

CHAPTER 351

RESIGNATIONS; VACANCIES; REMOVALS

351.01 RESIGNATIONS.

HISTORY. R.S. 1851 c. 9 s. 1; P.S. 1858 c. 10 s. 1; G.S. 1866 c. 9 s. 1; G.S. 1878 c. 9 s. 1; G.S. 1894 s. 891; R.L. 1905 s. 2666; G.S. 1913 s. 5722; G.S. 1923 s. 6952; M.S. 1927 s. 6952.

A resignation of public office is not complete and operative unless there be an intention to relinquish a part of the term, accompanied by the act of relinquishment. *State ex-rel v Ladeen*, 104 M 252, 116 NW 486; *Hosford v Board of Education*, 201 M 1, 275 NW 81.

Section 216.01 reads as follows: "Vacancies in the commission shall be filled by the governor until the necessary general election, when a commissioner shall be elected for the unexpired term." The phrase "next general election" means one occurring a sufficient time after the vacancy to give the notice required by law that the vacant office is to be filled at the election. *State ex rel v Atwood*, 202 M 50, 277 NW 357.

A member of the legislature has the right to resign and file his resignation with the governor, but he is still prohibited by the constitution from holding any office during the time for which he was elected. 1942 OAG 292, Aug. 19, 1942 (280-D).

351.02 VACANCIES.

HISTORY. R.S. 1851 c. 9 s. 2; P.S. 1858 c. 10 s. 2; G.S. 1866 c. 9 s. 2; 1869 c. 81 s. 1; G.S. 1878 c. 9 s. 2; G.S. 1894 s. 892; R.L. 1905 s. 2667; G.S. 1913 s. 5723; G.S. 1923 s. 6953; M.S. 1927 s. 6953.

The board of county commissioners, after a federal census, may upon ascertaining the result, proceed to redistrict their county as to commissioner districts, without any formal or official announcement or certification by the census bureau. Such redistricting is merely prospective and a person elected at the general election in November for a term to commence the following January is not disqualified by reason of the fact that by a redistricting made in December, the town in which he resided was included in a district of a different number than that for which he was elected. *Norwood v Holden*, 45 M 313, 47 NW 971.

The term of a clerk of the district court is limited by the constitution to four years and he is not empowered thereafter to hold the office until his successor is elected and qualified. A prospective appointment to fill a vacancy sure to occur in a public office made by an officer who, or a body which, is empowered to fill the vacancy when it arises is, in the absence of a law forbidding it, a valid appointment. *State ex rel v O'Leary*, 64 M 207, 66 NW 264.

The bond of a public official having a definite term of office is for such term and the sureties have no power to withdraw therefrom until expiration of term. 1936 OAG 50, Feb. 21, 1936 (469b-5).

Where at the end of a two-year term the mayor reappoints the chief-of-police and the council refuses the reappointment or to pay such officer, such officer holds over until successor is appointed and is entitled to compensation therefor. OAG Jan. 31, 1938 (785d).

Restatement of conflict of laws as to domicile and Minnesota decisions compared. 15 MLR 668.

(1) Ellsbury was elected register of deeds for Winona county for the regular term of two years commencing January 1, 1867. He held the office until March 11, 1869. At the election in November, 1868, Godard was elected but died in December, 1868, without qualifying. On March 11, 1869, the county commissioners

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appointed Beeman as register. At the annual election in November, 1869, Loring received a majority of the votes cast for the office. Held, that Godard not being in possession was not an incumbent and his death did not create a vacancy; Ellsworth was entitled to hold the office until January 1, 1871; the election in November, 1869, was a nullity; appointment by the county commissioners was for the unexpired term ending January 1, 1871. *State ex rel v Benedict*, 15 M 198 (153).

(2) Where two offices are incompatible, the acceptance of the second operates as resignation of the first. OAG March 14, 1939 (358f).

Mere election to a second incompatible office without having qualified, does not vacate the prior office. OAG Aug. 10, 1939 (358e-6).

Where a judge, on September 30, 1936, presented to the governor his petition for retirement and requested that retirement if granted be made effective prior to November 15, 1936, and the governor accepted the resignation and made an order directing retirement, no vacancy existed until November 15, which the governor could fill by appointment and no new judge was elected at the general election held on November 3. *State v Holm*, 202 M 500, 279 NW 218.

