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Digest of Attorney General's Opinions

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DIGEST OF ATTORNEY GENERAL'S OPINIONS

COOPERATIVES — GRAZING ASSOCIATION — CAPACITY TO HOLD TITLE

MARCH 1, 1966

HONORABLE CHARLES TIGHE, LIEUTENANT GOVERNOR

Whether a non-profit cooperative grazing association may own real and personal property?

Section 36-08-02 of the Century Code provides that a non-profit cooperative grazing association is to be operated under the general law governing cooperatives, which is set out in Chapter 10-15. Chapter 36-08, which pertains to grazing associations, says nothing concerning the owning of property, while § 10-15-03 (4) provides that a cooperative may acquire property. As the right to acquire property includes the right to hold property, a grazing association may own and dispose of real and personal property as it sees fit.

MUNICIPAL CORPORATIONS—FLUORIDATION—EXERCISE OF POLICE POWER

MARCH 8, 1966

CITY ATTORNEY, HAZEN, NORTH DAKOTA

Whether a municipality may legally provide for fluoridation of its water supply where same is not expressly authorized by any state statute?

Fluoridation projects are, as a general rule, valid exercises of the police power. This is so, whether such power is exercised by the state legislature, or by the municipality's legislative body. Further, fluoridation has been held not to constitute the unauthorized practice of medicine. Because the question of fluoridation is controversial, courts have determined that the decision regarding whether to fluoridate or not is one of policy which is best left to the discretion of the city council. Therefore, North Dakota municipalities have

the power to fluoridate in conjunction with their general power to regulate the municipal water supply

TAXATION—EVASION—VENUE OF PROSECUTION

MARCH 30, 1966

LLOYD OMDAHL, TAX COMMISSIONER

1. Whether jurisdiction of the offense of failing to file an income tax return with intent to evade the requirements of law is in Burleigh County, where the return is to be filed, or in the county of the taxpayer's residence?

The general rule is that where a crime involves a failure to do a particular act, "the venue or jurisdiction of the crime is the location where the act is required to be performed." However, North Dakota Century Code § 29-03-04 provides that where a crime is committed partly in one county and partly in another, jurisdiction of the offense is in either of said counties. In view of the fact that two elements of the various tax offenses, i.e. intent to evade, and rendering or signing of fraudulent returns, will occur in the county of residence, jurisdiction of the offenses will be in either county

2. Whether the state's attorney for the particular county must prosecute the action, or may the special assistant attorneys general attached to the tax commissioner's staff prosecute same?

The initial responsibility to prosecute offenses against the state lies with the state's attorney for the particular county involved under Sections 29-11-07 and 11-16-01 of the Century Code, however, assistant attorneys general, including those on the tax commissioner's staff "may act for and in behalf of the state's attorney in prosecuting the actions."

3. Whether the tax commissioner is required to give notice to a taxpayer requesting that he file a return, prior to signing a complaint against said taxpayer?

Analysis of North Dakota Century Code § 57-38-45 shows that under subsections 2, 4 and 6 the Commissioner is required to give notice to the taxpayer before subjecting him to the provisions of those subsections, however, subsection 3, under which the above-mentioned complaint would be filed, does not require notice and a request to file, therefore, the commission is not required to give such notice prior to commencing a criminal action.

4. Whether the "fine" provided for in Section 57-38-45(2) is a

civil penalty, and does the tax commissioner have exclusive authority to impose it?

5. Whether the "penalty of not more than one thousand dollars to be recovered by the attorney general" under Section 57-38-45 (3) is a civil penalty, and does the tax commissioner have authority to levy it?

Imposition of a variable or fixed sum of money as a fine or penalty for failure to comply with revenue laws is generally considered a civil penalty, and can be imposed regardless of whether there has also been a criminal conviction.

