

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1923

SYLLABUS

1. Schools--Emergency Loan--Public Service Corporation--Duty to Furnish Water to City.

(1) Stats. 1919, p. 497, provides that governing board of school district may borrow money in emergency. Before adoption of resolution declaring emergency to exist and authorizing loan, notice of intention to so borrow must be published in a newspaper of general circulation for at least two publications, one week apart. The resolution must then be adopted and submitted to and approved by State Board of Finance.

(2) An emergency tax must be levied immediately to pay loan.

(3) Stats. 1877, p. 52, sec. 14, provides that water company under contract to furnish water to city is bound by its contract therefor, and cannot change it so as to compel the city to pay portion of necessary expense of maintaining works.

(4) Stats. 1913, P. 398, requires supply and means of distribution to be adequate, pressure sufficient, and rate reasonable for fire protection, all to be fixed by Public Service Commission. If water company desires to be relieved of any responsibility the matter must be taken up with the commission.

INQUIRY

CARSON CITY, January 8, 1923.

I have your communication of January 6 asking for an opinion in reference to the following facts, to wit:

You advise me that eighteen months ago the School Trustees borrowed under an emergency loan the sum of \$2,000, and that this amount of money has not been repaid. You request an opinion as to whether or not the Board of County Commissioners, by resolution adopted, could borrow or transfer \$2,000 sufficient to pay this indebtedness to the school fund.

OPINION

You are advised that the governing board of the school district must proceed under the Statutes of 1919, p. 497, by having a meeting of the board, and declare, by resolution, that an emergency exists and authorize a temporary loan for the purpose of meeting such emergency. It

will be noted from a reading of this section of the Act that before the adoption of any such emergency resolution, the governing board shall publish notice of their intention to act thereon in a newspaper of general circulation for at least two publications, one week apart. It is necessary, of course, that an emergency tax be levied immediately to take care of this loan.

A certified copy of the resolution shall then be forwarded to the State Board of Finance for its approval.

You will, therefore, borrow a sufficient amount to pay principal and interest. Copies of the resolution, as to form, may be obtained from Hon. Gilbert C. Ross, Carson City, Nevada.

In reference to the second question propounded, to wit:

You advise me that it has been the custom for the water company of Virginia Cit to pay \$150 a month for a keeper to repair, regulate and watch over the three large fire-tanks which supply water for fire emergency, and you further advise that the water company reports that it will be necessary to discharge the keeper unless the city pays \$50 per month towards the salary of the watchman so employed.

Your attention is respectfully called to an Act approved January 22, 1877 (Stats. 1877, p. 48). Section 14 of this Act (p. 52) provides that during the existence of the contract with the city for supplying of water, the water company shall keep all reservoirs, pipes, and hydrants well supplied with water for the purpose for which they were constructed. In addition thereto your attention is respectfully called to an Act approved March 26, 1913, Statutes of Nevada 1913, at page 387. Under the provisions of this Act it is made the duty of every public utility to furnish to their city and town a reasonable and adequate supply of water, at a reasonable pressure for fire protection and at a reasonable rate--all to be fixed and determined by the Public Service Commission of this State. Section 2 of the Act further provides and makes it the duty of public utilities to provide means and all necessary connections for the proper delivery of water for fire protection.

It appears, therefore, and it is my opinion, that inasmuch as the services of a keeper are required to regulate and watch over the tanks provided for the supply of water in cases of fire, the water company is not authorized and cannot make any change under the contract whereby the city would be compelled to pay any charges for this service, and if the water company desires to be relieved of a responsibility the matter must be taken up with the Public Service Commission.

Please keep me advised in reference to this situation so that proper action may be taken to give your city fire protection.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. WM. S. BOYLE, District Attorney, Virginia City, Nevada.

SYLLABUS

2. Budget Law--County Commissioners.

(1) Transfer of money from one fund to another by County Commissioners acting in good faith and without loss to the county, not ground for removal.

(2) Sec. 1540, Rev. Laws (Stats. 1881, p. 32), was amended sections 3826 to 3836, Rev. Laws (Stats. 1903, p. 107), and both were repealed by Stats. 1917, p. 249, as amended Stats. 1919, p. 406, as amended Stats. 1921, p. 78.

(3) County Commissioners are not authorized to transfer surplus money from one fund to another, and, if any fund is exhausted, they should proceed under section 5, Stats. 1917, p. 249.

(4) County Commissioners are not subject to removal if, under mistaken theory, and without loss to taxpayers, they improperly transfer money from one fund to another.

INQUIRY

CARSON CITY, January 13, 1923.

I have your telegram, under date of January 10, 1923, requesting my opinion in reference to the following hypothetical case:

The county budget for a certain year sets aside for a road fund the sum of \$9,400. During the same year this amount is expended. The Commissioners thereupon, in good faith and acting for what they believe to be the best interests of the county, transfer from the general fund of the county, which contained moneys then no needed, additional money to the road fund and expended these. The road-fund appropriation is thus exceeded by several thousand dollars. There was, however, no excess of the sum total of the budget. The Commissioners were acting without criminal intent. Was the law violated upon such a statement of facts, so that removal proceedings under section 5 might or might not be instituted? Also advise whether budget law has been modified by a former statute which specifically authorizes transfer from certain county funds to other county funds.

OPINION

The statement of facts made by you presents the following questions for determination:

First--Has the Act entitled "An Act to authorize the County Commissioners of the several counties in this State to loan or transfer surplus money from one fund to the other," approved February 9, 1881 (section 1540, Revised Laws of Nevada, 1912),

been repealed by an Act entitled “An Act regulating the fiscal management of counties, cities, towns, school districts, and other governmental agencies,” approved March 22, 1917, Statutes of Nevada, 1917, p. 249, as amended Statutes of Nevada, 1919, p. 406, as amended by Statutes of Nevada, 1921, p. 78?

Second--When the Board of County Commissioners in fixing the budget for the year estimated that a certain amount was required to maintain the road fund of the county and the amount so fixed and collected was thereafter expended, would the action of the board, in transferring in good faith, and prompted by what they deemed to be the best interests of the county, a certain sum from the general fund of the county to the road fund, violate the provisions of section 4 of the Act of 1917, p. 249, as amended 1921, p. 78?

The Act of 1881 (p. 32, sec. 1540, Revised Laws of Nevada, 1912) provides:

Section 1. The County Commissioners in the several counties in this State are hereby authorized and empowered to transfer any surplus money which may be in any of the county funds of the respective counties (except the school fund) from one or more of said funds to another or others, and transfer the same back to the fund or funds from which said surplus money was taken at such times and in such manner as in the judgment of said Commissioners the best interests of the county may require.

When this Act was adopted by the Legislature, the business of the county was not operating under a budget system and the Legislature had made no provision authorizing emergency loans. It is apparent, therefore, that, in order to permit the County Commissioners to function, some system was required to permit the transfer of surplus funds from one fund to another.

Legislative action in 1903 varied the operation of county business by the adoption of an Act entitled “An Act relating to county government and the reduction of the rate of county taxation” (Stats. 1903, p. 107), Revised Laws of Nevada, sections 3826 to 3836, inclusive.

By virtue of the provision therein enumerated, a budget system was adopted (sec. 3829, supra), and by section 3831, supra, the emergency loan was provided.

The Act of March 22, 1917, Statutes of Nevada, 1917, p. 249, inaugurated a new plan for the fiscal management of counties and expressly repealed the Act of March 13, 1903, and provided under section 3 that the County Commissioners should prepare a budget of the amount of money estimated to be necessary to pay the expenses of conducting the public business for the then current year. The said Act enacted that the budget should--

estimate expenditures in detail showing administrative expense, indigent fund, roads and bridges, interest and redemption, county schools and high-school emergency;

and further provided:

and the several sums in said budget, under estimated expenditures, shall be thereby appropriated for the several purposes therein named for the then current fiscal year.

Section 4 of this Act, as amended by Statutes of Nevada, 1921, p. 78, provides:

that it shall be unlawful for any Commissioner, or any Board of County Commissioners, to authorize, allow or contract for any expenditure unless the money for the payment thereof is in the treasury and especially set aside for such payment;

and further--

that any County Commissioner violating the provisions of this section shall be removed from office and a suit to be instituted by the District Attorney upon request of the Attorney-General or upon complaint of any interested party.

It is also enacted--

that the provisions of this section shall not apply to lawful advances for the support of county farm bureaus.

Section 5 of the Act of 1917, supra, was amended by the Statutes of 1921, p. 79, in the respect that before the Board of County Commissioners could act on a resolution providing for an emergency loan, notice of said action must be published in a newspaper for at least two publications.

It will be noted that no express repeal is contained in the Statutes of 1917, p. 249, with the exception that this statute repeals the Act of March 20, 1903, contained in the Revised Laws (sections 3826 to 3836, inclusive, Revised Laws of Nevada, 1912).

It is evident that when the Legislature adopted the statute of 1917, p. 249, the legislative intent was to promulgate a system for the fiscal management of the respective counties, and that, in passing said Act, it was the purpose of the Legislature to divide the respective county funds into the classifications referred to in section 3 and make the appropriations called for under their respective headings to be the appropriation for the several purposes named therein for the fiscal year.

I am of the opinion that the Statutes of 1917, supra, together with the amendments as made by the Legislature in 1919, p. 406, and 1921, p. 78, repealed the Act of 1881 (sec. 1540, Revised Laws of Nevada, 1912) authorizing the County Commissioners to transfer surplus moneys from one fund to another. The Act of 1917 had for its purpose the placing of county business under a budget system, and limited the respective amounts designated therein for the respective funds to be the amount which could be expended for the current fiscal year. To permit the County Commissioners to transfer surplus moneys from one fund to another would be to

violate the provisions of the Act of 1917, as amended, supra.

It will be noted that in the Act of March, 1921, under section 4 thereof, which is an amendment to the Act of March 22, 1917, an exception is made in reference to lawful advances that can be made by the County Commissioners.

This office has heretofore held--

that it was the duty of the County Commissioners to make a budget and that it was unlawful for the Board of County Commissioners to contract for any expenditures unless the money for the payment thereof is in the treasury and especially set aside for such payment. (Opinions of Attorney-General, No. 111, 1913-1914.)

Again in the opinions of the Attorney-General, 1917-1918, No. 250, it was decided--

that the County Commissioners were bound by the estimates made in the budget and that the money in the general funds of the county could not be used for road construction and that the deficiency would have to be provided for by an emergency loan.

I am, therefore, of the opinion that the County Commissioners under the present laws are not authorized to make transfers of surplus money from one fund to the other, but if the money in any particular fund becomes exhausted, it is the duty of the County Commissioners to proceed under section 5 of the statute of March 22, 1917, as amended Stats. 1921, p. 79.

In reference to the second query, I feel that the Board of County Commissioners in transferring the funds were acting in good faith, under the mistaken theory that they had the right so to do under the section of the statute indicated.

It is apparent that they were conscientiously endeavoring to further the best interests of the county and that by reason of their action no loss accrued to the taxpayer, the county government was in no way embarrassed, and neither was the county fund in any way jeopardized.

