taconite development program?"

Opinion

The same reasoning applied in our opinion to Question 6 also applies here. Likewise, based upon the facts, it does not appear that the condition outlined in this question comes within the purview of Minnesota Statutes, Section 282.03. Your question is, therefore, answered in the negative.

MILES LORD,
Attorney General.

ARTHUR C. ROEMER,
Spec. Asst. Attorney General.

Itasca County Attorney.
February 21, 1958. 311-A

175

Soil Conservation Districts—Taxation—Premises owned by soil conservation districts, and used for the purposes authorized by M. S. 1957, c. 40, are not subject to ad valorem taxes.

Facts

"The East Agassis Soil Conservation District is considering building a garage to house district equipment."

Question

"Would the soil conservation district be required to pay taxes on such a building?"

Opinion

In its portion here material, Art. IX of the Minnesota Constitution reads:

"Section 1. The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, but * * * public property used exclusively for any public purpose, shall be exempt from taxation, * * * "

So far as pertinent to the question considered, M. S. 1957, Section 40.07 reads:

"A soil conservation district organized under the provisions of this chapter **shall constitute a governmental subdivision of this state, and a public body, corporate and politic, exercising public powers,** and the district, and the supervisors thereof, shall have the following powers, in addition to others granted in other sections of this chapter:

* * *

"(5) To obtain options upon and to acquire, by purchase, exchange, lease, gift, grant, bequest, devise, or otherwise, any property, real or personal, or rights or interest therein; to maintain, administer, and improve any properties acquired, to receive income from such properties and to expend such income in carrying out the purposes and provisions of this chapter; and to sell, lease, or otherwise dispose of any of its property or interests therein in furtherance of the purposes and provisions of this chapter;

* * * " (Emphasis supplied)

Under the provisions of Section 375.19, the county board is authorized "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."

The constitutional provision above cited exempts from taxation "public property used exclusively for any public purpose."

It seems clear from the statutory provisions above referred to that a soil conservation district organized pursuant to the provisions of M. S. 1957, c. 40, is a governmental subdivision of the state, a public body, exercising public powers, when engaged in the performance of its statutory powers and duties. It is authorized by statute to acquire by gift, purchase or otherwise, such real or personal property as may be necessary to a proper performance of its statutory powers and duties.

Consequently, it is our opinion that property owned by a soil conservation district organized under Chap. 40 and used for the purpose of performing the statutory powers and duties of such district is, under the provisions of Art. IX, exempt from taxation. Accordingly, we answer your question in the negative.

MILES LORD,
Attorney General.

VICTOR J. MICHAELSON,
Spec. Asst. Attorney General.

Soil Conservation Committee.
December 8, 1958. 705-A

176

Farm Stored Grain under Federal Government Price Support Loan—Declaration as income—M. S. 1953, Sec. 273.13, (5) as amended by L. 1957, c. 866.

Facts

"Farm-stored grain under Federal Government price support loan was placed under seal pursuant to the agreement with the Federal Government in 1956 and was under seal on the May 1, 1957 assessment date. The payment, due to the heavy loads placed on governmental offices toward the end of the year, was not received until May, 1957, and was not, therefore, received by the farmer in the accounting period for which income tax returns were filed with the Federal and State governments in 1957 and, therefore, was not reported on the return filed in 1957 for the 1956 tax year."

Question

"Should Minnesota Statutes 1953, Section 273.13 (5), as amended by Laws 1957, Chapter 866, be applied so as to exclude from assessment only that farm-stored grain sealed under Federal Government price support loan on the May 1 assessment date when the proceeds received have been actually reported on the income tax returns last filed with the Federal and State Governments?"

Opinion

Laws 1957, Chapter 866, Section 1, provides as follows:

"All agricultural products in the hands of the producer shall constitute class three 'a' and shall be valued and assessed at ten percent of the full and true value thereof. Provided, however, that upon farm-stored grain under federal government price support loan in such instances as the farmer shall have previously **declared** the amount of such loan as income under the federal and state income tax laws, the property shall, for tax purposes, no longer be considered as being owned by the farmer and there shall be no assessment of such grain. Wine produced in this state and in the possession of the producer and held in storage under bond to the United States government, shall be classed as agricultural products for the purposes of this section."