The fact that various subsections of tax statutes impose both civil and criminal sanctions does not violate constitutional guarantees of due process or equal protection. However, if two statutes, or subsections, impose criminal penalties for the same offense the above constitutional safeguards are violated due to vagueness, and unlawful delegation to an administrative agency of choice of penalty.

Thus, the "fine" provided for in subsection 2 of Section 57-38-45 is a civil penalty, and may be imposed, after the giving of proper notice, by the tax commissioner. The "penalty" mentioned in subsection 3 is also a civil penalty, and may be imposed by the tax commissioner, and collected in a civil action in which the commissioner may be represented by special assistant attorneys general from his office.

6. Whether, under N.D. Cent. Code § 57-38-45 (6), which allows the tax commissioner to compute a taxpayer's income, where the taxpayer has refused, after proper notice, to do so, and provides that the commissioner "shall assess the same at not more than double the amount so determined," the doubling of the computed amount is mandatory or discretionary? Further, if the tax is doubled pursuant to subsection 6, do the penalties imposed by Section 57-38-45(1) apply to such doubled amount?

The North Dakota Supreme Court construed the word "shall" in a property tax statute when used in connection with a provision designed to enforce collection of a tax as being mandatory in connotation. *Vetter v Benson*, 81 N. W. 2d 758 (N. D. 1957). Subsection 6 of Section 57-38-45 is penal in nature and is designed to enforce collection of a tax, and thus, the tax commissioner must assess the tax at "not more than double" the amount computed. However, the phrase "not more than double" would allow the commissioner to add an amount less than double.

The penalty provided for by Section 57-38-45 (1) cannot be applied to a tax assessed under subsection 6, as the subsection 1 penalty applies to a different transgression.

7 Whether the fact that a fine or penalty is imposed under subsections 2 or 3, or the tax is doubled under subsection 7, prohibits the application of either or both of the other above-mentioned subsections?

Section 57-38-45 (5) provides that the penalties provided by subsections 3 and 4 can be in addition to all other penalties provided for in the chapter, thus subsection 3 penalties could be applied in conjunction with either subsection 6, or subsection 2, but not both. However, the penalties provided for in subsections 2 and 6 are not stated to be in addition to other penalties, and as the same basis is apparent for imposing either, they cannot be used in conjunction with each other

**WORKMEN'S COMPENSATION—LUMP SUM PAYMENT—DISCLOSURE OF
DETAILS OF AWARD**

MAY 9, 1966

CHAIRMAN, WORKMEN'S COMPENSATION BUREAU

1. Whether regular payments to a permanent totally, or permanent partially disabled claimant are to be continued on a weekly basis following a partial lump sum payment, or are weekly payments to be discontinued until the time in which the lump sum payment would be used up at the regular rate?

Section 65-05-25 does not provide for a specific manner in which the Bureau is to make partial lump sum awards. The Supreme Court has apparently indicated that the matter of continuing regular payment following a partial lump sum award is to be left to the sound discretion of the Bureau. *Gotchy v North Dakota Workmen's Compensation Bureau*, 49 N.D. 915, 194 N.W. 663 (1923)

2. Whether Section 65-04-15 of the Century Code prohibits the disclosure of the details of an award made to persons other than the claimant and his employer?

The Bureau functions in a dual capacity, first, as the equivalent of an insurance company, and, second, as an administrative agency which hears and determines claims. Normally, when the Bureau functions as an insurer, its records would be as private as any other insurance company. However, section 44-04-18 provides that, "except as otherwise specifically provided," all records of public boards, agencies, etc., shall be open for public inspection. As there is nothing in title 65 (the Workmen's Compensation Title) which exempts the records of claims paid from the operation of Section 44-04-18 such records would be accessible to the public.

**WORKMEN'S COMPENSATION—REHABILITATION—PAYMENT FOR
PRELIMINARY EXAMINATION****MAY 11, 1966****CHAIRMAN, WORKMEN'S COMPENSATION BUREAU**

Whether the Bureau can make payments to cover the cost of a medical evaluation to determine which are of vocational rehabilitation a claimant should enter, as distinguished from payment of the costs of such vocational rehabilitation?