Therefore, in fairness to the members of the board, I do not consider that, under the circumstances, I am warranted in requesting that suit be instituted for their removal.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. L. T. WILLIAMSON, Foreman Grand Jury, Hawthorne, Nevada.

SYLLABUS

3. Corporation--Not Ipso Facto Dissolved by Failure to Display Name, Etc.

(1) Judicial proceedings are necessary before corporation failing to display name, etc., can be dissolved. The provision is not self-executing. The Governor may issue certificate of revival upon good showing for noncompliance. Secretary of State is not authorized to declare corporation dissolved.

INQUIRY

CARSON CITY, January 16, 1923.

I have your communication of January 6 requesting an opinion in reference to whether a corporation which fails to comply with section 16 of the general corporation laws of Nevada, Revised Laws, 1912, section 1120, is ipso facto dissolved, and to the extent that you would be authorized in permitting the corporate name of such corporation to be used by another.

OPINION

Section 16 provides:

Every corporation organized under this Act shall have and maintain in a conspicuous place on its principal office required by section 14, in letters sufficiently large to be easily read, painted or printed the corporate name of such corporation. Any every such corporation which shall fail or refuse to comply with the requirements of section 14 and of this section, for a period of thirty days, or fail to maintain such office or fail to have a competent agent in charge thereof, on all business days of the year, shall be subject to a fine of not less than one hundred dollars nor more than five hundred dollars, to be recovered with costs by the State before any court of competent jurisdiction by action at law, to be prosecuted by the Attorney-General, or by the District Attorney of the county in which such action or proceeding to recover such fine is prosecuted. Failure to comply with the requirements of this section for a period of ninety days shall render the certificate issued by the Secretary of State void, and the same can only be revived by a certificate from the Governor issued for good and sufficient reasons for noncompliance.

The Supreme Court of the United States has held, in reference to a similar section--

that a ground was not self-executing, although providing that on a certain contingency "the corporate powers and privileges should cease and determine." Frost's Lessee v. Frostburg Coal Co., 16 L. Ed. 637.

In another case decided by the Supreme Court of the United States a distinction between conditions subsequent and conditions precedent is dwelt upon and the necessity for recourse to the courts in case of conditions subsequent is emphasized. Bybee v. Oregon & C. R. Co., 35 L.

Ed. 305.

While courts are divided on the question as to whether a provision similar to the provision found in our statute is self-executing, the great weight of authority holds that such a provision is not self-executing.

It will be noted further that provision is made, under section 16, that upon good cause shown for noncompliance the Governor is authorized to issue a certificate of revival. If you, as Secretary of State, under section 16, supra, declared a forfeiture for noncompliance and permitted a new corporation to assume the corporate name, this provision of the Act would thereby be ineffectual.

I am, therefore, of the opinion that a judicial proceeding must be instituted before a corporation could be dissolved. For these reasons, it is my opinion that you are not authorized to declare a corporation forfeited or to permit the name of such corporation to be used by another.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. W. G. GREATHOUSE, Secretary of State, Carson City, Nevada.

SYLLABUS

4. Corporation--Nonprofit Cooperative Association--Fees.

(1) Stats. 1921, p. 366: Only fee chargeable by Secretary of State against nonprofit cooperative association is \$10 for certifying to articles of incorporation.

(2) Articles of incorporation too broad or inconsistent with powers granted by statute should be amended.

INQUIRY

CARSON CITY, January 16, 1923.

You request an opinion in reference to what fees you may collect from a corporation organized under the Act approved March 23, 1921.

OPINION

You are advised that the only fees that are chargeable against such an association is the sum of \$10 for certifying to its articles of incorporation.

This statute provides for the organization of a nonprofit cooperative association. Your attention is respectively called to subdivision (f) of section 2, on page 2, and to the first paragraph on page 4 of the proposed articles of incorporation.

I am of the opinion that the provisions in both of these sections are too broad and are inconsistent with the powers sought to be granted to such associations by the Legislature of this State, and, for these reasons, the proposed articles should be amended.

Your attention is further directed to the fact that the articles of incorporation state that the parties seek to form a corporation under the Act approved March 16, 1901, whereas the Act was not adopted until March 23, 1921, Statutes of Nevada, 1921, p. 366.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. W. G. GREATHOUSE, Secretary of State, Carson City, Nevada.

SYLLABUS

5. Sheep--Law Providing for Grazing License Repealed.

(1) Stats. 1915, p. 247, repeals section 3769, Rev. Laws, which provided that persons grazing sheep and failing to secure license therefor might be prosecuted.

INQUIRY

CARSON CITY, January 16, 1923.

Receipt is acknowledged of your communication of the 13th instant, requesting an opinion as to whether or not, under section 3769, Revised Laws of Nevada, 1912, persons engaged in the business of grazing sheep in your county, and who have failed to pay a license, may be arrested for violation of this section.

OPINION

Section 3769, Revised Laws of Nevada, 1912, was repealed by Statutes of Nevada, 1915, p. 236, at p. 247, and, therefore, the provisions of this section are no longer operative.

Respectfully submitted,

M.A. DISKIN, Attorney-General.

HON. JOSEPH T. MURPHY, District Attorney, Tonopah, Nevada.

SYLLABUS

6. Election--Variation in Name on Ballot and in Certificate--Duty of Clerk to Correct.

(1) Sec. 1795, Rev. Laws (sec. 29, General Election Law): Where person is elected to an office, and, through error, Clerk issues certificate of election containing variations in name, he should issue corrected commission to conform to name on ballot.

INQUIRY

CARSON CITY, January 16, 1923.

You advise me that Hon. J. A. Callahan, recently elected Judge of the Sixth Judicial District Court of the State of Nevada, has informed you that the commission issued recites his name as James A. Callahan, but that his name appeared on the ballot and he was elected under the name of J. A. Callahan. You request advice as to what action you should take in the premises.

OPINION

Section 29, General Election Laws, provides:

When two or more counties are untied in one senatorial, representative, or judicial district for the election of any officers, the Board of County Commissioners of each county shall canvass the votes, according to law, of the voters of their respective counties for said officer or officers; and the Commissioners of the county whose initial is the lowest on the alphabet shall transmit to the Commissioners of the county of the highest initial a copy of the abstract of the votes for such officer or officers, when the said last Commissioners shall make a final abstract and aggregate of said votes, and shall proceed to cause to be issued certificates of election, and otherwise to act as is provided in this and the two preceding sections.

It appears, therefore, that the Clerk of the county of Humboldt has made a mistake in issuing the election certificate under the provisions of this Act, and his attention should be called to the error that the same might be corrected and a commission issued under the name as appearing on the ballot.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. W. G. GREATHOUSE, Secretary of State, Carson City, Nevada.

SYLLABUS

7. Nepotism--County Officer--Deputy--"Employ."

(1) Stats. 1915, p. 17, 3 Rev. Laws, p. 2877: County officer cannot lawfully appoint or employ deputy without compensation who comes within third degree of consanguinity or affinity.

(2) The word "employ" does not necessarily imply compensation.

INQUIRY

CARSON CITY, January 23, 1923.

You request an opinion in reference to the following facts:

Can a county official appoint or employ a deputy, without compensation, who comes within the third degree of consanguinity or affinity, and not violate the nepotism law, as provided in Statutes 1915, p. 17; Revised Laws of Nevada, 1919, vol. 3, p. 2877?

OPINION

You are advised that it is my opinion that a county officer cannot appoint or employ a deputy without compensation who comes within the third degree of consanguinity or affinity and not violate the nepotism law. This law makes it unlawful "to employ or keep in his employ on behalf of the State of Nevada."

The word "employ" does not necessarily mean that the party serving in this capacity receives a reward or compensation. *Commonwealth v. Griffith*, 90 N.E. 394; *Mousseau v. City of Sioux City*, 84 N.W. 1027.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. GROVER L. KRICK, District Attorney, Minden, Nevada.

SYLLABUS

8. City Official May Hold other City or County Office.

No provision in State Constitution or laws prohibits city official from holding other city or county office, if positions are not incompatible. The city charter governs in such cases.

INQUIRY

CARSON CITY, January 24, 1923.

Can a city officer hold any other city or county position?

OPINION

You are advised that there is no provision in the Constitution of the State of Nevada, or in the laws of this State, which prohibits a city official from holding a city or a county position, or prohibiting a city official from holding two positions under the city; provided, however, that the respective positions are not incompatible.

I have not before me your city charter, and cannot, therefore, state whether there is any provision therein which might incapacitate a person from holding two positions under the city government.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. J. W. BURROWS, City Attorney, Sparks, Nevada.

SYLLABUS

9. Crimes and Punishments--Assault with Deadly Weapon--Penalty--Indeterminate Sentence--Duty of Court.

(1) Stats. 1921, p. 265, repealing Stats. 1919, p. 191, which amends Rev. Laws, 6413, was intended to have court, in all cases where judgment of confinement is rendered on conviction of any felony for which no fixed period of confinement is imposed, to fix imprisonment for indefinite term, within minimum and maximum term prescribed.

(2) Court may impose fine without imprisonment.

(3) In construing the two sections, all doubts have been resolved in favor of defendant, as opinion cannot be reviewed by Supreme Court.

INQUIRY

CARSON CITY, January 24, 1923.

You advise that Judge Hart and yourself request an opinion as to what effect Statutes of

1915, p. 191, has upon that portion of section 6413, Revised Laws 1912, in reference to the punishment the Court may pronounce upon a person convicted of violating that portion of said section which defines assault with a deadly weapon. The particular portion of section 6413, Revised Laws 1912, material for consideration, reads as follows:

An assault with a deadly weapon, instrument, or other thing, with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant heart, shall subject the offender to imprisonment in the State Prison not less than one year or exceeding two years, or to a fine not less than one thousand, nor exceeding five thousand dollars, or to both such fine and imprisonment.

Statutes of 1915, p. 122, provide:

Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law, *the Court shall, in addition to any fine or forfeiture which he may impose, direct that such person be confined in the State Prison*, for an indeterminate term limited only by the minimum and maximum term of imprisonment prescribed by law for the offence of which such person shall be convicted; and where no minimum term of imprisonment is prescribed by law, the Court shall fix the minimum term in his discretion at not less than one year nor more than five years, and where no maximum term of imprisonment is prescribed by law, the Court shall fix such maximum term of imprisonment.

Your query is:

Do the provisions of the Act of 1915, *supra*, compel the Court in pronouncing sentence for violation of section 6413, *supra*, to impose confinement in the penitentiary?

OPINION

The question might be somewhat of a serious one if the provisions of the statutes of 1915, *supra*, were still in force and effect, but the Legislature of 1921, Stats. 1921, p. 265, amended section 410, and the amendment reads as follows:

Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law *and where a judgment of confinement is rendered*, the Court shall, in addition to any fine or forfeiture which he may impose, direct that such person be confined in the State Prison for an indeterminate term limited only by the minimum and maximum term of imprisonment prescribed by law for the offense of which such person shall be convicted; and where no minimum term of imprisonment is prescribed by law, the Court shall fix the minimum term in his discretion at not less than one year nor more than five years, and where no maximum term of imprisonment is prescribed by law, the Court shall fix such maximum term of imprisonment.