Necessity of acceptance of resignations. 23 MLR 245.

(4) Incompatibility of offices 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 whether the functions of the two are inherently inconsistent and repugnant. The county commissioners have no power to remove county superintendent of schools; they can only fill the office after it has been vacated in proper judicial proceedings or by act of incumbent. *State ex rel v Hays*, 105 M 399, 117 NW 615.

Ruth Peterson was elected county treasurer and qualified. During her term she married a resident of the state of North Dakota where she and her husband maintain a home. She devoted part of her time to the office and conducted it largely through a deputy. In the event the county board finds there is actually a vacancy they may by resolution declare the office vacant and appoint a successor, but if the incumbent can prove that she has not in fact changed her residence, the action of the county board would be null. 1938 OAG 151, Aug. 30, 1937 (450a-15).

If a notary public leaves Minnesota with the intention of ceasing to be an inhabitant of the state, or leaves the county for which he was appointed with the intention of ceasing to be an inhabitant thereof, his office is vacant, and if he again becomes a citizen or resident he must be reappointed; if, however, he is temporarily away from his residence with no intention of ceasing to be an inhabitant and does not acquire a domicile elsewhere, absence from the state or county will not alone create a vacancy. 1940 OAG 290, March 24, 1939 (320a).

Acceptance of a federal appointment in another city creates a vacancy in the office if the officer has in fact ceased to be an inhabitant of his city. OAG Oct. 17, 1935 (266a-12).

A civil service rule requiring the chief-of-police to be a resident of the city is a valid rule. OAG June 25, 1936 (785b-3).

The office of township clerk became vacant when the clerk moved into a village located within the township, the village and the town being separated for election and assessment purposes. OAG March 1, 1938 (436m).

The office of alderman elected for a particular ward becomes vacant upon his removal to another ward. OAG Feb. 11, 1939 (63a-11).

A member of the county light, power, and building commission of the city of New Prague must be an inhabitant and resident of the city. 1934 OAG 151, Feb. 2, 1934 (63a-1).

(5) In order to render defamatory words acceptable in themselves when spoken in reference to the official character or action of a person holding office of profit, it is not necessary that they should charge a crime; it is sufficient if they charge incapacity or corruption in the officer. *Gove v Blethen*, 21 M 8.

Acts and conduct in opposition to the policy of the federal government in entering into the war with Germany, having no relation to the official duties of a judge of probate, furnish no sufficient legal basis for an order by the governor

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of the state removing an incumbent of that office. *State ex rel v Burnquist*, 141 M 308, 170 NW 201, 609.

Conviction of crime vacates the office of notary public, and restoration of civil rights does not restore office. OAG Dec. 13, 1934 (320j-633).

There is no statutory authority or power for the removal of an elected village officer except upon conviction of a felony or infamy involving a violation of such officer's official oath. 1936 OAG 50, Feb. 21, 1936 (469b-5).

Where an official issued certificates for wolf bounties on fox pelts he is guilty of an offense involving violation of official oath and office may be declared vacant and the state may recover the sums of money of which it has been defrauded from those persons participating in such fraudulent conduct and against whom proof is available. 1938 OAG 93, March 17, 1938 (47f).

Whether the conviction of a town clerk of a crime vacates the office depends upon the kind of crime committed. His conviction of any infamous crime or of any offense involving the violation of official oath would vacate the office. 1940 OAG 208, Dec. 2, 1940 (475g).

There is no statutory authority for the removal of the clerk of a school district, but the office becomes vacant if he has in fact been found guilty of malfeasance in office. 1940 OAG 288, Jan. 22, 1940 (213g).

A public officer, on conviction of violation of federal liquor laws, forfeits his office. OAG Feb. 10, 1930.

The term "infamous crime" would not apply to a conviction of a misdemeanor such as illegal sale of liquor. OAG Aug. 31, 1934 (61f).