Section 65-02-14 of the Century Code provides that the Bureau may cooperate with other agencies interested in the rehabilitation of the injured person. Section 65-05-07 authorizes the Bureau to determine whether or not an injured employee should receive courses of study, training or education in order that said employee might be rehabilitated.

In order to make the above determination, the Bureau must exercise sound judgment. In order to exercise sound judgment, the Bureau must be well informed concerning what will be best for the injured employee. This information can only come from qualified medical and rehabilitation personnel. As the Bureau needs this information to exercise sound judgment, the Bureau is impliedly authorized to pay for it.

**ESTATE TAX—DETERMINATION—REPRESENTATION OF NON-RESIDENT
DECEDENT'S ESTATE****JUNE 23, 1966****STATE'S ATTORNEY, OLIVER COUNTY**

1. Whether an estate tax determination must be made by a county court, subject to the tax commissioner's approval, where the property is left by a non-resident decedent:

a. If a probate proceeding has been commenced prior to the filing of an application for estate tax determination;

b. If the application for estate tax determination has been filed before probate proceedings are begun?

Under N.D. Cent. Code 57-37-13 (1960) the county court "shall" assess the estate tax payable, and the tax commissioner shall approve said determination under N.D. Cent. Code § 57-37-26 (1960). The state tax commissioner may, where there has been no commencement of probate proceedings, make a determination of estate

tax due upon request of an administrator, executor, or grantee under a conveyance made during the grantor's lifetime. Thus, where probate proceedings have been commenced the county court *must* make the estate tax determination, and, if probate proceedings have not been commenced, the tax commissioner *may* determine the estate tax [N.D. Cent. Code § 57-37-27 (Supp. 1965)] However, the tax commissioner does not have "exclusive" jurisdiction for a particular type of gross estate of non-resident decedent, that is, the county court is not ousted of its jurisdiction to make an estate tax determination for any particular kind of gross estate.

2. Whether there is any situation in which the county court of a particular county has exclusive jurisdiction to make an estate tax determination, subject to the tax commissioner's approval, for the property of a non-resident decedent if some or all of the property is located in that particular county?

Where the tax is not adjusted within four months of the death, and the tax commissioner has requested the proper county court to appoint an administrator, that county court has jurisdiction to determine the tax not only on property located in that county, but on property of said non-resident decedent located anywhere in the state. This is so, even though such property is not subject to probate.

3. Whether a non-resident attorney, who is not licensed to practice in North Dakota, is authorized on behalf of the non-resident decedent's estate, to conduct in county court the "estate tax matter," and the "probate matter," if a probate is necessary?

Section 27-11-02 of the Century Code vests in the Supreme Court the power to admit persons to practice as attorneys. By Rule 1, the Supreme Court stated the qualifications for admittance to practice before the district courts of the state, but no similar rule was promulgated in regard to the county courts.

Section 27-11-27 provides that a "member of the bar of another state actually engaged" in a "matter pending in any court in this state" may be permitted to appear and conduct said matter. However, the phrase "matter pending" requires that the action be instituted by an attorney licensed in North Dakota. Although the probate code does not require pleadings as such, a probate action is a "matter pending" within the above Section; therefore, a North Dakota licensed attorney must institute the action, and the court may permit an associated non-resident attorney to carry on.