The provisions of the indefinite-sentence law, sometimes called the indeterminate-sentence law, adopted by the Legislature of 1921, noted an exception in this, to wit That the provision in said section which reads “for which no fixed period of confinement is imposed by law *and where a judgment of confinement is rendered,*” shows that the Legislature had in mind that under existing laws in felony cases there might arise violations under which a judgment of confinement would not be rendered. The purpose of the Legislature, in adopting the provisions of this section, was to compel the Court in all case where a judgment of confinement is rendered to fix the imprisonment for an indefinite term, limited only by the minimum and maximum term, as prescribed by law.

It must be remembered that the indeterminate-sentence law was enacted for the purpose of meting out justice on a more equitable basis and not to inflict a greater hardship upon those convicted of crime than already existed. To construe the Act of 1921, supra, upon the theory that the Court, in addition to a fine, must pronounce a confinement sentence, would be to hold that the Legislature had in mind the repealing of all punishment sections of statutes which imposed a lighter sentence than that provided by the indefinite-sentence law.

For these reasons, therefore, it is my opinion that the Court in this case may impose a fine without imprisonment. If the Court desires to impose a prison sentence, he would under the law, enter a judgment that defendant be confined in the State Prison for a period of not less than one year and not to exceed two years, or he could impose the prison sentence, as stated, and, in addition thereto, impose a fine.

In construing these two sections, I have resolved all doubts in favor of the defendant, realizing that the opinion rendered by me cannot be reviewed by the Supreme Court.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. E. E. WINTERS, District Attorney, Fallon, Nevada.

SYLLABUS

10. Schools--Trustee May Not Contract.

(1) Rev. Laws, 3309 (Stats. 1911, p. 183, sec. 71), prohibits School Trustee from being pecuniarily interested in any contract made by the board of which he is a member.

INQUIRY

CARSON CITY, January 24, 1923.

OPINION

I am of the opinion that a School Trustee, by reason of section 71 of the school laws, is incapacitated to enter into any negotiations or contracts providing for the disposal to the School Districts of any goods, wares, or merchandise, and, therefore, Mr. Treat, a School Trustee, would not be in a position to furnish coal to the school inasmuch as he is a School Trustee.

In connection with section 71, it is apparent in sparsely settled communities it is invoking a harsh rule to prohibit School Trustees from rendering services to the School District, and the statute might be amended to eliminate this feature in communities of this description.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. CHARLES PRIEST, Deputy Superintendent of Public Instruction, Carson City, Nevada.

SYLLABUS

11. Schools--Fund for "Support and Maintenance" of, Not Liable for Expense of Supervision and Administration--Superintendent of Public Instruction Is a State Officer--Constitution--Statute, Construction Of.

(1) Art. 11, sec. 6, of Constitution provides for special tax for "support and maintenance" of schools and University. The salary of the State Superintendent of Public Instruction of Public Instruction, and the salaries and expenses of his deputies, are not included within the term quoted.

(2) Art. 11, sec. 1, makes the Superintendent and his deputies state officers, and intends their salaries, etc., shall be paid as are those of other state officers.

(3) Art. 4, sec. 32, provides for abolition of office of County Superintendent of Schools.

(4) Stats. 1907, p. 181, abolished that office and transferred duties thereof to Deputy Superintendent.

INQUIRY

CARSON CITY, January 31, 1923.

I am in receipt of your communication requesting an opinion concerning the interpretation of article 11, section 6, of the Constitution of the State of Nevada, which reads:

The Legislature shall provide a special tax, which shall not exceed two mills on the dollar of all taxable property in the State, in addition to the other means provided for

the support and maintenance of said University and common schools.

You make the following inquiry:

Does the expenditure for state supervision and administration of the public-school system come within the meaning of the terms “support and maintenance”?

You desire to be advised further in reference to the provisions of article 4, section 32, of the Constitution of the State of Nevada, wherein it is provided for the supervision of the schools through county paid officers, and your query is:

When this function was taken over by the State, could such expenditure be counted as “support and maintenance” of schools?

OPINION

Assuming that expenditures for state supervision and administration is intended to include the salary, office and other administrative expenses of the State Superintendent of Public Instruction, and the salaries, office and other administrative expenses of the Deputy Superintendents of Public Instruction, there can be no question that such expenditures do not come within the meaning of the terms “support and maintenance” as used in section 6, article 11, of the Constitution of Nevada.

Section 1, article 11, of the Constitution provides for a Superintendent of Public Instruction and makes him a state officer the same as other state officers, and, of course, intends, there being no special provision therefor, that he shall be paid the same as other state officers, and also, in addition thereto, the expenses of his office.

The Constitution (section 32, article 4) makes provision for Superintendents of Schools and contemplates, in the absence of a special provision to the contrary, that their salaries and the expenses of their office shall be paid in the same manner as other county offices.

Section 6 of article 11 of the Constitution provides for a special tax of two mills on the dollar for the support and maintenance of said University and county schools. It, therefore, manifestly appears that, provisions having been otherwise made for expenses of state supervision and administration, it was not the intent that they should be included within the meaning of “support and maintenance” as used in section 6 of article 11.

Article 4 of section 32 further provides that the Legislature shall have power to abolish the office of Superintendent of Schools as well as other county offices. This the Legislature did by “An Act to provide for a reorganization of the system of school supervision and maintenance, to repeal all Acts in conflict therewith, and matters properly connected therewith,” approved March 29, 1907.

This Act provides for the appointment of Deputy Superintendents of Public Instruction,

and assigns to them generally the duties formerly performed by the County Superintendents of Schools--their duties being generally the same--and, it being the intent to replace the County Superintendents of Schools, the expenditures for their salaries, office and other administrative expenses could not be held to be within the term "support and maintenance" as used in said article 11 of section 6.

The conclusion must follow, therefore, that expenditures for state supervision and administration should not be paid out of the fund provided by the tax mentioned in article 11 of section 6 of the Constitution, but that such fund should be used exclusively for the "support and maintenance" of the University and commons schools.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. W. J. HUNTING, Superintendent of Public Instruction, Carson City, Nevada.

SYLLABUS

12. High Schools--Bond Issue Limited--Statute.

Stats. 1921, chap. 81, as amended, limits bond issue for high-school purposes, and same Act, par. 5, sec. 7, as amended, limits total bonded indebtedness of county for all purposes.

INQUIRY

CARSON CITY, February 1, 1923.

You advise that School District No. 3 is contemplating the erection of a high-school building and that you are in doubt as to the amount of bonds that can be legally issued by a county for high-school purposes.

You state that Lyon County has an assessed valuation of eleven and one-half million dollars, and you desire to be advised if high-school bonds could be issued to the extent of \$172,500.

OPINION

Under chap. 81, Stats. 1921, Lyon County, with an assessed valuation of \$11,500,000, may issue bonds for high-school purposes in the sum of \$172,500, provided such issue will not increase the total bonded indebtedness of your county to more than \$1,150,000.

The statute limits the amount of bonds that may be issued for high-school purposes in any case to 1 ½ per cent of the assessed valuation of the county, and paragraph 5, section 7 of the

Act, as amended, further limits the total amount of bonded indebtedness for all purposes to 10 per cent of the assessed valuation.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. W. E. KING, Secretary Wellington Community Center, Wellington, Nevada.

SYLLABUS

13. Statutes--Amendment and Repeal--Sufficiency of Title.

(1) When provisions of related Acts are repugnant and inconsistent, later Act repeals former in so far as they conflict.

(2) Slight error in title of Act amended is immaterial. Reference which

INQUIRY

CARSON CITY, February 1, 1923.

You request an opinion as to whether chap. 229, Stats. 1919, entitled:

“An Act to amend sections 32, 34, and 39 of an Act entitled ‘An Act to provide for the support of the government of the State of Nevada, and to repeal certain Acts relating thereto,’ approved March 23, 1891,” approved April 1, 1919.

repealed the provisions of an Act entitled:

“An Act to amend an Act entitled ‘An Act to provide revenue for the support of the government of the State of Nevada, and to repeal certain Acts relating thereto,’ approved March 23, 1891, and of Acts amendatory thereto,” approved March 2, 1917.

You further desire an opinion as to the effect the omission of the word “revenue” from the title of the Act of 1919, wherein it appears to amend the provisions of section 39 of the Act approved March 23, 1891.

OPINION

An examination of legislative action in reference to the subject-matter covered by these various Acts discloses that the Legislature heretofore enacted a measure entitled:

“An Act to amend an Act entitled ‘An Act to provide revenue for the support of the government of the State of Nevada and to repeal certain Acts relating thereto,’ approved March 23, 1891, and of Acts amendatory thereof,” approved March 2, 1917. (Chap. 32, Stats. 1917.)

Section 1 thereof provides for the amendment of section 39, Revenue Act of 1891, and also makes provision for the time and manner of sale of property upon which delinquent taxes are a lien, and states that such property shall be advertised for sale on the second Monday of December, and that such property shall be sold on the third Monday of June next succeeding.

“An Act to amend sections 32, 34, and 39 of an Act entitled ‘An Act to provide for the support of the government of the State of Nevada and to repeal certain Acts relating thereto.’ approved March 23, 1891,” approved April 1, 1919, being chap. 229, Stats. 1919.

Section 3 of this Act provides for the amendment of section 39 of the Revenue Act of 1891 and makes provision for the time and manner of sales of property upon which delinquent taxes are a lien, and enacts that such property shall be advertised for sale after the second Monday in June, and sold on the third Monday in July.

It is obvious that chapter 32, Stats. 1917, and chapter 229, Stats. 1919, deals with the same subject-matter, and the provisions of these two sections are inconsistent in reference to procedure. The provisions are so inconsistent in reference to procedure. The provisions are so repugnant and inconsistent that the conclusion must follow that the statute of 1919 repeals chap. 32 of the statute of 1917, in so far as their provisions are in conflict.

In reference to the variance between the amended and the amendatory Acts, by reason of the omission of the word “revenue” from the amended Act, I am of the opinion that the failure to correctly recite the Act amended would not affect the provisions of the amendatory Act.

Where the title of the amendatory Act recites the title of the Act amended with that title, an error in referring to the date of the passage or approval of the Act amended will not vitiate the title. *Citizens Street Railroad Co. V. Hough*, 41 N.E. 533.

All that the law requires is that the reference to the amended Act be sufficient for identification. *People v. Beaun*, 92 N.E. 917.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. J. H. WHITE, District Attorney, Hawthorne, Nevada.

SYLLABUS

14. District Attorney--Drainage District--Statute.

Stats. 1913, p. 461, creating drainage district, does not require services of District Attorney. He may therefore advise, prosecute, or defend for or against such district.

INQUIRY

CARSON CITY, February 7, 1923.

I have your letter for the 3d instant, requesting an opinion as to whether or not you are disqualified, inasmuch as you are the District Attorney of Pershing County, from bringing an action against the drainage district for damages.