(6) Ring was elected and qualified as county treasurer for term commencing March 1, 1878. In November 1879, he was reelected to the office for a two-year term to commence March 1, 1880, but he did not qualify on or before January 15, 1880, as required by statute. He continued to hold office until June 21, 1880. The office became vacant since Ring was not entitled to administer it, and it became the duty of the county board when Ring did not requalify by the 15th of January, to appoint a person to office for a period to commence March 1, 1880. *County of Scott v Ring*, 29 M 398, 13 NW 181.

A person elected to the office of clerk of the common school district is required to file written acceptance of office within ten days after the election and notice thereof, but he need not take and file his oath of office within said ten-day period. If no action has been taken looking toward filling the office by appointment or election of another person, it is sufficient if he takes and files such oath within a reasonable time after the election. *State ex rel v Stratte*, 83 M 194, 86 NW 20.

Bond covering shortages of school district treasurer during term and "until successor is elected and qualified" was not in force on date of qualification of himself as successor where term had expired more than three months previous. *American Surety Co. v Independent School District*, 53 F(2d) 178.

Where a village attorney of the village of Proctor, drawing a salary of \$100.00 per year, changed his residence to Duluth, the village had authority to employ an attorney who was not a resident of the village on either per diem or monthly basis to handle specific assignments of work. 1936 OAG 41, Sept. 26, 1935 (469b-1).

If the newly elected president of the village council indicates an intention not to qualify or if he fails to qualify within a reasonable time, it necessarily follows that a vacancy exists in said office which should be filled by appointment by the village council. The old president of the village council will continue to hold over until such appointee qualifies. 1938 OAG 55, Jan. 13, 1937 (471m).

The failure to take the oath of office or otherwise qualify within a time specified by law does not ipso facto create a vacancy which will prevent an official from qualifying thereafter, if it is done before any steps are taken to declare a vacancy. 1938 OAG 58, Feb. 18, 1937 (456g).

A notary public is qualified only for the term for which he was originally appointed and commissioned, and the mere fact that the bond is for a longer term does not legally qualify the notary. 1938 OAG 319, March 15, 1937 (320b).

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Vacancy in the office of justice of the peace of the city of Wayzata is to be filled by appointment by the governor. OAG April 20, 1934 (266a-12).

The person receiving the next highest number of votes for justice of the peace is not elected to the office because the person who did receive the highest number failed to qualify. OAG Dec. 10, 1935 (266a-5).

The incumbent village assessor was defeated and the person elected declined to qualify. The council must fill the vacancy by appointment. OAG Jan. 20, 1945 (12b-5).

(7) A person was duly elected to the office of county superintendent of schools. The opposing candidate, being the incumbent of the office, instituted a contest on the ground that the successful candidate had violated the corrupt practices act. The contestant made no claim of having been elected. Judgment was for contestee in the district court. The contestant surrendered the office, the contestee qualified and assumed its duties. Upon the contestant's appeal judgment of ouster was directed to be entered against contestee. Thereupon, he resigned and contestant was appointed to fill the vacancy. A vacancy existed which authorized the appointment. State ex rel v Billberg, 131 M 1, 154 NW 442; State ex rel v Windom, 131 M 407, 155 NW 629.

The constitution provides that the office of the clerk of district court is elective, the term is four years, and it commences and terminates on the first Monday in January, and upon its termination there is a vacancy, and no right in the incumbent to hold over. The term cannot be extended by the legislature. State ex rel v Berg, 132 M 426, 157 NW 652.

Where a village recorder resigned shortly before the regular election and a trustee of the village was appointed to perform the duties of recorder until election, and he took over those duties with the understanding that he need not vacate his office as trustee, and he did not take the oath of office as recorder or accept compensation, the court rightfully denied a petition to file an information in the nature of a quo warranto on the ground that the respondent forfeited his office as trustee. State v Ingelbretson, 201 M 222, 275 NW 686.

Power to fill a vacancy does not include power to declare one. The only guide to determine under what circumstances the governor may appoint a judge to fill a vacancy is found in Minnesota Constitution, Article 6, Section 10. State v Holm, 202 M 500, 279 NW 218.

Removal from public office. 20 MLR 730.

(8) An officer who was officially reelected died between election and the end of the term. A vacancy existed at once to be filled by the commissioners and on the first Monday in the succeeding January a vacancy again existed, for the term for which the deceased was elected, which must also be filled by the commissioners. 1940 OAG 209, April 11, 1939 (373a-4).