4. Whether the person who handles an estate tax matter before the county court or the tax commissioner must be an attorney

Although the preparation of income tax returns and the answering of certain legal questions collateral to such preparation is not

generally considered the practice of law, the preparation of estate tax returns is to be distinguished on the ground that instructions for filing of estate tax returns are not available for lay consumption, as they are in the income tax case. Therefore, a person engaged in preparing estate tax returns in this state must be a licensed North Dakota attorney

**STATE—CONTINGENCY FUND—ALLOCATION OF FUNDS THEREFROM TO
AID IN EMERGENCIES**

JULY 1, 1966

GOVERNOR WILLIAM L. GUY

Whether the State Emergency Commission can allocate funds from the contingency fund to counties and municipalities to help offset the costs of reconstruction of public works damaged by flood water

In view of the North Dakota Supreme Court's decision in *Backman v Guy*, 126 N.W.2d 910 (1964), holding the transfer of money between funds (as authorized by Chap. 54-16 N.D.C.C.) to be limited to emergencies arising within established funds and departments for which appropriations have already been made, the opinion concluded that the State Emergency Commission cannot allocate funds directly to political subdivisions of the state.

The opinion also noted that, although direct assistance must be authorized by the legislature, the National Guard might be called out in a case of emergency and funds for their services might be derived from the Contingency Fund.

**SCHOOLS—SCHOOL BOARD SINKING FUND—INVESTMENT OF
SURPLUS FUNDS**

JULY 7, 1966

STATE'S ATTORNEY, GRANT COUNTY

Whether a school board with a population over one thousand, has the authority to invest surplus funds in its sinking fund in United States Treasury Bills or in Certificates of Deposit in State or National Banks.

The opinion concluded that, under section 21-03-43 of the Century Code, the school board may so invest its surplus in certifi-

ates of deposit of State or National Banks, but only in those banks, "which have been selected as official depositories of the school district in accordance with the provisions of Chapter 21-04 of the North Dakota Century Code." A treasury bill, however, is not an "interest bearing bond of the United States" as required by section 21-03-43 (2), hence these may not be invested in by the school district.

CITIES AND VILLAGES — POWERS — PROVIDING POLICE FIRE
PROTECTION BEYOND CITY LIMITS

JULY 13, 1966

CITY ATTORNEY, BISMARCK, NORTH DAKOTA

Whether a city has legal authority to contract or furnish police or fire services beyond its corporate limits.

As to police services, the opinion concluded that these could not be contracted for or furnished except within the city limits and for a distance of one and one-half miles in all directions therefrom as provided in section 40-25-05 of the Century Code. Further, whether a city could provide these services for a federal military enclave even within the above limits would depend upon whether the federal government's exclusive jurisdiction for law enforcement thereon, has, in some way been ceded back to the state.

With regard to fire services and protection, the opinion concluded that, under section 40-05-01 (37) of the Century Code, "a city may contract to provide fire protection outside the city limits whether such protection is furnished to private or governmental property, including that of the United States." This opinion was expressed although the statute provides for fire attendance and assistance "to other municipalities within or without this state, or to private property including farm buildings located outside the city limits."

JUDICIAL PROCEDURE, CIVIL—PROVISION FOR PAYMENT OF
ATTORNEY'S FEES — VOID IN SECURITY AGREEMENT

JULY 15, 1966

STATE'S ATTORNEY, DIVIDE COUNTY

Whether a provision as to the payment of attorney's fees would

be allowed in a security agreement under the North Dakota Uniform Commercial Code.

In view of the amendment of section 28-26-04 of the Century Code to include "Security Agreement" and the fact that such amendment was part of the same law by which the Uniform Commercial Code was enacted, the opinion expressed the belief that, as in the case of notes, bonds, and other evidence of debt, a provision in a security agreement for the payment of attorney's fees is against public policy and void.

CHARITABLE ORGANIZATION—LICENSE TO SOLICIT—BUSINESS AS A
CHARITABLE ORGANIZATION

JULY 20, 1966

STATE'S ATTORNEY, BURLEIGH COUNTY

Whether Chapter 50-22 of the North Dakota Century Code is applicable to certain transient or temporary businesses advertising that all or a percentage of their sales or net profits are for the benefit of certain charities.