OPINION

An examination of the law creating this drainage district (Act of 1913) makes no provision requiring the District Attorney of the county to give legal advice to the drainage district or to act in any capacity. Therefore there is no provision of law which would in any way confer upon you the duties of advising or counseling this district.

18 Corpus Juris, p. 1309, lays down this doctrine:

It is not a part of the official duty of a county attorney to prosecute for and defend a drainage district located in his county. *Lincoln County v. Roberson*, 130 Pac. 947.

I am of the opinion, therefore, that you are not in any way disqualified from accepting employment in connection with or against the drainage district.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. BOOTH B. GOODMAN, District Attorney, Lovelock, Nevada.

SYLLABUS

15. Commissioner Districts--Plan of Local Government Not Uniform throughout State Unconstitutional.

(1) Constitution, art. 25, sec. 4, provides that system of county and township government shall be uniform. An Act providing for commissioner districts in one county not applicable to other counties of the State would be unconstitutional.

INQUIRY

CARSON CITY, February 7, 1923.

You have submitted to me Senate Bill No. 15, which has for its purpose the establishing of commissioner districts in the county of Mineral, and providing for the election thereof of members of the Board of County Commissioners, and you desire my opinion as to the constitutionality of this Act.

OPINION

Section 25 of article 4 of the Constitution provides: "The Legislature shall establish a system of county and township government which shall be uniform throughout the State." The provisions of Senate Bill No. 15 violate this provision of the Constitution of the State of Nevada, inasmuch as this bill has for its purpose establishing a system of county government in the county of Mineral, and which provisions are not applicable to the other counties of the State.

The Supreme Court of this State, in the case of State v. Boyd, 19 Nev. 43, has interpreted and construed this section of the Constitution and the reasons which prompted its adoption in the following language:

It is claimed by relator that the provision is a violation of article 4, section 25, of the Constitution, which provides that "the Legislature shall establish a system of county and township government, which shall be uniform throughout the State." If this requirement can be expressed more significantly in its application to this case, it means that the Legislature shall establish a uniform plan or method for the government of all the counties of the State. It is a matter of general knowledge that Legislatures are disposed to adopt, without particular scrutiny, measures proposed by the representatives of a particular locality, affecting it only, and not the State at large. The object of the provision was to prevent this character of legislation in relation to county government. Any change in the general system of county government may affect every county in the State. Among the advantages attained by this requirement is that legislation upon this subject will receive the careful attention of the members of the Legislature in general, all proposed alterations will be scrutinized, and frequent and disturbing changes avoided.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. J. G. SCRUGHAM, Governor, Carson City, Nevada.

SYLLABUS

16. Cigarettes, License for Sale of--Revenue--Statute.

(1) Stats. 1916, p. 236 (sec. 2): Both wholesale and retail dealers in cigarettes must pay license.

INQUIRY

CARSON CITY, February 14, 1923.

You request an opinion as to whether or not under section 2 of an Act entitled "An Act to provide revenue for the support of the government of the State of Nevada, and to repeal all Acts and parts of Acts in conflict therewith" (Stats. 1915, p. 236), the license fee therein provided must be collected from those who conduct a wholesale or retail business in selling cigarettes.

OPINION

This section provides that "any person, firm, association, or corporation engaged in dealing, in selling, giving away, or offering to sell cigarettes * * * shall take out a license and pay therefor the sum of \$15 per quarter-year."

It is my opinion that wholesalers, as well as retailers, engaged in dealing, selling, or giving away cigarettes must pay this quarterly license.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. HARLEY HARMON, District Attorney, Las Vegas, Nevada.

SYLLABUS

17. United States and Nevada Constitutions--Statute--Prohibition Act Unconstitutional--Subject Must Be Expressed in Title--When Invalid Portion Vitiates Whole Act--Fines--Affirmed by Supreme Court.

(1) Stats. 1923, p. 43, is void under art. 4, is void under art. 4, sec. 17, Constitution of Nevada, because subject-matter of bill is not expressed in title.

(2) United States Constitution, art. 6, sec. 2, makes national law supreme law of land by which judges of all States are bound.

(3) A legislative Act attempting to extend jurisdiction of national law is an idle thing.

(4) Section 3 of the statute violates art. 4, sec. 1, Nevada Constitution, in that it attempts to delegate legislative power to Congress.

(5) Where the intent of an Act is to accomplish a single purpose and its provisions are so mutually connected as to indicate the intent that they be construed as a whole, if some of such provisions are void, the whole Act is void.

(6) Section 3 violates article 2 of the Constitution, being section 355, Revised Laws, as to disposition of fines.

This opinion was affirmed by Supreme Court in Ex Parte Mantell, 47 Nev. 95, 216 Pac. 509.

CARSON CITY, February 17, 1923.

I have your request for an opinion as to the constitutionality of Assembly Bill No. 64.

The title of this Act provides:

An Act to make the provisions of the National Prohibition Act of the United States of America the law of the State of Nevada; and to repeal an Act entitled "An Act to prohibit the manufacture, sale, keeping for sale, and gift, of malt, vinous and spirituous liquors, and other intoxicating drinks, mixtures or preparations, making the Superintendent of the Nevada State Police ex officio Commissioner of Prohibition, and defining his duties; and providing for the enforcement of this Act, and prescribing penalties for the violation thereof," enacted pursuant to direct vote of the people, general election, November 5, 1918; and an Act entitled "An Act prohibiting the sale, furnishing, giving away, or having in possession of any intoxicating drinks; defining the same; making the Superintendent of the Nevada State Police ex officio Commissioner of Prohibition, and defining his duties; prescribing penalties for the violation of this Act and providing for the enforcement of the same," approved April 1, 1919; and to repeal all Acts in conflict herewith; and other matters connected therewith.

I

Section 1 "adopts the penal provision of the Volstead Act" and imposes the duty of enforcing the same on Sheriffs, peace officers, etc.

Section 2 recites that "all acts or omissions declared unlawful by the Eighteenth Amendment to the Constitution of the United States or by the Volstead Act are prohibited and declared to be unlawful"; and further, that violations thereof are subject to the penalties provided in the Volstead Act.

Section 3 provides "whenever Congress shall amend or repeal the Volstead Act, or enact any other law to enforce the Eighteenth Amendment to the Constitution of the United States, then the provisions of sections one and two of this Act shall apply."

Section 4 provides that “all fines and forfeitures collected under any ordinance * * * shall be paid into the treasury of the city whose ordinance is violated.”

Only such portions of the provisions of this Act have been quoted as are deemed essential for a determination of the questions involved.

TITLE OF THE ACT

Eliminating that portion of the title of the Act which repeals existing statutes, the title states:

An Act to make the provisions of the National Prohibition Act of the United States of America the law of the State of Nevada.

The body of the Act reveals an intent to adopt the provisions of the Volstead Act, confer jurisdiction upon the courts of this State in cases of violation thereof; and impose upon District Attorneys and peace officers the duty of enforcing the same. No mention, or even hint, of any such enactment is contained in the title of this bill.

This Act, with the exception of the title, is an exact duplication of what is known in the State of California as the “Wright Act.” It will be noted that the title of the Wright Act provides:

An Act to enforce the provisions of article 18 of the amendments to the Constitution of the United States; prohibiting all acts or omissions prohibited by the Volstead Act; imposing duties on courts, Prosecuting Attorneys, Sheriffs, and other officers and extending their jurisdiction; and providing for the disposition of fines and forfeitures.

The difference in the title of the Nevada and California Acts is very apparent. The title of the latter Act sets forth:

First--That it is to enforce the provisions of article 18 of amendments to the Constitution of the United States.

Second--To prohibit all acts or omissions prohibited by the Volstead Act.

Third--Imposing duties on courts, Sheriffs, District Attorneys, etc., and extending their jurisdiction.

Fourth--Providing for the disposition of fines and forfeitures.

The Nevada Act falls far short in its title of expressing the subject-matter contained in the body of the bill.

Section 17, article 4, of the Constitution of the State of Nevada provides:

Each law enacted by the Legislature shall embrace but one subject and matters properly connected therewith, which subject shall be briefly embraced in the title.

* * *

The title of Assembly Bill No. 64 discloses a purpose to enact a measure which would extend the jurisdiction of the Act of Congress to the State of Nevada. This, of course, is an idle thing and a mere work of supererogation. One, in reading the title, would conclude that its purpose was simply to concede that the State of Nevada is a part of the United States and subject to the law of Congress. It is hardly necessary to state the provisions of the Constitution of the United States, under section 2 of article 6:

This Constitution, and the laws of the United States which shall be made in pursuance thereof. * * * shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

As was said by the Supreme Court of Pennsylvania, in the case of Commonwealth v. Sweeney, 61 Pa. Sup. Ct. 367, 373:

Now an Act of the Federal Congress is a law. Where its terms are applicable, it is as much the law of Pennsylvania as it is of Maine or California.

Construing the words used in this title in their broadest sense, the conclusion is inevitable that, from the title of the bill, the Legislature was attempting to enact a measure which had for its purpose the application, in and within the State of Nevada, of the provisions of the National Prohibition Law.

This in itself would be a measure without life or meaning, unless, in addition thereto, further provisions were enacted seeking to enforce the same, imposing duties for enforcement upon peace officers, and extending the jurisdiction of courts in reference to violations thereof.

If the intent of the Legislature was to enact a law similar in all respects to the Act of Congress, but based upon the lawmaking power of this State, fit words might have been chosen in the title to have expressed this purpose.

Again, the title of this bill simply refers to the National Prohibition Law and makes the provisions thereof the law of this State.

Our Constitution declares, in reference to the title of the Act, that "the subject shall be expressed in the title," and it cannot be said that this has been done when the title does no more than furnish a reference to the National Prohibition Law, from which by search the true purpose of the title may be ascertained. As was said by the Supreme Court of Texas, in the case of Gunter v. The Texas Land and Mortgage Co., 17 S. W. 840:

The body of a bill would furnish more ready means of information to members of the Legislature as to its subject than would a mere reference in a title to some other law which it was the purpose of a bill to adopt or amend. No one would contend that a title as follows: "An Act to amend an Act in reference to the subject contained in the bill to which this is the title," would be a compliance with the Constitution.

It is, therefore, my opinion that the title to Assembly Bill No. 64 is contrary to the provisions of section 17 of article 4 of the Constitution of the State of Nevada, in that the subject-matter embodied in the bill is not expressed in the title.

II

Section 3 of this bill provides:

Nevada hereby recognizes that its power to enforce the Eighteenth Amendment to the Constitution of the United States should at all times be exercised in full concurrence with the exercise of the like power of Congress; and, to that end, whenever Congress shall amend or repeal the Volstead Act or enact any other law to enforce the Eighteenth Amendment to the Constitution of the United States, then the provisions of sections 1 and 2 of this Act shall apply thereto.

This section vests Congress with the power to write laws upon the statute-books of Nevada and make the same binding and obligatory upon the people of this State, and is a power that cannot be exercised, for the reason that it is a delegation of legislative power by the Legislature of Nevada to Congress.

