

CHAPTER 388

COUNTY ATTORNEY

388.01 ELECTION; TERM; BOND.

HISTORY. R.S. 1851 c. 8 art. 5 s. 1; P.S. 1858 c. 7 s. 66; 1860 c. 5 s. 1; G.S. 1866 c. 8 s. 180; 1876 c. 71 s. 1; G.S. 1878 c. 8 s. 210; 1887 c. 68; G.S. 1894 s. 801; R.L. 1905 s. 563; G.S. 1913 s. 964; G.S. 1923 s. 924; M.S. 1927 s. 924; 1943 c. 355 s. 1.

The incumbent of an office, the term of which is for a specified period "and until his successor is elected and qualified", is entitled to retain the office after the lapse of the specified period in the event of the election of an ineligible person to succeed; and the incumbent has such an interest in such election that he may invoke a decision as to its legality. *Taylor v Sullivan*, 45 M 309, 47 NW 802.

The constitution, making persons of foreign birth who have not declared their intentions to become citizens of the United States ineligible to any elective office, disqualifies such persons from being legally elected, and the declaration of their intentions to become citizens made after being elected does not remove the disqualification. *Taylor v Sullivan*, 45 M 309, 47 NW 802.

Under a statute creating an office, fixing the term, and making no provision for holding over until a successor is elected and qualified, the term is definite and a vacancy exists upon its expiration. *Smallwood v Windom*, 131 M 401, 155 NW 629.

An incumbent of an office failing of reelection may abandon his right, if such is given by statute, to hold over until his successor is elected and qualified; but an incumbent claiming such right, willing to perform the duties of the office, making his willingness known, may peaceably surrender possession to one having a certificate of election without thereby working an abandonment. *Smallwood v Windom*, 131 M 401, 155 NW 629.

County board cannot require the county attorney to furnish corporate surety bonds and cannot arbitrarily refuse to accept a proper personal bond when tendered. OAG March 2, 1935 (121a-3).

388.02 JUSTICE OF THE PEACE INELIGIBLE.

HISTORY. 1874 c. 87 s. 1; G.S. 1878 c. 8 s. 211; G.S. 1894 s. 802; R.L. 1905 s. 564; G.S. 1913 s. 965; G.S. 1923 s. 925; M.S. 1927 s. 925.

This section does not apply to a municipal judge. OAG Sept. 27, 1938 (184).

388.04 COUNTY ATTORNEY AND VILLAGE ATTORNEY NOT INCOMPATIBLE.

HISTORY. 1935 c. 14; M. Supp. s. 925-2.

388.05 DUTIES.

HISTORY. G.S. 1866 c. 8 s. 181; G.S. 1878 c. 8 s. 212; G.S. 1894 s. 803; R.L. 1905 s. 565; G.S. 1913 s. 966; G.S. 1923 s. 926; M.S. 1927 s. 926.

It is the duty of the county attorney to attend any suit in which the county is a party whether within or without the county without any extra compensation. *County Commissioners v Robinson*, 16 M 381 (340).

It is the duty of the county attorney when called upon to do so to attend preliminary examination of offenders. *Day v Putnam*, 16 M 408 (374).

Notice of appeal to the supreme court from an order of a district court refusing to set aside a tax judgment, must be served upon the county attorney. *Board v Sutton*, 23 M 299.

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Where a prisoner was under arrest, the approval of his bond and direction to the sheriff to release the prisoner were beyond the county attorney's official authority; and if the officer with a corrupt motive acts beyond his lawful authority assuming to act officially, he is guilty of malfeasance in office. *State v Wedge*, 24 M 150.

The attorney general has authority to institute in a district court a civil suit in the name of the state when the interest of the state so requires; and by coming in and joining with the county attorney in a supplemental brief and filing in the trial court his appearance, the action may be considered as if originally instituted on relation of the attorney general. *State ex rel v O'Neil*, 205 M 366, 286 NW 316.

A new trial granted, because among other things of prejudicial remarks by the county attorney. *State v Schobert*, 218 M 1, 15 NW(2d) 588.

The county board may require the opinion of the county attorney as to the title of real estate mortgages, on which are being given as security depositories of county moneys; and the county attorney is not entitled to additional compensation for examining such abstracts. 1934 OAG 221, March 22, 1933 (140a-13).