The basic prohibition of Chapter 50-22 is that "no charitable organization shall solicit contributions from persons in this state by any means whatsoever without first having obtained a license from the secretary of state." This coupled with the definition of "charitable organization" and "contribution" (50-22-01 (2) (3) N.D.C.C. Supp. 1965), led the opinion to conclude that this practice in advertising was not "inherently different from that of the average permanently located merchant in displaying an appropriate symbol or sticker in his store window to show that such business has made the appropriate contribution to obtain such symbol or sticker "

COUNTIES—COUNTY JUSTICE—QUALIFICATIONS AND TENURE

JULY 25, 1966

ASSISTANT STATE'S ATTORNEY, PEMBINA COUNTY

1. Whether an unlicensed attorney of the State of North Dakota may circulate petitions and file for the office of County Justice.

The qualifications and term of office of the county justice as set out in section 27-18-02 provide that: "the county justice shall be

licensed to practice law in this state ” Although noting that section 27-18-06 provides for an alternate procedure of appointment by the board of county commissioners when a qualified person is not available or will not accept the position, the opinion concluded that a person, not licensed to practice law in North Dakota is not eligible to run for the office of County Justice.

2. Whether one duly appointed to the office but not a licensed attorney would be required to give up his office in favor of a qualified attorney who wished the job.

If an unqualified person does accept an appointment to the office under the alternate procedure provided by section 27-18-06, this appointment would be for the full term of two years or if an interim appointment, for the remaining portion thereof. The opinion notes that the provisions of section 27-18-06 do not imply otherwise and that any other approach to the problem, would in all likelihood lead only to uncertainty, confusion and a generally unfavorable atmosphere for the administration of the office.

MOTOR VEHICLES—EQUIPMENT—SAFETY CHAINS AND BRAKES ON TRAILERS

AUGUST 9, 1966

**NORTH DAKOTA HIGHWAY PATROL, BISMARCK,
NORTH DAKOTA**

Whether all trailers, with reference to subsection 3 of section 39-21-32, are required to have safety chains or brakes.

Section 39-21-32 (3) requiring trailers and semi-trailers (as defined by section 39-01-01) to be equipped with safety chains or brakes, coupled with section 39-18-04, requiring the same as to mobile homes and house trailers, leads the opinion to conclude that all trailers operating in the highways of this state must be equipped with safety chains or brakes if operated at speeds in excess of fifteen miles per hour

STATE—PUBLIC MONEYS—HIGHWAY FUNDS

AUGUST 11, 1966

**MR. ROBERT VAALER, ATTORNEY
GRAND FORKS, COUNTY DRAINAGE DISTRICT**

Whether or not the expenditure of funds by the State Highway Department for an opening through a highway for drain purposes

pursuant to 61-21-31, would contravene the intent of Article 56 of the constitution of North Dakota.

The intent of Article 56 of the State Constitution is "to prevent any use of the gas revenues for other than highway purposes." Section 61-21-31 provides that the State Highway Department, "shall make necessary openings through such road or highway," when the board of drainage commissioners notifies the department that such are needed.

The opinion, citing *Bergen Township v Nelson County*, 33 N.D. 247, 156 N.W. 559 (1915), concludes that the necessity of such an opening, when properly decided upon by the board of drainage commissioners, cannot be questioned. Further, the presence of the mandatory word, "shall," in section 61-21-31, and the belief that the openings are "clearly for highway purposes," lead to the conclusion that there is no conflict with the intention of Article 56.

PUBLIC SERVICE COMMISSION—POWERS—PENALTIES FOR
NON-COMPLIANCE .

AUGUST 18, 1966

SECRETARY, PUBLIC SERVICE COMMISSION,
BISMARCK, NORTH DAKOTA

Whether the Public Service Commission has the authority to impose monetary penalties upon utilities which violate a provision under Title 49-07 or a commission rule or regulation.

There being no special authorization for such a penalty in either Chapter 49-02 or any other provision of the North Dakota Century Code, the opinion concludes that the Public Service Commission cannot impose criminal monetary penalties upon utilities in violation of Title 49-07 or a commission rule or regulation.