The provisions of section 3 constitute, and are, in effect, an unconditional surrender of the autonomy of the State to the Federal Government. Section 1 of article 4 of the Constitution provides:

The legislative power of this State shall be vested in the Senate and Assembly which shall be designated the Legislature of Nevada.

In the case of *Merchants v. Knott*, 111 S. E. 565, at page 571, the Court said:

We are of the opinion that the power to bind and loose, to inaugurate and suspend the operation of a law, to say where and when it is a law, is, of necessity, an inherent and integral part of the lawmaking power not to be delegated.

In the case of *Davenport v. Elwood*, 107 N. W. 833, the Court said:

One of the settled maxims in constitutional law is that power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority.

Section 3 further provides that any amendments made by Congress to the Volstead Act shall, by virtue thereof, be adopted and applied under sections 1 and 2 of this Act. This violates section 17, article 4, of the Constitution of the State of Nevada, in that it attempts to amend an Act without reenacting and publishing at length its provisions. Further, it is an attempt to adopt prospectively laws which may be enacted by the Congress of the United States, and, as was said by the Court in the case of *Moore v. Allen*, 30 Ky. 651:

It is a fundamental rule that we cannot adopt prospectively any law that might be passed by a foreign lawmaking body, because this would enable the foreign lawmaking body to write statutes upon our books.

III

Inasmuch, therefore, as section 3 of the provisions of this Act is, in my opinion, unconstitutional, the question necessarily arises: What effect would this have upon the other provisions of the bill?

It must be remembered that section 6 of the bill provides:

Should any section or any portion of any section of this Act be found unconstitutional, the remainder shall continue in full force and effect, it being expressly declared that such is the intention.

The Legislature, in enacting this measure, has provided that all amendments made by the Congress of the United States should, by operation of section 3, be applicable in so far as the enforcement of the prohibition law in Nevada is concerned. There is herein expressed an intent by the lawmakers to enable Nevada to operate “in full concurrence” with Congress in the enforcement of the Eighteenth Amendment.

No other construction can be placed upon the Act. This intent is apparent; were this not the intent, it would not be so expressed and furthered by every step in the Act.

Were there a mere desire to employ the machinery of our State to enforce the provisions of the Eighteenth Amendment, this could be done by very different means than those employed in the Act.

A new law could be adopted by our Legislature absolutely independent of the Act of Congress.

In the law the same acts or omissions could be punished by the same penalties as prescribed by the Act of Congress.

But if it were the intention of our lawmaking body to act independently and not in “full concurrence” with Congress, why did our lawmakers provide in the Act for our law paralleling that of Congress, keeping abreast of amendments, dying with a repeal of the congressional Act, and adopting any new laws of Congress?

None of these things was or is necessary if a different intent is to prevail.

Cooley, in his able work on Constitutional Limitations, says:

But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion, and, if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and, if all could not be carried into effect, the Legislature could not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.

So it will be seen that the rule we must invoke in placing a construction upon a statute in an effort to determine the effect of an invalid portion of the same Act is that, if the purpose is to accomplish a single object and some of the provisions are void, the whole must fail, if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the Legislature intended them as a whole.

The rule applicable to this point is forcibly stated by Chief Justice Shaw in *Warren v. Mayor of Charleston*, 2 Gray, 98, who, after stating the general proposition that some portions of a statute may be held to be constitutional, while another portion may be pronounced void, and that in certain cases the valid portion may stand and the other be rejected, proceeds to say that "this must be taken with this limitation, that the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them." This case was quoted with approval in *French v. Tescemacher*, 24 Cal. 548; and doubtless states the law correctly. Tested by this rule, the whole of section 3696 was void per se. *Wills v. Austin*, 53 Cal. 152, p. 179.

The insuperable difficulty with the application of that principal of construction to the present instance is that, by rejecting the exceptions intended by the Legislature of Georgia, the statute is made to enact what confessedly the Legislature never meant. *It forces upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions.*

The conclusion must follow that it was not the purpose of the Legislature to forever bind

the people of this State with the provision of the National Prohibition Law as it now exists, but, on the contrary, to make this enactment in reference to prohibition not positive and rigid, but it was desired to submit to the will of Congress the right to regulate in reference to this measure; to have the advantage of such change as may be adopted in making more liberal provisions. This being true, the removal of section 3, supra, by reason of its unconstitutionality, thereby eliminates what might be termed its elasticity, with the result that what remains of the Act would make the provisions positive and beyond the intent which the Legislature had in mind.

It is true the bill contains a saving clause, but the provisions of the saving clause are repugnant to the intent expressed in the Act, and, by reason of their repugnancy, would be inoperative.

IV

There is serious doubt as to whether or not the provisions of this Act are not violative of the due-process clause of the Constitution.

One of the essential elements in the enactment of legislative Acts which seek to make the performance of certain acts criminal, is that those acts, commissions, or omissions be defined with certainty. The provisions of this bill do not definitely define what acts, commissions, or omissions are criminal, but refers the individual to the statute adopted by Congress wherein he can obtain the information in reference to what acts and omissions are a violation of this law. The citizen shall, at his peril, determine for himself what are the acts and omissions prohibited by the Volstead Act, for this bill makes no attempt to define them. As was said by the Supreme Court of California in the case of *In Re Lockett*, 179 Cal. 583:

So important is the liberty of the individual that it may not be taken away even from the most debased wretch in the land except upon conviction of a crime which has been so clearly defined that all might know in what act or omission the violation of the law should consist.

Every citizen realizes the difficulty that is encountered today in enforcing the prohibition law. Is it wise and prudent to enact a measure seeking to define certain acts or omissions as criminal when the measure, as adopted and by the Act of the Legislature is thus raised to the dignity of a law, is uncertain and indefinite in its terms and provisions?

V

The Supreme Court of California, in the matter of the Application of Frank Burke, was called upon to determine the validity of the Wright Act, and it was urged to this body that the fines imposed for a violation of the Wright Act were payable to the United States Government, and not the State of California. The Supreme Court of California, passing upon this question, remarked:

The question whether the fines which are imposed under the penal provisions of the

Act are payable to the United States or to the State, may be a matter of dispute, but it is not the question with which petitioner is concerned.

This question is of serious importance in this State because, if the fines collected, by reason of enforcing this Act, do not inure to the benefit of the State of Nevada, the provisions of the Act violate section 3, article 2, of the Constitution of the State of Nevada, being section 355, Revised Laws of Nevada, vol. 1, p. 107, wherein it is stated that “all fines collected under the penal laws of the State are hereby solemnly pledged for educational purposes, and shall not be transferred to any other fund for other uses.”

I realize that the Supreme Court of California has passed upon the Wright Act and held the same to be constitutional, but it is to be remembered that the question of the invalidity of section 3 was not before the court for decision, and, second, that the matter of the disposition of the fines and forfeitures was held to be of no concern to the petitioner, and the Court stated that this was a matter of disposition between the Federal and State Governments, to be determined later. The title of the Wright Act was not assailed before the Supreme Court. The only serious question urged was that it violated that section of the Constitution of the State of California, which provides:

No Act can be revised or amended by reference to its title, but such section as is amended or revised must be published at length.

The Legislature of this State is now in session. The defects which I have pointed out herein can be easily remedied. If it is the desire of the legislative body, as expressed in this bill, to exercise its law-making power by enacting a measure similar in import to the provisions of the National Prohibition Law, it is a very simple matter to pass an Act incorporating therein the National Prohibition Law.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. J. G. SCRUGHAM, Governor, Carson City, Nevada.

18. Constitution--Amendment--Statute--Void Local Law--Delegation of Legislative Power--Compensation of Township Officers.

(1) Stats. 1919, p. 395, is void under art. 4, sec. 20, of the Constitution, as amended at general election of 1921.

(2) Compensation of township officers cannot be fixed in any other way than by a general law applicable to all townships.

(3) No power exists in Legislature to delegate to County Commissioners authority to fix

compensation of township officers.

INQUIRY

CARSON CITY, February 21, 1923.

I have your request for an opinion as to the effect of the amendment to section 20 of article 4 of the Constitution of the State of Nevada, which amendment was adopted and made part of the Constitution by the vote of the people at the last general election.

OPINION

In your communication requesting this opinion you have set forth your views in reference to the effect of this amendment and, after careful examination of your letter and the reasoning therein contained. I have concluded to adopt the contents of your letter as my opinion in reference to this matter. Your letter reads as follows:

At the last general election, section 20 of article 4 of the Constitution of the State of Nevada was amended. Two changes were made in that section, to wit:

The words "and fixing their compensation" were added to the first subdivision of the section. As it now reads, the Legislature is expressly prohibited from passing any local or special laws fixing the compensation of Justices of the Peace and Constables.

The second change was in the last subdivision, by striking out the words "and township." Whereas there was formerly an express exception permitting special laws to be passed fixing the compensation of township officers, that has been eliminated *ex industria*, and such laws can be passed now only with respect to county officers.

These two changes very definitely and plainly deprive the Legislature of the power to pass any local or special law fixing the compensation of Justices of the Peace and Constables.

What is the effect of this amendment? During the last election it was generally stated to the public that it would remove from the time and consideration of the Legislature measures dealing with the compensation of Justices of the Peace and Constables, and place the same in the Boards of County Commissioners.

It seems to me that it has had exactly the opposite effect, and that the compensation of Justices of the Peace and Constables throughout the State will remain stationary and not subject to change unless this Legislature passes a general Act fixing such compensation for every Constable and Justice of the Peace in the State. Of course, this could be done by a classification of townships, providing a certain compensation for townships of a certain population.

Such compensation, however, will hold from one session of the Legislature to the next, and will not permit of regulation by the Boards of County Commissioners, as the law now stands.

This, to my mind, would render the statute of 1919, p. 395, unconstitutional under section 20 of article 4, as amended. That Act authorizes the County Commissioners to fix the compensation of Justices of the Peace and Constables under certain conditions.

The reason for my conclusion is this: It is elemental that a governmental body cannot delegate to an inferior body powers which it does not itself possess in the first instance. So, too, the Legislature cannot delegate a power which it does not possess. 12 C. J. 840.

This principle, of course, applies in any character of cases involving agency.

Neither can a thing be done indirectly which cannot be done directly.

Consequently, if the Legislature cannot fix, for instance, the salary of the Justice of the Peace of Verdi Township, in Washoe County, how can it authorize the Board of County Commissioners of Washoe County to do so?

The only thing it can do, it seems to me, under the Constitution as it now stands, is to classify all of the townships in the State, or else allow compensation to remain as now fixed by law.

The power to pass such special Acts cannot be read into the Constitution by implication as was done in State v. Fogus, 19 Nev. 247, 9 Pac. 123, and Mining Co. v. Allen, 21 Nev. 325, 31 Pac. 434. The express language of the amendment prohibits any such construction by implication.

Apparently, the various salary Acts as already passed would not be affected, because the section goes to the power to pass, and not to the Acts per se. That power existed when they were passed.

After classification it could not be provided that the Commissioners might fix the compensation of those classifications, because they could then be fixed differently in different counties, and the law would not, in its very nature, be general throughout the State.