The county attorney shall represent all county officials when actions are brought against them in their official capacity, but not where the sheriff is sued in his individual capacity. 1934 OAG 515, March 3, 1933 (358a-3).

A county attorney has not the duty of prosecuting misdemeanors, except where the law specifically states that the county attorney shall do so. In practice, many county attorneys do prosecute misdemeanors in order to save their counties certain expense and trouble, but they do it as a matter of public duty rather than legal duty. 1934 OAG 603, Oct. 31, 1933 (217b-7).

The offices of county attorney and school board member are not incompatible; the same person may hold both offices. This reverses previous opinions. 1940 OAG 180, June 13, 1939 (358a-1).

It is not a part of the county attorney's duties to advise towns with reference to legal matters. If he does so he may make a charge therefore. OAG Dec. 22, 1933.

Offices of the county attorney and special assistant United States attorney to assist in securing flowage easements are not incompatible. OAG Feb. 7, 1934.

Duty of determining whether a criminal prosecution should be commenced rests upon the county attorney and, if conscientiously and fairly made, is not subject to review either by the attorney general or any other office. OAG April 17, 1937 (605b-33).

It is the duty of the county attorney to assist county board in proceedings to refinance bonds of the county, and he should give his opinion and advise without extra compensation. OAG April 25, 1938 (37a).

The county attorney is not required to act as police officer or detective or to institute criminal proceedings in any case unless evidence or information reasonably sufficient to justify action is brought to his attention, either by an officer or by a private individual. 1942 OAG 189, Nov. 10, 1942 (121B-7).

See as to acts inconsistent with his duty as county attorney. OAG Jan. 14, 1944 (521p-4); OAG Feb. 4, 1944 (121b); OAG Feb. 14, 1944 (121a-7); OAG Feb. 17, 1944 (989a-6); OAG June 12, 1944 (121b-20).

The county attorney is not authorized to settle or compromise a personal property tax judgment. OAG Jan. 17, 1945 (421a-8).

388.06 REGISTER OF CRIMINAL ACTIONS.

HISTORY. 1862 c. 30 ss. 1 to 3; G.S. 1866 c. 8 s. 185; G.S. 1878 c. 8 s. 216; 1885 c. 191 ss. 1, 2; G.S. 1878 Vol. 2 (1888 Supp.) c. 8 ss. 212a, 212b; G.S. 1894 ss. 804, 805; R.L. 1905 s. 566; G.S. 1913 s. 967; G.S. 1923 s. 927; M.S. 1927 s. 927.

388.07 TRANSCRIPT TO ATTORNEY GENERAL.

HISTORY. 1885 c. 191 s. 6; G.S. 1878 Vol. 2 (1888 Supp.) c. 8 s. 212f; G.S. 1894 s. 809; R.L. 1905 s. 567; G.S. 1913 s. 968; G.S. 1923 s. 928; M.S. 1927 s. 928.

The transcript to the attorney general need not include infractions of municipal ordinances. OAG Feb. 15, 1944.

388.08 NOT TO RECEIVE FEES; PROHIBITIONS; MISDEMEANOR.

HISTORY. R.S. 1851 c. 8 art. 5 s. 5; P.S. 1858 c. 7 s. 70; 1860 c. 5 s. 3; G.S. 1866 c. 8 s. 182; Penal Code 124, 502; G.S. 1878 c. 8 s. 213; G.S. 1894 ss. 810, 6810; R.L. 1905 s. 568; G.S. 1913 s. 969; G.S. 1923 s. 929; M.S. 1927 s. 929.

A county attorney performing services for the county in proceedings under the drainage laws in the establishment of a county ditch is not entitled to compensation therefor unless his services were rendered in protection of some special interest of the county; and the county has no special interest in the question of damages and benefits to be paid by or to the owners of affected property and no such interest to protect on an appeal to the district court from the award. *Dosland v County*, 136 M 140, 161 NW 382.

While the offices of county attorney and city attorney are in general incompatible, there are special instances where the county attorney may be employed to represent the city in a certain selected case. 1940 OAG 178, July 27, 1939 (358a-1).

Rules governing attorneys in the practice of their profession. 16 MLR 273.

