

Date Issued: March 4, 1981 (AGO 81-18)

Requested by: Representative Richard J. Backes

- QUESTIONS PRESENTED -

I.

Whether under a family farm incorporation law with an emergency clause farmers and ranchers will be allowed to incorporate between the time referral petitions are filed with the Secretary of State and the time set for the election on the referral petitions.

II.

Whether farmers and ranchers who have incorporated under a family farm incorporation law with an emergency clause will be allowed to continue farming and ranching as a corporation if the family farm incorporation law is rejected by the electors at a referral election.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that under a family farm incorporation law with an emergency clause farmers and ranchers will be allowed to incorporate between the time referral petitions are filed with the Secretary of State and the law is voted upon by the electors at a referral election.

II.

It is my further opinion that if a family farm incorporation law with an emergency clause is rejected by the voters at a referral election, those farmers and ranchers who incorporated prior to the election in which the law was rejected will be subject to the provisions of chapter 10-06 of the North Dakota Century Code which will automatically be revived concurrent with the rejection of the family farm incorporation law.

- ANALYSIS -

The legislative power of the people through the initiative and referendum provisions of the North Dakota Constitution is well-established. Article III, Section 1, of the North Dakota Constitution provides that the people reserve the power "to approve or reject legislative Acts, or parts thereof, by the referendum." The power of the referendum is reserved to enable the people to pass final judgment on whether laws enacted by the Legislative Assembly shall be approved or rejected. McCarney v. Meier, 286 N.W.2d. 780 (N.D. 1979).

Article III, Section 5, of the North Dakota Constitution provides as follows:

The submission of a petition shall suspend the operation of any measure enacted by the legislative assembly except emergency measures and appropriation measures for the support and maintenance of state departments and institutions. (Emphasis supplied).

Thus, as to measures other than emergency measures, the filing of a referendum petition suspends the operation of the law until a referendum election is held. If the law is subsequently rejected by the people, it will never go into effect. Dawson v. Tobin, 24 N.W.2d. 737, 748 (N.D. 1946). However, emergency measures are afforded somewhat different treatment.

Article IV, Section 41, of the North Dakota Constitution is the provision which governs and prescribes when acts of the Legislative Assembly become operative, and it provides as follows:

SECTION 41. No Act of the Legislative Assembly shall take effect until July first after the close of the session, unless the legislature by a vote of two-thirds of the members present and voting, in each house, shall declare it an emergency measure, which declaration shall be set forth in the Act, provided, however, that no Act granting a franchise or special privilege, or Act creating any vested right or interest other than in the state, shall be declared an emergency measure. An emergency measure shall take effect and be in force from and after its passage and approval by the governor. (Emphasis supplied).

Therefore, an emergency measure takes immediate effect and is in force upon its approval by the Governor. Nevertheless, the Supreme Court of North Dakota has held that while an emergency measure takes effect as law upon its approval by the Governor, the measure is subject to the power of the referendum. If an emergency measure is later rejected at a referendum election, the measure is repealed and ceases to have an effect. Dawson v. Tobin, 24 N.W.2d. 737, 748 (N.D. 1946); Cuthbert v. Smutz, 282 N.W. 494 (N.D. 1938); see State v. Crawford, 162 N.W. 710 (N.D. 1917); Annot., 7 A.L.R. 530 (1920).

In Dawson, the Supreme Court of North Dakota was confronted with issues identical to those presented in this opinion. The controversy in Dawson resulted from the enactment by the Legislative Assembly of Chapter 317, Session Laws of 1945, which amended and reenacted Section 57-0228 of the North Dakota Revised Code of 1943. Section 57-0228 of the Revised Code had basically provided that in computing the general property tax, the value of all property subject to such tax shall be fifty percent of the full and true value of the taxable property. Chapter 317 merely increased the percentage to be used as a basis in the tax computation from fifty percent to seventy-five percent. The problems arose when Chapter 317 was subsequently rejected by the people at a referendum election.

The Attorney General in 1946 rendered an opinion and determined that Section 57-0228 had been repealed by Chapter 317 and that the repeal was not affected by the voters rejection of the referred measure at the referendum election. Thus, the issue the Court was confronted with was whether Section 57-0228 of the North Dakota Revised Code of 1943 had been revived and was once again applicable in the computation of taxes.

The Supreme Court of North Dakota in *Dawson* perceived that the need to make provisions for the immediate enactment of emergency legislation had long been recognized in the provisions of the state constitution. However, the Court recognized that "the people reserved the right to refer any emergency measure notwithstanding the fact that such measure was then operative as law." 24 N.W.2d. 737, 744. Particularly relevant to the issues in the present case is the following language:

The emergency measure is given the force and effect of law from the time of its approval; but the period of its existence is indefinite and contingent upon what may be, and is, done under the power of the referendum. The people have the last word.

If the referendum is not invoked, or if the referendum is invoked and the measure is approved at the referendum election it remains law; but if it is rejected at the referendum election "by a majority of the votes cast thereon" it is "thereby repealed" - i.e., recalled and destroyed and ceases to have any effect from and after the time the rejection of the measure at the referendum election takes effect. 24 N.W.2d. 737, 748.

An emergency measure is a law even though a referendum petition is filed, and the measure remains a law until the people repeal it at a referendum election. *Cuthbert v. Smutz*, 282 N.W. 494, 498 (N.D. 1938). The holdings of the North Dakota Supreme Court are now supported by the state constitution, i.e., Article III, Section 8, which provides that "a referred measure which is rejected shall be void immediately."

In summary, in accordance with Article III, Section 5, of the North Dakota Constitution, the submission of referral petitions to the Secretary of State will not suspend the operation of an emergency measure. The measure will have the immediate force and effect of law at the time of its passage and approval by the Governor. In response to the first question, if referral petitions are filed with the Secretary of State and assuming the act passes as an emergency measure, farmers and ranchers will be allowed to incorporate between the time of the filing of the petitions and the time set for a referendum election.

However, the emergency measure is subject to the power of the referendum. If the measure is later rejected by the electors at a referendum election, the measure is void immediately and ceases to have any effect. As stated by the Supreme Court of North Dakota in *Dawson*, *supra*:

It necessarily follows that from the time such rejection became effective the whole emergency measure, including the repealing provision therein, was recalled and destroyed, and that the law that had been replaced and

superseded by the rejected emergency measure was revived. 24 N.W.2d. 737, 750.

Therefore, if passed as an emergency measure and signed by the Governor, a family farm incorporation law will be a valid legislative act until repealed by the people through the means of the referendum. All farmers and ranchers who incorporate pursuant to the provisions of the emergency measure will have acted in accordance with the law. However, if the emergency measure is later rejected by the electors, the present provisions of chapter 10-06, N.D.C.C., would be revived. Those farmers and ranchers who incorporated will be required to either dissolve those corporations or run the risk of being found in violation of the provisions of Chapter 10-06 of the North Dakota Century Code.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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