If it is the desire that this power should rest with the County Commissioners, amendment of this section should again be provided for in this session of the Legislature, so as to go before the people at the earliest possible date.

In the meantime, compensation must remain as it is, unless the Legislature

undertakes to classify all of the townships in the State.

It is my opinion, therefore, that under section 20, article 4, the Legislature is prohibited from fixing fees and compensation of township officers in any other way than by a general law applicable to all the townships in this State, and, therefore, no power would exist in the Legislature to delegate to the County Commissioners authority inconsistent with the power thus vested in the Legislature. If it is desired to have the County Commissioners fix the fees and compensation of township officers in the several counties of this State, a proper amendment will have to be made to this section and article of the Constitution.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. L. D. SUMMERFIELD, District Attorney, Reno, Nevada.

SYLLABUS

19. Automobile--Negligence--Liability for Personal Injury by Federal or State Official when Driving Official Car--Relief.

United States cannot be sued for negligence of its officers, and State is not liable for torts of its officers in discharge of official duties, unless each has assumed liability. Aggrieved person's only relief is by appeal to Legislature. The only liability is personal liability of driver of car.

INQUIRY

CARSON CITY, February 21, 1923.

I have your communication of the 14th instant wherein you desire an opinion in reference to the following two questions:

First--If a federal veterinarian operating a state-owned car should inflict damage on another party and the Court should decide that the damage arose through the negligence of the driver, who would be held financially responsible--the driver as an individual, the Federal, or the State Government?

Your second query relates to the liability of a state-owned car as to whether or not the State would be liable if an employee caused damage to an individual while he was not engaged along the line of his official business.

OPINION

Replying thereto, you are advised that the courts have held, first, that the United States cannot be sued for damages for the negligence of its officers; and, second, that a State is not liable for the torts of its officers or agents in the discharge of their official duties unless each has voluntarily assume such liability and consented to be liable. The only relief the aggrieved person has in such case is an appeal to the Legislature.

Melvin v. State, 53 Pac. 416;
Lewis v. State, 48 Am. Rep. 607;
Billings v. State, 67 Pac. 583.

It would follow, therefore, that the only liability to the aggrieved person would be the personal liability of the individual driving the car.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. EDWARD RECORDS, University of Nevada, Reno, Nevada.

SYLLABUS

20. Emergency Loan--Legality of Form of Application For.

Papers in application for temporary loan, held to be in proper form.

INQUIRY

CARSON CITY, February 28, 1923.

This will acknowledge the receipt of your letter of the 28th instant, together with the resolution of the Board of County Commissioners of Mineral County in re application for a temporary loan.

OPINION

I have examined the several papers submitted, and I am of the opinion that the same are in due form and according to law. I therefore approve their legality as to form.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. GILBERT C. ROSS, Secretary State Board of Finance, Carson City, Nevada.

SYLLABUS

21. National Prohibition Law--State Court Has No Power to Enforce National Law.

(1) The United States and the State of Nevada are two separate and distinct sovereignties, and the courts of this State have no power to enforce the penalties prescribed by criminal laws of the United States.

INQUIRY

CARSON CITY, February 28, 1923.

You advise me that a petition was filed in your District Court for a writ of habeas corpus, wherein the defendant was held in custody for a violation of the state prohibition Act.

The habeas corpus proceedings were sought upon the theory that the law under which the petitioner was arrested had been repealed by the Legislature, and, inasmuch as no saving clause was contained in the repealing Act, upon the hearing of the petition the Court granted the writ and the petitioner was released.

OPINION

There can be no question but what the Court ruled correctly, and it appears from your letter that you are satisfied with the Court's decision in this respect.

You maintain, however, that "there is still sufficient law in this State, even though the Legislature should wipe out all state legislation on the prohibition question, to hold persons charged with the manufacture or sale of intoxicating liquors"; this upon the theory that the National Prohibition Law can be enforced in state courts without any Act upon the part of the State Legislature in reference thereto.

I cannot agree with your contention. The State of Nevada and the United States are two separate and distinct sovereignties.

The powers of the General Government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. *Abelman v. Booth*, 21 How. (U.S.) 516.

The several States can have no constitutional power to enforce the penalties prescribed by the criminal laws of the United States. *Stearns v. United States*, 2 Paine, 300; *Commonwealth v. Feely*, Va. Cas. 321.

It is likewise held that--

The courts of the United States have no power to execute the penal laws of the

individual States. *Huntington v. Attrill*, 146 U.S. 671.

No sovereignty can have power to enforce the penal laws of another sovereignty. *People v. Kelly*, 38 Cal. 145.

It is, therefore, my opinion that an appeal to the Supreme Court, based upon the theory suggested by you as stated above, would be ineffectual.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. W. T. MATHEWS, District Attorney, Elko, Nevada.

SYLLABUS

22. Easement of Highway on Public Land--Settler.

The Highway Department acquires an easement upon that portion of the public domain which it designates for highway purposes, and a subsequent settler thereon takes subject to such easement.

INQUIRY

CARSON CITY, March 6, 1923.

I have your request for an opinion as to the right of the Department of Highways to claim a right of way for state highway purposes over public lands. Your inquiry states that at the time the survey was made the lands were public lands and had not been settled upon by any person. However, after the state highway had been surveyed and the lines established, an individual filed a homestead entry on a portion of said lands embraced within that section of the same over which the state highway was designated.

OPINION

I am of the opinion that the case of *Wallowa County v. Wade*, 72 Pac. 793, is decisive of the right of the state highway in connection with this matter. The Court in this case stated:

The right is necessarily indefinite, and, in a sense, floating and liable to be extinguished by a sale or disposition of the land until the highway is surveyed and marked on the ground, or in some other way identified or designated, but when the public authorities law out and locate a road over public lands of the United States by surveying and marking it on the ground, or by some legislative Act, or when it is shown by user, the right becomes complete, and an intention to accept the dedication

is manifested, and subsequent settlers on the land take subject to the easement.

I am, therefore, of the opinion that the person settling on the land after the highway had been designated over and across the public land in question, took the said land so settled upon subject to the easement that accrued to the Highway Department by reason of the facts stated above.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. GEO. W. BORDEN, State Highway Engineer, Carson City, Nevada.

SYLLABUS

23. Statute--Budget Law Construed.

Stats. 1917, p. 250, the Budget Law: A recital of the estimated expenditures, etc., in such detail as shall be prescribed by the Tax Commission would be a compliance with this statute.

INQUIRY

CARSON CITY, March 19, 1923.

You desire an interpretation concerning the following words in Stats. 1917, p. 250:

And shall show the estimated expenditures in detail, showing administrative expense, etc.

OPINION

It is my opinion that this language should be construed together with the other recitals contained in this Act, which provides:

Said budget shall be prepared in such detail as to the aggregate sums and the items thereof as shall be prescribed by the Nevada Tax Commission.

Therefore a recital of these items in accordance with the prescribed form of the Nevada Tax Commission would be a compliance with the provisions of this statute.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. J. H. WHITE, District Attorney, Hawthorne, Nevada.

SYLLABUS

24. Surety Bonds for Public Officers--Payment of Premiums at Public Expense--
Constitutionality of Statute.

(1) The title of Stats. 1917, p. 340, seems to authorize payment of all official bonds at public expense, but the Act contains no authority in the body thereof justifying County Commissioners in paying premium on bonds for township officers.

(2) Failure to recite in the body of an Act a provision indicated in the title does not render the Act unconstitutional.

INQUIRY

CARSON CITY, March 19, 1923.

You address to me the following inquiries:

1. Under the provisions of the Act of the Legislature of March 24, 1917, entitled "An Act to provide surety bonds for state, district, county, city, and township officers at public expense," can the county allow a claim for payment of premium on bonds of Justices of the Peace, when there is no mention in the body of the Act of township officers?
2. Would the omission of such, thereby making a conflict between the title and the body of the Act, render it unlawful to pay premiums on the other classes of officials named therein?

OPINION

Replying to your first inquiry, I am of the opinion that surety bonds executed by Justices of the Peace or Constables cannot be paid by the county, for the reason that, while the title of the Act would seem to authorize such proceeding, the body of the Act contains no authority that would justify County Commissioners in paying the premium on surety bonds for township officers.

Replying to your second inquiry, I am of the opinion that the failure to recite in the body of the Act a provision authorizing the payment of surety bonds for township officers in compliance with the title of this Act would not render the Act unconstitutional.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. J. H. WHITE, District Attorney, Hawthorne, Nevada.

SYLLABUS

25. Private Employment Agency--Annual License--Bond.

INQUIRY

CARSON CITY, March 19, 1923.

I have your letter dated March 17, 1923, containing the following inquiry:

I am submitting herewith copy of the amendments to chap. 167, Stats. 1919, relating to regulation of private employment agencies and the amendment to section 5 of the Act, approved March 5, 1923.

Section 5 of the Act increases license fees to \$50 per year and reenacts section in connection with the filing of bonds. Sam Francovich of the Francovich Employment Agency has submitted check for \$50 for license fee. He has held license since 1919 under the Act referred to. Are we privileged to continue bond, copy of which I am enclosing herewith, and which is on file with the City Clerk of Reno, or should he be required to obtain new bond, although the sections against which the former bond was a penalty have not been changed?

OPINION

I have examined sections 1 and 5 of said Act, as amended by the Act of March 5, 1923, and am of the opinion that section 5, as amended, places an additional liability upon the bondsmen for the payment of annual fee of \$50 by the licensee, and that you should require a new bond from such licensee conditioned that the licensee "comply with the provisions" of the Act as amended by the Act of March 5, 1923.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, Deputy Attorney-General.

HON. FRANK INGRAM, Labor Commission, Carson City, Nevada.

SYLLABUS

26. Budget Law--Indigent and Other Funds.

(1) Requirement that County Commissioners fix amount of indigent and other funds is for budget-fixing purposes only.

(2) Revenues collected for indigent and other general expenses are apportioned to general fund, while those collected for special purposes are placed in special funds. Notwithstanding fact that money for the several general expenses goes into general fund, County Treasurer must keep account of each county, state, and special fund.

INQUIRY

CARSON CITY, March 19, 1923.

You request an interpretation from this office as to whether Stats. 1919 (chap. 184, p. 331, par. 2, sec. 1) conflict with or supersede the provisions of par. 1, p. 250, Stats. 1917, as to requiring an indigent fund to be kept, or whether all revenues (other than special for special funds) are to be paid into a general fund, and paid out therefrom.

OPINION

For the purpose of arranging the budget under Stats. 1917, p. 250, it is required that the County Commissioners, under the heading "Indigent Fund," should set forth the amount of money that is necessarily required for this fund during the fiscal year, and the several funds therein set forth and enumerated are for budget-fixing purposes only.

Under Stats. 1919, p. 331, it is required that "all revenue collected for general, administrative, current expense, salary, indigent, and contingent purposes shall be apportioned to the general fund." In other words, the taxes collected for these respective purposes are placed in the general fund, and all revenue collected for special purposes is apportioned to the special fund in contradistinction to the general fund. Therefore the moneys collected by taxation for the benefit of the indigent fund are paid into the general fund, and obligations accruing to the indigent fund are paid by the County Treasurer from the general fund.