On the death of a newly elected councilman of the city of St. Paul before the term of office began, there was a vacancy to be filled by the council and the candidate at the election who had received the second highest number of votes did not automatically succeed to the office. OAG April 14, 1939 (63a-1).

A person is a de facto officer even when illegally holding an incompatible office. OAG Aug. 16, 1944 (358f).

Residence and removal from the political subdivision is a question of fact. OAG Jan. 24, 1944 (471h); OAG March 22, 1944 (12c-4).

The school cannot keep the school treasurer in office after he removes from the district but the treasurer's bond remains in force. OAG April 3, 1944 (768N).

351.03 REMOVAL BY GOVERNOR.

HISTORY. R.S. 1851 c. 9 ss. 4, 5; P.S. 1858 c. 10 ss. 4, 5; G.S. 1866 c. 9 s. 3; 1868 c. 45 s. 1; G.S. 1878 c. 9 s. 3; 1881 c. 21 s. 1; G.S. 1894 s. 893; R.L. 1905 s. 2668; 1913 c. 462 s. 1; G.S. 1913 s. 5724; G.S. 1923 s. 6954; M.S. 1927 s. 6954.

Where the libel charged culpable neglect by a public officer of official duty, evidence, in mitigation of damages, that it was the general opinion and common talk of the community that the officer was guilty of such neglect of duty, unless it had come to the knowledge of and was believed in and relied on by defendant

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in making the publication, is not admissible. *Larrabee v Minnesota Tribune*, 36 M 141, 30 NW 462.

The governor has authority to remove a sheriff from office whenever it appears to him by competent evidence that such officer has been guilty of malfeasance or nonfeasance in the performance of his official duty; and power to suspend an officer during investigation is not arbitrary but involves the exercise of good judgment by the governor to be exercised when reasonable grounds shall indicate the necessity therefor. *State ex rel v Megaarden*, 85 M 41, 88 NW 412.

The county commissioners have no power to remove the county superintendent of schools. They can only fill the office after it has been vacated in proper judicial proceedings or by the act of the incumbent. *State ex rel v Hays*, 105 M 399, 117 NW 615.

Certiorari is the proper remedy to review the decision of the governor in removing a county officer from office and in the instant case the decision of the governor is sustained. *State ex rel v Eberhart*, 116 M 313, 133 NW 857. In re *Removal of William M. Nash*, 147 M 383, 181 NW 570.

To warrant the removal of elected public officers under this section the misconduct complained of must have some connection with or relation to the performance of the officer's official duties; and conduct opposing the policy of the federal government in entering into war with Germany having no relation to the duties of a judge of probate furnished no legal basis for removal. *State ex rel v Burnquist*, 141 M 308, 170 NW 201, 609.

Judges of probate are among those for whose removal Minnesota Constitution, Article 13, Sections 1 and 2, gives the legislature authority to provide, and under section 351.03 the governor has power to remove judges of probate for malfeasance; and as incident to power of removal the governor has power of suspension pending the hearing. *Martin v County of Dodd*, 146 M 129, 178 NW 167.

Section 351.03 embraces officers who collect, receive or have the custody of money belonging to the state or to a county, but not those who have custody only of money belonging to a city. *State ex rel v Essling*, 157 M 15, 195 NW 539.

The duties imposed upon the governor by sections 351.03 and 351.04 are purely ministerial and are in no way mandatory, and the governor cannot be coerced by mandamus. *State ex rel v Christianson*, 179 M 337, 229 NW 313.

By constitutional authority the legislature has placed the power to remove justices of the peace in the governor. That power is exclusive as against the attempted home rule charter to give a similar power to the city council. *State ex rel v Hutchinson*, 206 M 446, 288 NW 845.

A sheriff's official duty entails alertness and initiative to enforce the laws and as chief peace officer of his community he is responsible both by common and statutory law to conserve peace and good order. This official either carelessly or intentionally failed to exercise responsible diligence in performance of his duties and was properly removed from office. *Removal of Mesenbrink*, 211 M 114, 300 NW 398.