388.09 OTHER ATTORNEY EMPLOYED.

HISTORY. R.S. 1851 c. 8 art. 5 s. 6; P.S. 1858 c. 7 s. 71; 1860 c. 5 s. 4; G.S. 1866 c. 8 s. 183; 1875 c. 29 s. 1; G.S. 1878 c. 8 s. 213a; G.S. 1894 s. 811; 1895 c. 282; R.L. 1905 s. 569; G.S. 1913 s. 970; G.S. 1923 s. 930; M.S. 1927 s. 930.

If the county attorney, after an informal conference with the board in session undertakes to employ an attorney to assist him in the prosecution of a criminal case, the county board may ratify his action and thus bind the county. The allowance of the bill for services of the attorney so chosen constitutes ratification. *Peterson v County*, 133 M 343, 158 NW 605.

This section does not authorize the county board to supersede the regular county attorney by the employment of another attorney to make such investigation and institute such actions on behalf of the county as he may deem fit. Such employment may only be authorized in specific matters, where it appears to the board that the regular county attorney cannot, for some good reason, represent the county; and where taxpayers sought to restrain the county board from paying such attorney's bill, the burden was upon the plaintiffs to prove that no occasion existed for employing the outside attorney on the specific work said attorney was engaged to do. *Keiver v County*, 141 M 64, 169 NW 254.

388.10 COUNTY ATTORNEYS MAY APPOINT ASSISTANTS IN CERTAIN CASES.

HISTORY. 1921 c. 444; G.S. 1923 s. 930½; 1925 c. 15 s. 1; M.S. 1927 s. 930½; 1941 c. 96.

In the absence of statute, county board has no legal authority to provide the county attorney with clerk hire. OAG July 20, 1936 (121a-4).

The appointment of the chief deputy registrar of titles of Hennepin county is legal. This modifies previous opinions. 1934 OAG 256, March 20, 1933 (104b-9).

388.103 ASSISTANT COUNTY ATTORNEYS AND DEPUTY SHERIFFS IN CERTAIN CASES.

HISTORY. 1941 c. 347.

388.105 CLERK HIRE FOR COUNTY ATTORNEYS IN CERTAIN COUNTIES.

HISTORY. 1941 c. 483.

388.11 LAW PARTNER NOT TO DEFEND.

HISTORY. 1879 c. 88 s. 1; G.S. 1878 Vol. 2 (1888 Supp.) c. 8 s. 213f; G.S. 1894 s. 812; R.L. 1905 s. 570; G.S. 1913 s. 971; G.S. 1923 s. 931; M.S. 1927 s. 931.

388.12 ATTORNEY TO ASSIST.

HISTORY. 1876 c. 66 s. 1; G.S. 1878 c. 8 s. 214; G.S. 1894 s. 813; R.L. 1905 s. 571; G.S. 1913 s. 972; G.S. 1923 s. 932; M.S. 1927 s. 932.

A county attorney is a quasi officer of the district court and such court is exercising a proper function when it fixes and determines the salary to be paid such officer upon appeal from the action of the county board, as authorized by General Statutes 1878, Chapter 7, Section 3, as amended by Laws 1885, Chapter 17, Section 1. *Rockwell v County*, 47 M 219, 49 NW 690.

Where in the prosecution and trial of a defendant having committed a crime, the county attorney was present at the term when such trial was had, but took no part in such trial, and did not offer or attempt to do so and did not object to another attorney being duly appointed by the court, such appointment was valid and prosecution by the attorney authorized by law. *State v Borgstrom*, 69 M 508, 72 NW 799, 975.

A sheriff has no authority to employ counsel to conduct litigation in behalf of his county. Such authority rests exclusively with the county board. Such unauthorized employment by the sheriff can be ratified only by formal action of the county board. *True v Board*, 83 M 293, 86 NW 102.

Where a judge of the district court upon due hearing determines that a county attorney is disqualified from taking part in the prosecution of a person accused of crime and directs another attorney of the court to conduct the case, the substitute is entitled to be compensated by the county. *Matthews v Board*, 90 M 348, 97 NW 101.

388.13 RENDER ACCOUNT; PAY OVER MONEYS.

HISTORY. R.S. 1851 c. 8 art. 5 ss. 7, 8; P.S. 1858 c. 7 ss. 72, 73; 1860 c. 5 ss. 5, 6; G.S. 1866 c. 8 ss. 184, 186; G.S. 1878 c. 8 ss. 215, 217; G.S. 1894 ss. 814, 815; R.L. 1905 s. 572; G.S. 1913 s. 973; G.S. 1923 s. 933; M.S. 1927 s. 933.