Notwithstanding the fact that all these go into the general fund, it is necessary that the County Treasurer, in accordance with the provisions of section 2, Stats. 1919, p. 331, submit to the Board of County Commissioners a statement giving the balance in each county, state, and special fund. For the purpose of deducting the amount, the money from all funds, except the special fund, is paid into the general fund and from this fund distributed, and the County Treasurer is required under the law to keep an account of the moneys expended from the several funds which comprise the general fund.

Respectfully submitted,
M. A. DISKIN, Attorney-General.

HON. J. H. WHITE, District Attorney, Hawthorne, Nevada.

SYLLABUS

27. Brands--Livestock Units.

(1) No person who has one or more brands of legal record under previous law can be awarded a new brand under provisions of this Act unless he is owner of separate livestock unit.

(2) No one who has recorded brand for separate units is entitled to new brand unless he is owner of separate unit.

INQUIRY

CARSON CITY, March 20, 1923.

You request an opinion in reference to section 7 of Assembly Bill No. 27, "An Act providing for the adoption, recording, and use of brands," etc.

Section 6 provides:

Hereafter but one brand shall be awarded for each owner of horses, mules, asses, cattle or hogs.

In connection with the provisions of this section you desire an interpretation, as follows:

1. That no one who had one or more brands of legal record under the previously existing system of recording brands in the various counties could be awarded a new brand under the provisions of the law recently enacted and here cited.
2. That this section would only become applicable after this Act became a law, and that at the present time each and every separate and distinct livestock owner is entitled to record one new brand regardless of how many brands of legal record he owned under the provisions of previously existing statutes.

OPINION

The purpose of the Act in question was to provide "for the adoption of and recording, rerecording, transferring and use of brands and marks, etc.; defining the duties and powers of the State Board of Stock Commissioners in connection therewith;" etc.

It will be seen, therefore, that it was the intent of the Legislature to make certain changes in the then existing laws in reference to the record of brands, etc.

Section 7 provides:

Hereafter but one brand shall be awarded or recorded for each owner of horses, mules, asses, cattle, or hogs; *provided*, that each owner of a separate and distinct livestock unit may, under the terms of this Act and within the discretion of the board, record one brand for use in connection with and for each such distinct and separate livestock unit; * * * *and provided further*, that nothing in this section shall apply to the rerecording of any brand or brands legally recorded at the time of passage of this Act and remaining of legal record in this State under the provisions of this Act, in so far as the legal owners of such brand or brands at the time of passage of this Act are concerned; or to brands legally transferred as provided for in section 11 of this Act.

Sections 3 and 4 of this Act authorize the several County Recorders of this State to transfer to the board all of the records having to do with the recording of brands and marks, and also provide that all brands and marks now recorded in accordance with law shall be rerecorded in the office of said board.

This is a sufficient statement of the provisions of this Act to answer your questions.

It is my opinion, in answer to your first inquiry, that no one who had one or more brands of legal record under the previously existing law could be awarded a new brand under the provisions of this Act unless he was the owner of a separate and distinct livestock unit, as defined in section 7 of said Act.

Replying to your second inquiry, I am of the opinion that no person, who at the present time has a brand and the same is of record for separate and distinct livestock units, would be entitled to a new brand unless, as defined in subdivision 7, supra, he is the owner of a separate and distinct unit.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. EDWARD RECORDS, State Board of Stock Commissioners, University of Nevada, Reno, Nevada.

SYLLABUS

28. Statute--Attorney-General's Opinion on Constitutionality of Statute--When Same Is an Opinion on a Moot Question.

(1) Attorney-General should not pass on validity of law unless question arises in regard to act of some official. An inquiry otherwise presented would be a moot question, and an opinion of the Attorney-General thereon that a law is unconstitutional would not relieve the official from compliance with such Act nor from the penalty for his noncompliance.

INQUIRY

CARSON CITY, March 20, 1923.

I have your request for an opinion as to the constitutionality of that certain Act entitled:

“An Act in relation to courts of record, to prevent unnecessary delay in rendering judicial decisions, and repealing a certain Act in conflict therewith,” approved March 24, 1913 (Stats. 1913, p. 313);

and, particularly, with reference to sections 2 and 5 thereof.

OPINION

I have read with a great deal of interest the authorities submitted by you to sustain the theory that this Act is unconstitutional.

I am of the opinion that my office should not pass upon the validity of Acts of the Legislature unless the question arises or is submitted where an officer is required to perform or not to perform certain acts in connection with the statute in question.

In this case, if a District Judge should refuse to file an affidavit with the State Controller, under the provisions of this section, and the State Controller should request an opinion from me regarding the constitutionality of this Act. I would, of course, be glad to give him my opinion in reference to the provisions of this Act. I feel, however, that in the way this matter is presented it might be said to be a moot question. If I should render an opinion in this case holding that the Act in question was unconstitutional, my opinion, of course, would not absolve the District Judge from complying with the provisions of this statute and would not relieve him from the penalty of the law in the absence of such compliance.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. L. D. SUMMERFIELD, District Attorney, Reno, Nevada.

SYLLABUS

29. Constitutionality of Relief Bill--Statute.

(1) Stats. 1919, p. 439, prescribed procedure for claims against State. Subsequent Legislatures may enforce or ignore it. Legislature is not bound by Act of previous Legislature.

(2) An Act allowing a claim which has previously been presented and disallowed, is constitutional. Its passage is simply a question of policy.

INQUIRY

CARSON CITY, March 21, 1923.

You hand me Assembly Bill No. 69, which is a relief measure in the sum of \$280.23, authorizing the payment to Eugene Schuler of a sum of money. You request an opinion as to whether this Act is constitutional.

OPINION

It appears upon the face of this relief bill that this claim accrued several years ago and the bill was presented to different Legislatures without success. It will be noted that Stats. 1919, p. 439, provides:

That any person having, or claiming to have, any alleged claim against the State of Nevada shall present such alleged claim for consideration to the next succeeding session of the Legislature following its incurrence. Any such alleged claim not so presented, or which has been so presented, shall be forever barred from presentation to any subsequent Legislature for further consideration.

This Act is nothing more nor less than a rule of procedure in reference to when and how claims against the State of Nevada must be presented. The Legislature of 1923, which allowed the instant claim, had the right to enforce this provision of the statute or to ignore it. It is doubtful if any legislative enactment could be binding on subsequent Legislatures. In any event, the Legislature that enacted this bill would have the inherent right to repeal the Act of 1919, p. 439, supra, or to refuse to be governed by its provisions.

The Legislature, in enacting laws, is supreme except only as it may be restricted by the provisions of the Constitution of the State of Nevada.

I am, therefore, of the opinion that this Act is constitutional, and it is simply a question of policy on the part of the Legislature in enacting this measure. It is not within my province to criticize the policy which may have prompted them to enact any measure.

Respectfully submitted,
M. A. DISKIN, Attorney-General.

HON. J. G. SCRUGHAM, Governor, Carson City, Nevada.

SYLLABUS

30. Old-Age Pension--Senate and Assembly Bills--Funds Available.

(1) Sum available for old-age pensions would be amount of tax imposed for that purpose.

- (2) Expenses of administration should be paid from the old-age pension fund.
- (3) No other fund could be used to supplement the tax levy.

INQUIRY

CARSON CITY, March 21, 1923.

You direct my attention to Senate Bill No. 147 and Assembly Bill No. 49 (old-age pension bills), and request information:

First--The amount of money available for the use of this commission under the tax levy;

Second--For what purpose this money can be used;

Third--Whether or not, if the money is available under the tax levy or insufficient to carry out the provisions of the Act, could any other state or county funds be used to supplement the tax levy; and

Fourth--Is the Act unconstitutional?

OPINION

Replying to your first inquiry: Section 19 of Assembly Bill No. 49 provides:

The Boards of County Commissioners of each and every county of the State of Nevada are directed to collect for the fiscal year 1923, and annually thereafter, a tax of two and a half mills on each one hundred dollars of taxable property within their respective counties for the purpose of creating an "Old-Age Pension Fund."

The amount of money therefore available for the use of the Commission would be the sums of money collected by reason of this tax imposed.

Replying to your second interrogatory: Section 20 of the Act provides:

All expenses incurred by the Commission in the administration, investigation, and salaries shall be borne by the State of Nevada. The Commission shall audit all bills for said expenses and salaries, and when same shall have been certified to by the chairman and secretary, the secretary shall file the same with the State Board of Examiners for approval, and the same shall be paid *out of the old-age pension fund*.

All expenses, including such salaries as are authorized by this Act, must be paid from the old-age pension fund.

Replying to your third inquiry: It is my opinion that, if the tax levied as provided for in section 19 is not sufficient to pay all demands arising by virtue of the provisions of this Act, no other state or county fund could be used to supplement the tax levy. State v. LaGrave, 23 Nev. 25.

The Act, in my opinion, is constitutional.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. J. G. SCRUGHAM, Governor, Carson City, Nevada.

SYLLABUS

31. Gasoline Tax, by Whom Paid--Coupon Books--Interstate Commerce.

(1) Senate Bill No. 20 is not an excise tax on sale of gasoline, but rather a tax upon the use of public highways.

(2) The tax is to be paid by all users of gasoline for propelling certain motor vehicles.

(3) Purchasers of coupon books, prior to enactment of Act, are not relieved from payment of tax on portion of such books used after enactment of Act.

(4) Shipments of gasoline out of State are not subject to tax.

INQUIRY

CARSON CITY, March 26, 1923.

Your letter reads:

I would like an opinion:

*First--*As to the taxability of coupon gallonage books which have been sold prior to the enactment of Senate Substitute for Senate Bill No. 20, which is an Act authorizing collection of a 2-cent tax on gasoline.

*Second--*Whether or not the 2-cent tax is to be collected on sales made to the government, state, and municipalities;

*Third--*As to whether or not the tax is to be collected on shipment of gasoline made to

points outside of the State of Nevada.

OPINION

Senate Substitute for Senate Bill No. 20 is entitled:

“An Act to provide an excise tax on the sale of gasoline, distillate, and other volatile and inflammable liquids produced or compounded for the purpose of operating or propelling motor vehicles,” etc.

The introductory clause contains recitations disclosing that the operation of motor-driven vehicles over the state highways of the State of Nevada is attended by constant and serious danger to the public and that, by reason thereof, the State expends large sums of money repairing said highways.

Section 2 of the Act imposes an excise tax of 2 cents per gallon on all motor-vehicle fuel sold or used by every dealer as is defined in said Act.

Section 4 exempts all motor-vehicle fuel which is used for operating or propelling such apparatus as are stationary or that are not used on the public roads of this State.