Within the legislative field lies the power to remove public officers, whether elective or not, or to authorize their removal, without notice or hearing, subject only to constitutional limitations as to the particular office. The corporation counsel of the city of St. Paul was legally removed from office upon a vote of five-seventh of the city council, without charges filed or hearing had. *State ex rel v Oehler*, 218 M 290, 16 NW(2d) 765.

Conviction of a crime is not essential in order that the governor may exercise powers of removal, nor is it a sufficient offense that the accused officer has already been accused in previous criminal proceedings on the same charge. *OAG March 17, 1938 (47f)*.

In a proceeding against a sheriff, the witnesses may be brought in under subpoenas issued by the clerk of the court of the sheriff's county. *OAG Jan. 22, 1944 (144b-24)*.

The effect of an unconstitutional statute in the law of public officers; effect on official status. 13 MLR 439.

Removal from public office in Minnesota. 20 MLR 721.

Governor's constitutional powers of appointment and removal. 22 MLR 451.

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Evidence before administrative tribunals. 23 MLR 68.

Power of the governor to remove a municipal officer where a home rule charter provides for recall. 8 MLR 70.

Liability of governor to mandamus. 14 MLR 572.

Rule 1 of rules governing attorneys in the practice of their profession. 16 MLR 273.

Special legislation in Minnesota. 16 MLR 675.

Tort liability of administrative officers. 21 MLR 275.

Factors controlling determination of whether an office is a county or a state office. 23 MLR 535.

351.04 SPECIAL COMMISSIONER TO TAKE TESTIMONY.

HISTORY. 1872 c. 37 ss. 1, 2, 3; G.S. 1878 c. 9 ss. 4, 5, 6; G.S. 1894 ss. 894 to 896; R.L. 1905 s. 2669; G.S. 1913 s. 5725; G.S. 1923 s. 6955; M.S. 1927 s. 6955.

The only authority providing for compensation of commissioners, appointed by the governor, who hear and report evidence in proceedings for removal of county officers, is \$5.00 per day to be paid by the county whose officer is investigated; and the governor has no authority to enlarge the fee except from his own contingent fund. He cannot impose an additional expense upon the county for necessary stenographic service. *Hillman v County Board*, 84 M 130, 86 NW 890; *State ex rel v Megaarden*, 85 M 41, 88 NW 412; *State ex rel v Eberhard*, 116 M 313, 133 NW 857; in re *Removal of William M. Nash*, 147 M 383, 181 NW 570; *State ex rel v Christianson*, 179 M 337, 227 NW 313.

In proceedings to remove a sheriff, if the governor or his agent the commissioner orders subpoenas they must be paid from the governor's contingent fund, otherwise they must be paid by the party making the complaint. The cost of the subpoenas are not chargeable to the county. OAG Dec. 26, 1944 (144b-24).

351.05 VACANCY DURING RECESS OF LEGISLATURE.

HISTORY. R.S. 1851 c. 9 ss. 6, 8; P.S. 1858 c. 10 ss. 6, 8; G.S. 1866 c. 9 ss. 4, 5; G.S. 1878 c. 9, ss. 9, 10; G.S. 1894 ss. 899, 900; R.L. 1905 s. 2670; G.S. 1913 s. 5726; G.S. 1923 s. 6956; M.S. 1927 6956.

351.06 APPOINTMENT; CONTINUANCE OF TERM; IMPEACHMENT.

HISTORY. G.S. 1866 c. 9 s. 6; 1873 c. 30 s. 1; G.S. 1878 c. 9 ss. 11, 12; 1879 c. 53 s. 1; G.S. 1894 ss. 901, 902; R.L. 1905 s. 2671; G.S. 1913 s. 5727; G.S. 1923 s. 6957; M.S. 1927 s. 6957.

The county commissioners in the instant case were authorized to appoint a register of deeds. *State ex rel v Benedict*, 15 M 198 (153).

The county commissioners in the instant case were authorized to appoint a county treasurer. *County of Scott v Ring*, 29 M 398, 13 NW 181.

An appointee to fill a vacancy on the county board in a county not newly organized or in which the number of commissioners is not increased, holds only until the next election occurring after there is sufficient time to give the notice prescribed by law and until a successor is elected and qualified. *Prenevost v Delorme*, 129 M 359, 152 NW 758; *State ex rel v Windom*, 131 M 401, 155 NW 629.