The Commission may compel obedience to its orders by instituting the proper proceedings in a court having jurisdiction over the parties or perhaps by imposing a civil monetary penalty, collection of which must be made by resort to the proper legal proceedings.

TAXATION—EXEMPTIONS FOR DISABLED VETERANS—CONSTRUCTION
AUGUST 19, 1966

STATES ATTORNEY, GRIGGS COUNTY

Whether the real and personal property tax exemption afforded by section 57-02-08 (20) of the North Dakota Century Code is ap-

plicable to the homestead used and owned by the surviving wife.

Under subsection 20 of 57-02-08 of the 1965 supplement, the phrase, "with a service connected disability greater than fifty per cent" is meant to modify both the antecedent phrases; "any other disabled veteran," and a person "who had been retired from the armed forces of the United States." Thus, for either of these two classes to be qualified for the exemption, a service connected disability of fifty per cent or more must be shown.

As is the case with widows of paraplegic disabled veterans, the unmarried widows of either of the other two classes treated in subsection 20 may claim the exemption afforded, provided she can meet the qualifications as to income.

TAXATION—SALES AND USE TAX—PRESERVING OF RECORDS

AUGUST 22, 1966

R. FAY BROWN, REPRESENTATIVE,
27TH LEGISLATIVE DISTRICT

1. Whether the Tax Commissioner can require production of records or proof of deductions as to sales or use tax returns prior to June 30, 1961.

As a result of the 1963 amendment to section 57-39-08, the period required for keeping and preserving sales tax records was increased from a period of two years, to a period of six years. In order to satisfy the provision would require only that records be kept for a six year period beginning two years prior to the amendment of July 1, 1963, and moving forward as time progresses. The same result would obtain as to the use tax, due to the 1963 amendment to section 57-40-08 providing for the preserving of use tax records for a six year period.

2. Whether the re-sale of property repossessed under a conditional sales contract is subject to sales tax, provided the re-sale doesn't result in a greater net realization to the merchant.

The re-sale of repossessed property under a conditional sale contract is a separate transaction and is subject to the tax. Any tax paid in excess of the amount actually received on the purchase price from the defaulting buyer, however, may be adjusted or used for future credit. Also, a conditional sales contract may be treated as a worthless account within the meaning of section 57-39-04 if taxes have been collected on the full purchase price when only a portion of the purchase price has actually been received.

3. Whether the Tax Commissioner may assess penalties when a taxpayer files returns in good faith, claiming transactions as exempt which are later determined to be not exempt and as to which no disallowance is made by the commissioner for a period of years after the filing.

The Tax Commissioner is authorized to assess penalties against retailers failing to file or remit payments. If a delay is excusable, it is likely that the penalty wouldn't apply. It is also noted that any penalty, unless voluntarily paid, must be enforced through the courts. The opinion concludes that "courts would take into account extenuating circumstances and good faith on the part of the retailer in determining whether or not the penalty should apply."

**COUNTIES—OFFICE SPACE—PROVISION FOR WITHIN THE COUNTY SEAT
AUGUST 22, 1966**

STATE'S ATTORNEY, CASS COUNTY

Whether offices for the County Engineer, County Nurse, and County Extension Agent, must be provided within the county seat by virtue of section 11-10-20 of the North Dakota Century Code.

Section 44-04-18 is to be given a broad definition as to which records shall be public records and hence open and accessible for inspection by the public. Under such a broad definition of public records, such non-elected county employees as the County Engineer and County Nurse are officers who have charge of public records. The opinion concludes that these officers must be provided office space within the county seat for this reason.

**STATE—STATE BOARDS AND INSTITUTIONS—DUTY OF HEADS THEREOF TO
MAKE REPORTS**

SEPTEMBER 8, 1966

GOVERNOR WILLIAM L. GUY

1. Whether the list of all persons required to be made under section 44-04-08, as amended, should include every individual employed at any time on either a full or part-time basis during the two year period ended June 30, 1966.