The Legislature, by Chapter 866, provided that, with reference to farm-stored grain under Federal Government price support loan, where a farmer previously **declared** the amount of such loan as income for income tax purposes, the property shall, for tax purposes, no longer be considered as being owned by the farmer.

The income tax statutes of the State (Minnesota Statutes, Section 290.073) and Federal governments (Section 77) give a farmer an election to report the loan as income when received in the same manner as if it were a sale, or to regard the loan as a true loan in which event the income

would be reportable only when a sale is consummated or the right to redeem expired. Although you have not so stated, we assume for the purposes of this opinion that if the farmer has made an election under these statutes he has elected to report the loan as income when received.

In the facts you present, the income could not have been reported in the farmer's calendar year income tax returns normally filed on or before April 15 since the proceeds had not been received during the preceding taxable year. Therefore, as of the May 1 assessment date the income had not been reported for income tax purposes.

The delay in payment until after the first of the following year is not uncommon. The Legislature must have been cognizant of this when it required only that the farmer **declare** that the loan is to be regarded as income instead of requiring that the loan be **reported prior to May 1 in the farmer's income tax returns.** This would have resulted in completely denying some farmers on a fiscal year the benefits of this law since in many instances the farmer's tax return would not be due until after May 1.

For example, a fiscal year taxpayer, July 1 to June 30, would not be in a position to file a return and report the loan as income until after June 30. We cannot assume the Legislature intended to deprive that farmer of the benefits of Chapter 866.

Our research has failed to locate any Minnesota court decision defining "declare". In the absence thereof, the ordinary dictionary definition becomes important in interpreting this word.

The word "declare" is defined by Black's Law Dictionary, Fourth Edition as "to make known, manifest, or clear. **Lasier v. Wright,** 304 Ill. 130, 136 N. E. 545, 552, 28 ALR 674. To signify, to show in any manner either by words or acts. **Edwardson v. Gerwien,** 41 N. D. 506, 171 N. W. 101, 102. To publish; to utter; to announce clearly some opinion or resolution."

It appears clear from this definition that the requirement imposed upon the farmer to declare the loan as income is not the same as reporting it in his return for income tax purposes. Had the Legislature intended that a taxpayer had to include the income in his return in order to avail himself of the benefit of Chapter 866, it would have said so.

Your question is, therefore, answered in the negative.

MILES LORD,
Attorney General.

PERRY VOLDNESS,
Assistant Attorney General.

Cottonwood County Attorney.
February 19, 1958. 421-A-4

177

Counties—County Auditor—Certificate as to tax liens and tax sales—Minn. St. 1957, Sec. 272.46.

Facts

The county auditor has received a request to make a search of his records with reference to an undivided one-eighth interest in a certain parcel of land and to certify as required by Minn. St. 1957, Sec. 272.46, as to any tax liens or tax sales affecting such undivided one-eighth interest. You state that "Undivided interests are not assessed separately and it is, therefore, impossible for the auditor to make a search on a particular undivided interest."

Question

Has the auditor "carried out his duty when he certifies the description of the land and all tax liens and tax sales shown by the records with reference to that land * * * "

Opinion

So far as material Minn. St. 1957, Sec. 272.46, reads:

"The county auditor, upon written application of any person, shall make search of the records of his office, and ascertain the existence of all tax liens and tax sales as to any lands described in the application, and certify the result of such search under his hand and the seal of his office, giving the description of the land and all tax liens and tax sales shown by such records, and the amount thereof, the year of tax covered by such lien, the date of tax sale, and the name of the purchaser at such tax sale."

The county auditor under this statute is not required to give a certificate as to tax liens or tax sales except as disclosed by the records in his office. Consequently the auditor should certify officially only to what is shown on his records. It is my opinion that the auditor is not required to certify as to tax liens and tax sales on undivided fractional interests unless it appears from the records in his office that such undivided interests were separately assessed and taxed and as such are subject to tax liens or have been sold for taxes. See O. A. G. 21-A, March 27, 1942, printed as No. 193, 1942 Report.

MILES LORD,
Attorney General.

VICTOR J. MICHAELSON,
Spec. Asst. Attorney General.

Crow Wing County Attorney.
May 9, 1958. 21-A

INDEX
TO
OPINIONS

A

B

C

D

E

F

G

H

I

J

L

M

N

O

P

R

S

T