The term of office of the county officer appointed when a new county is created continues until the first Monday in January following the next general election at which county officers are elected in all the counties of the state. *Imsdahl v Weeks*, 158 M 512, 197 NW 973.

No lawful ballots can be cast for the office of sheriff at general election unless the term of incumbent, whether elected or appointed, expires on the first Monday of January following such election. *State ex rel v Borgen*. 189 M 216, 248 NW 744, 249 NW 183.

"Next general election" means one occurring after there is sufficient time after the vacancy to give the notice required by law that the vacant office is to be filled at the election. *State ex rel v Atwood*, 202 M 50, 277 NW 357.

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There must be a vacancy before an election to fill it can be ordered and an election to fill an anticipated vacancy may not be validly held unless there be constitutional authority for it. *State ex rel v Holm*, 202 M 500, 279 NW 218.

Cases where a vacancy occurs and where the office may be filled temporarily, a successor must be elected at the next general election. OAG Sept. 12, 1944 (126h); OAG Oct. 17, 1944 (144a-5).

351.07 HABITUAL DRUNKENNESS.

HISTORY. 1878 c. 74 s. 1; G.S. 1878 c. 9 s. 13; G.S. 1894 s. 903; R.L. 1905 s. 2672; G.S. 1913 s. 5728; G.S. 1923 s. 6958; M.S. 1927 s. 6958.

351.08 SUSPENSION OF COUNTY TREASURER; TREASURER AD INTERIM.

HISTORY. 1881 c. 108 ss. 1, 2; G.S. 1878 Vol. 2 (1888 Supp.) c. 9 ss. 14, 15; G.S. 1894 ss. 904, 905; R.L. 1905 s. 2673; G.S. 1913 s. 5729; G.S. 1923 s. 6959; M.S. 1927 s. 6959.

Under Minnesota Constitution, Article 13, Section 2, legislature has authority to vest the power of removing inferior officers in the governor. *State ex rel v Peterson*, 50 M 239, 52 NW 655; *State ex rel v Dart*, 57 M 261, 59 NW 190.

It is not a prerequisite to an action on a county treasurer's bond against the sureties, that leave should be obtained of court to commence suit thereon. *Board v Smith*, 22 M 97; *County v Sheehan*, 42 M 57, 43 NW 690; *Board v Bongard*, 82 M 431, 85 NW 214.

351.09 CHARGES; COMMISSIONER; WITNESSES.

HISTORY. 1881 c. 108 ss. 3 to 7; G.S. 1878 Vol. 2 (1888 Supp.) c. 9 ss. 16 to 20; G.S. 1894 ss. 906 to 910; R.L. 1905 s. 2674; G.S. 1913 s. 5730; G.S. 1923 s. 6960; M.S. 1927 s. 6960.

351.10 HEARING; DECISION; DEMAND, WHEN MADE.

HISTORY. 1881 c. 108 ss. 8, 9; G.S. 1878 Vol. 2 (1888 Supp.) c. 9 ss. 21, 22; G. S. 1894 ss. 911, 912; R.L. 1905 s. 2675; G.S. 1913 s. 5731; G.S. 1923 s. 6961; M.S. 1927 s. 6961.

351.11 FEES OF COMMISSIONERS AND WITNESSES; HOW PAID.

HISTORY. 1872 c. 37 ss. 4, 5; 1881 c. 108 s. 10; G.S. 1878 c. 9 ss. 7, 8; G.S. 1878 Vol. 2 (1888 Supp.) c. 9 s. 23; G.S. 1894 ss. 897, 898, 913; 1903 c. 282; R.L. 1905 s. 2676; G.S. 1913 s. 5732; G.S. 1923 s. 6962; M.S. 1927 s. 6962.

Relating to payment of fees of commissioners. *Hillman v Board*, 84 M 130, 86 NW 190, and *State v Megaarden*, 85 M 41, 88 NW 412.

351.21 PAY TO EMPLOYEE ANNUAL LEAVE ALLOWANCE.

HISTORY. 1945 c. 492 s. 1.