The requirement that a list of all persons employed be set forth

in the annual or biennial report of the department now means that the section is not limited to heads of state institutions and boards, but covers all departments and offices required by other statutes to make reports. The report should include every individual employed at any time during the two year period ended June 30, 1966, whether or not the employment was of a full or part-time nature and whether or not the persons so employed are employed at the end of the period. The opinion concludes that the intent of the requirement is that the published report should indicate every person employed irrespective of duration or time of termination. The published list of persons employed should be limited to those employed during the two year period ending June 30, 1966.

2. Whether the term "emoluments" include such payments as mileage of use of a personal car, and per diem payments for meals and lodging.

The opinion adopts the definition of "emoluments" set out in *State ex rel. Lyons v Guy*, 107 N.W.2d 211 (1961) Under this definition, the opinion concludes that mileage for the use of a personal car, reimbursements of airplane or railroad tickets, per diem payments for meals and lodging, social security payments made by the state as employer, and matching payments made by the employing agency to the State Employee's Retirement Program are not considered as emoluments. The converse is true as to a monthly payment made by the state for medical insurance coverage if this is not reported as salary to the employee.

COUNTIES—COUNTY COMMITTEE—DATE OF MEETINGS

SEPTEMBER 12, 1966

STATE'S ATTORNEY, BURLEIGH COUNTY

Whether the statutory language of section 16-17-10 of the Century Code, as amended, refers to the third Monday after the September election or to the third Monday in September

The language "following the primary election" means only that the county committee shall meet only in those years in which a primary election is held and is not meant to specify which Monday in September the meeting is to be held. As a result, the language "the third Monday in September" is restricted to its ordinary meaning and the county committee will meet on that day in those years in which a primary election is held.

STATE—DIRECTOR OF ACCOUNTS AND PURCHASES—CONTROL OVER RATE
OF EXPENDITURES

SEPTEMBER 19, 1966

DIRECTOR, DEPARTMENT OF ACCOUNTS AND PURCHASES

Whether the Director of Accounts and Purchases may reduce appropriations through the use of an allotment system as set forth in section 54-44.1-12 of the Century Code.

The language of this section seems to give the Director of Accounts and Purchases the sole discretion as to such allotments and sets forth no guidelines or policies. The statute also attempts to delegate a legislative function thus is perhaps in conflict with section 25 of the North Dakota Constitution. In view of these objections, the opinion expresses serious doubt as to the validity of the section and states "that it would be difficult to defend the validity of this section."

HEALTH AND SAFETY—NUISANCE—ABATEMENT BY REMOVAL
OF A BUILDING

SEPTEMBER 12, 1966

ASSISTANT STATE'S ATTORNEY, BOTTINEAU COUNTY

Whether an alleged health nuisance existing with respect to a building may be abated by a summary type removal of the building.

Sections 23-05-04, 05, and 06 of the North Dakota Century Code dealing with abatement of a health nuisance do not authorize removal of buildings but are concerned with matter located on private property. Such matter may be removed and the cost charged against the property if, after notice is served on the owner, he refuses to do so. Removal of buildings, however, requires an action in a court of competent jurisdiction to satisfy the due process requirement. Such an action to compel abatement of the health nuisance may be brought under Chapter 42-02 of the Century Code.

The building alleged to be a health hazard may be quarantined or other similar steps may be taken to protect the public.

AGRICULTURE—DAIRY PRODUCTS—UNFAIR DISCRIMINATION IN SALE

SEPTEMBER 14, 1966

ACTING DAIRY COMMISSIONER, STATE OF NORTH DAKOTA

1. Whether a privately owned store cutting the prices of milk is unfairly discriminating in the sale of farm products as against

other stores within the same city and whether the competitors in other areas of the state can sell milk under the price set by the price cutting store without violating the state discrimination laws.