It is necessary for the county attorney to include in his report and turn over to the county treasurer, any fees collected by virtue of section 272.15. 1938 OAG 133, Jan. 22, 1937 (779m).

388.14 CONTINGENT FUND; EXPENSES.

HISTORY. 1903 cc. 204, 264; R.L. 1905 s. 574; 1909 c. 233 s. 1; 1917 c. 307; G.S. 1913 s. 975; G.S. 1923 s. 934; M.S. 1927 s. 934.

The necessary expenses incurred by a county attorney in attending the annual and semiannual meetings of the county attorney association constitute a legal claim against the county attorney's contingent fund. 1938 OAG 134, July 29, 1938 (121a-8).

Contingent fund; clerk hire in the absence of statute; certain expenses. 1940 OAG 190, July 28, 1939 (121a-4).

The county attorney using his own motor car is entitled to actual expenses which may include gas and oil, but the allowance may not be based on the rate of five cents or any other amount per mile. OAG Feb. 17, 1939 (121a-8).

It is possible to use part of the contingent fund for the purpose of procuring evidence in criminal matters, subject to the approval of the district court judge. OAG Jan. 17, 1939 (390a-1).

In the absence of express statute the county board has no legal authority to provide the county attorney with clerk hire. OAG July 20, 1936 (121a-4).

The traveling expenses of out-of-state witnesses may be paid from the contingent fund of the county attorney. OAG May 16, 1935 (196r).

When on the business of the county, the county attorney, on order of the district judge may be reimbursed in the amount paid for meals. OAG Feb. 24, 1944 (121c-4).

388.15 FUNDS GIVEN FOR HIS INVESTIGATION OF LAW VIOLATIONS BY BANKS, TRUST COMPANIES, AND BUILDING AND LOAN ASSOCIATIONS.

HISTORY. 1925 c. 264 s. 1; M.S. 1927 s. 934-1.

388.16 BORROWING MONEY.

HISTORY. 1925 c. 264 s. 2; M.S. 1927 s. 934-2.

388.17 COMPENSATION IN CERTAIN COUNTIES.

HISTORY. March 6, 1852; P.S. 1858 c. 7 s. 75; 1860 c. 5 s. 7; 1862 c. 32 s. 1; G.S. 1866 c. 7 s. 3; 1870 c. 33 s. 1; G.S. 1878 c. 7 s. 3; 1885 c. 17; 1903 c. 224; G.S. 1894 s. 532; R.L. 1905 s. 573; 1909 c. 313; 1911 c. 214 s. 1; G.S. 1913 s. 974; G.S. 1923 s. 935; 1927 c. 415; M.S. 1927 s. 935.

The salary of the county attorney as fixed by the county board is not subject to revision by such board during his official term. *Hawkins v Watkins*, 34 M 554, 27 NW 65.

The county attorney is a quasi officer of the district court and the court is exercising its proper function when it fixes and determines the salary to be paid such officer upon appeal from the action of the county board. *Rockwell v County*, 47 M 219, 49 NW 690.

Where a judge of the district court upon due hearing determines that a county attorney is disqualified from taking part in the prosecution of a person accused of crime, and directs another attorney of the court to conduct the prosecution, the substitute is entitled to be compensated for his services by the county where the crime is alleged to have been committed. *Matthews v Board*, 90 M 348, 97 NW 101.

A county attorney who performs services for the county in proceedings under the drainage laws to establish a county ditch is not entitled to compensation therefor unless his services are rendered in protection of some special interest of the county; and the county has no special interest in the question of damages and benefits to be paid by and to the owners of affected property and no such interest to protect on an appeal to the district court. *Dosland v County*, 136 M 140, 161 NW 382.

Under this section where the county attorney for the year 1931 received a fixed salary of \$1,500 a year as fixed by the county board after appeal to the district court and thereafter the board fixed the salary at \$1,400, \$1,200 and \$1,200 per year for the three succeeding years, the original order of the court fixed the salary at \$1,500 per year and the county attorney is entitled to \$700.00 back salary where he accepted less than \$1,500 per year. 1936 OAG 107, June 25, 1936 (121a-9).

388.18 COMPENSATION SCHEDULE, SALARIES.

HISTORY. 1945 c. 525 ss. 1, 2.