The prohibition against unfair discrimination in the sale of farm products is set out in section 4-14-04 (Supp. 1965) of the Century Code. The opinion, not considering the questions of price-fixing or restraint of trade, concluded that a single store selling below the prices charged by others would not be in violation of the statute. Further, if the store's competitors having several outlets sold at all their outlets at a lower uniform price, there would be no violation. If, however, the competitors sold at differing prices in each area except as allowed by statute, there would be discrimination and a violation of the statute.

2. Whether the privately owned store could be denied the privilege of purchasing milk from the producer until such time as his prices rise to the same as those charged by the other outlets.

As to this point, the opinion notes that Chapter 4-18 (repealed by S.L. 1963, ch. 86 § 2; 1963, ch. 87 § 56) makes no requirement that dairy and cream stations receive or sell milk to all offerors or that dairies must sell to all members of the general public. As a result, the opinion concludes that the State Dairy Department is not "in a position to either require, forbid, or make recommendations as to whether the individual, one outlet store mentioned, could be denied the privilege of purchasing milk from the creamery until such time as his price is the same as other outlets in the city"

COUNTY COMMISSIONERS—PURCHASE OF DEPRECIATION
INSURANCE

OCTOBER 1, 1966

CHAIRMAN, COUNTY COMMISSIONERS, CASS COUNTY

Whether a county can purchase depreciation insurance which is over and above the insurance provided for by the State Fire and Tornado fund?

Under N.D. Cent. Code ch. 26-24, counties and other political subdivisions are authorized to insure public buildings, their contents and permanent fixtures with the State Fire and Tornado Fund. It is a basic rule of law that political subdivisions "have only such authority as is specifically granted by statute" and powers implied of necessity from such specific grant. As the Legislature has not seen fit to grant to the State Fire and Tornado Fund the right to

issue depreciation insurance, counties and other political subdivisions have no authority to purchase such insurance, under the above basic rule of law

**STATE AUDITING—APPROVAL OF PAYMENT OF EARNED VACATION TIME
AFTER TERMINATION OF EMPLOYMENT**

OCTOBER 6, 1966

SECRETARY, STATE AUDITING BOARD

Whether the payment of earned vacation time to an employee in the month after his employment terminated with one state agency can be approved where said employee went to work for another state agency during said month, and received a full month's salary?

Although N.D. Cent. Code § 54-06-14 (Supp. 1965) sets out some standards regarding sick leave and annual leave, it leaves the details of a specific program at the discretion of the particular department head (employer). In this case, as employer and employee had a standing agreement as to the payment of accrued vacation time, the payment made in the month following termination would be a legal expenditure.

**PARENT AND CHILD—TERMINATION OF PARENTAL RIGHTS—NECESSITY
OF RESIDENCE AND DUTY TO SUPPORT**

OCTOBER 25, 1966

EXECUTIVE DIRECTOR, PUBLIC WELFARE BOARD

Under N.D. Cent. Code § 27-16-36 (Supp. 1965) the parent who wishes to petition the juvenile court for termination of parental rights may do so regardless of whether he (or she) is a resident of the state. The petition may instead be submitted in the county in which the child was born or was found.

Where the parental rights are involuntarily terminated by court order, as provided by N.D. Cent. Code § 27-16-34, and care and custody are given to the state, a charitable agency, or a suitable adult person, the parents still have the primary duty to support. If the parents are unable to support the child, the burden falls on the county of the child's domicile.

If the child is legally adopted, the natural parents (or previous

adoptive parents) are relieved of any further duty to support, but may be liable for accrued and unpaid support costs.

The juvenile court in its termination order may relieve the state or any particular county of financial responsibility for the dependent child. However, if the question of duty to support is determined in judicial proceedings begun for that purpose, the judgment would prevail over the termination order.

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JOHN HENRY NEWTON

Clerk of North Dakota Supreme Court, 1917 - 1967