The excise tax is not imposed on account of purchase of gasoline nor on the gasoline itself. On the contrary, the final and essential element in the imposition of the tax is that the gasoline purchased must be used in propelling a certain kind of vehicle over the public highways. That which is really taxed is the use of the vehicle of the character described upon the public highway, and the extent of the tax is measured by the quantity of fuel consumed; the tax is imposed according to the extent of the use as thus measured. It is clear that the tax is not imposed upon the seller nor upon the gasoline while in his hands, but it is rather a tax upon the use of the public highways by the vehicle described in said Act.

With this statement of the purpose of the Act in mind, it must necessarily follow that the sale of coupon books made by dealers in gasoline prior to the enactment of this measure would in no way relieve the buyer of said books from the payment of the tax imposed. It is my opinion, further, regarding sales of gasoline made to the government, state, and municipalities, if the same are to be used for the purposes described in said Act, that a tax must be collected on the sales so made unless they come within the provisions of section 4 of the Act.

In cases where sales of gasoline are made to be shipped to points outside of the State of Nevada, I am of the opinion that no sale tax should be charged; this for the reason that in these cases it cannot be said that the highways of this State will be used by any such vehicle, and for the further reason that it would be placing restrictions on interstate commerce.

In conclusion, I desire to call your attention to the specific provision of this Act which requires that the dealers shall not only pay a charge of 2 cents on all gasoline sold by them, but they must also pay 2 cents per gallon for all gasoline used by them in this State.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. J. G. SCRUGHAM, Governor, Carson City, Nevada.

SYLLABUS

32. Corporations--May Purchase their Own Stock for Unpaid Assessments.

(1) Nevada corporations may purchase their own stock when same is on sale for unpaid assessments.

INQUIRY

CARSON CITY, March 28, 1923.

Have Nevada corporations the right to purchase their own stock on sale for unpaid assessments?

You advise me that the charter of the company in question contains an express authorization to the company to purchase its own stock; that the company is solvent and that there are no rights of creditors or nonassenting stockholders affected.

OPINION

This matter is elaborately treated and the rule is laid down as follows:

In the absence of constitutional, statutory, or charter restriction, by the weight of authority in the United States a corporation may purchase and hold shares of its own stock. 144 C. J. 275, and note 58, citing several hundred cases.

The provisions of our general corporation law were borrowed from New Jersey. I find the following New Jersey decisions to support the rule stated:

Chapman v. Iron Co. (N.J.), 41 Atl. 690;
Knickerbocker Co. v. State Board (N.J.), 65 Atl. 913, 9 L. R. A. (N.S.) 885;
Berger v. U.S. Steel Co. (N.J.), 53 Atl. 68;
Oliver v. Ice Co. (N.J.), 54 Atl. 460;
Hoskins v. Seaside Co. (N.J.), 59 Atl. 645.

In *Gilchrist v. Highfield* (Wis.), 17 Am. & Eng. Ann. Cas. 1257, and particularly in the extended and elaborate note, is a very complete consideration of the entire question; and it is to

the effect that, in the absence of statute, corporations have this power.

So, in an extended note to the case of *Hall v. Henderson* (Ala.), 61 L. R. A. 621, the same general rule is arrived at, and the cases laying down a contrary rule are explained as being governed by statutes different from anything existing in Nevada or New Jersey.

The United States Supreme Court, in *Johnson County v. Thayer*, 94 U.S. 631, 24 L. Ed. 133, laid down the rule squarely that, unless prohibited by law, a corporation may become a holder of a portion of its own shares, and this case has been uniformly followed.

It is my opinion, therefore, that the question propounded to me, *supra*, should be answered in the affirmative--that is to say, that Nevada corporations may purchase their own stock when the same is on sale for unpaid assessments.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. W. G. GREATHOUSE, Secretary of State, Carson City, Nevada.

SYLLABUS

33. State Engineer--Public Service Commission--Statute--Repeal.

(1) The general appropriation law of 1923 does not repeal Stats. 1919, chap. 1108, providing for salaries of State Engineer and his office force, nor chap. 109, sec. 5, Stats. 1919, providing for his salary as ex officio member of Public Service Commission.

INQUIRY

CARSON CITY, April 2, 1923.

Would the paragraph of the general appropriation law of the State of Nevada, enacted at the recent session of the Legislature of the State of Nevada, reading as follows:

For salary of State Engineer for all services rendered to the State, ex officio or otherwise, \$7,200; for salary of Assistant State Engineer, \$4,800; for salary of Deputy State Engineer, \$4,400; for maintenance and support of State Engineer's office, \$20,000; one Chief Clerk, \$3,600; for snow surveys, \$1,500; one stenographer, \$3,000; for cooperative water measurements with U. S. Geological Survey, \$5,000--

have the effect of repealing that part of section 5 of chapter 109, Statutes of Nevada, 1919, which provides a salary of \$1,000 for the ex officio member of the Public Service Commission of the

State of Nevada?

OPINION

The paragraph of the general appropriation law passed at the last session of the Legislature of the State of Nevada, and as above quoted, was never intended for any purpose other than to prescribe a compensation for the State Engineer, his assistant, and office force, as provided by the bill passed by the recent Legislature, and vetoed by the Governor, the paragraph above quoted being insufficient to repeal chapter 108, Statutes of Nevada, 1919, providing for the salaries of the State Engineer and his office force. (See recent opinion upon this subject.)

We are of the opinion that the clause, “for all services rendered the State, ex officio or otherwise,” would be also insufficient and without force and effect to repeal chapter 109, Statutes of Nevada, 1919, providing for the salaries of the State Engineer as ex officio member of the Public Service Commission of the State of Nevada.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, Deputy Attorney-General.

HON. J. G. SCRUGHAM, Governor, Carson City, Nevada.

SYLLABUS

34. Witnesses--Mileage--Per Diem Fees.

(1) Witnesses subpoenaed in criminal cases from out of county are not entitled to mileage, but may be paid actual and necessary expenses in traveling, and per diem, not exceeding \$4 per day while away from home; amount to be fixed by District Judge, certified to County Clerk for entry on pay-roll.

(2) Witnesses from within county are paid per diem for “attendance.”

INQUIRY

CARSON CITY, April 2, 1923.

Will you please advise me whether or not witnesses in criminal cases, subpoenaed to attend in the District Court, wherein the witnesses are subpoenaed from without the county, are entitled to mileage at the rate of 30 cents per mile, or just entitled to their actual and necessary traveling expenses incurred by them in going to and returning from the place where the court is held?

Also, if they are entitled to per diem from the day they leave their homes until they return, or just entitled to their per diem for the days they are actually in attendance in court? (See page 3322, vol. 3, Rev. Laws, 1919.)

OPINION

Replying to the above inquiry, we beg to state that it is our opinion that under the provisions of section 3, chapter 96, Statutes of 1919, witnesses who have been subpoenaed from out the county are not entitled to mileage, but are entitled to their actual and necessary traveling expenses in going to and returning from the place where the court is held and per diem for the number of days necessarily consumed by them from the time they leave their homes until they return thereto, not exceeding \$4 per day, as may be fixed by the District Judge who shall certify who shall certify the same to the County Clerk for entry upon his pay-roll of witnesses and jurors.

Our reasons for this opinion are as follows: Section 1 of the Act provides that witnesses subpoenaed from within the county shall receive mileage, but no per diem, except while actually in "attendance" upon the court, and the time consumed in going to and returning from the county-seat is short, thus placing no unjust burden upon the witnesses, and, the mileage being comparatively small, place no unjust burden upon the county.

But when witnesses attend from another county or State where a number of days may be consumed in going to and returning from the place of trial, if the witness could receive no per diem for that time, it would place an unjust burden upon him, and would make it practically impossible to secure the attendance of witnesses from without the State; while, if mileage were allowed to such witnesses, frequently such mileage would be quite considerable and thus place a heavy burden upon the county and give the witness an unreasonable compensation.

So the Legislature has provided for witnesses within the county per diem "for each day's *attendance*," while for witnesses without the county such sum per diem while going to and returning from the place of trial not exceeding \$4 per day, as may be fixed by the District Judge.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, Deputy Attorney-General.

HON. EDGAR EATHER, District Attorney, Eureka County, Nevada.

SYLLABUS

35. Brands--Recording.

Stats. 1915, sec. 1, chap. 249, was not intended to render illegal a brand recorded after January 1, 1921, provided it had not in meantime and after that date been filed as brand of some other person.

INQUIRY

CARSON CITY, April 2, 1923.

Under the provisions of section 1, chapter 249, Statutes of Nevada, 1915, reading as follows:

Every person, company, or corporation having horses, cattle, or other live stock and owning a brand or mark, or brands or marks, for the same, shall record such brand or brands, or mark or marks, with the County Recorder on or before the 1st day of January, 1916, and again within sixty days prior to the 1st day of January, 1921, and repeatedly within sixty days prior to the first day of January at the end of each five-year period thereafter, such record to be made in the manner provided by existing laws for the recording of marks and brands--

would a brand recorded after the 1st day of January, 1921, under the provisions of that section be considered a legally recorded brand?

OPINION

We are of the opinion that section 1, chapter 249, Statutes of 1915, wherein appears the clause, "again within sixty days prior to the 1st day of January, 1921," was not intended to invalidate or render illegal, either as a rerecorded brand, or as a new or original brand, a brand recorded after the 1st day of January, 1921, provided it had not in the meantime, and after January 1, 1921, been filed and recorded as a brand by some other person.

The clause above referred to was manifestly intended to name a date after which any person might record and use a brand, irrespective of whether or not it had been previously used by some other person. And, even though it was rerecorded after January 1, 1921, it would still be a legally recorded brand, provided it had not at that time been filed and recorded by some other person.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, Deputy Attorney-General.

HON. EDWARD RECORDS, State Board of Stock Commissioners, University of Nevada,
Reno, Nevada.

SYLLABUS

36. Corporation--Preferred and Common Stock--Par and Nonpar Value--Opinion Affirmed by Supreme Court.

- (1) Nevada corporations may have both common and preferred stock without par value.
- (2) Dividends upon preferred stock with
- (3) Company may not have part of its stock with, and part without, par value.

This opinion was affirmed by Supreme Court in State ex rel. Goodman v. Greathouse, [47 Nev. 198](#), 217 Pac. 957.

INQUIRY

CARSON CITY, April 12, 1923.

(a) Under subdivision 4 of section 4 of "An Act providing a general corporation law," approved March 16, 1903, as amended by chapter 206, Statutes of 1923, can a company be incorporated with two kinds of stock, viz: (a) Common stock without par value, and (b) preferred stock without par value?

OPINION

Our answer is, Yes. The first proviso under subdivision 4 of section 4, above referred to, as amended, provides for different classes of stock without par value.

INQUIRY

(b) On what shall the dividends provided for in section 10 of the "General Corporation Law," as amended by chapter 249, Statutes of 1921, be estimated where the preferred stock, mentioned in section 10, shall be without par value?

OPINION

At the time section 10 of the "General Corporation Law" was enacted there was provision for "par value" stock only. Subdivision 4 of section 4 of the law as now amended provides for the issuance of stock without par value, and, *in lieu of a par value*, it further provides as follows:

and upon the organization of any corporation without par value to the shares of its capital stock, the board of directors may, from time to time, fix the consideration for which any and all shares, except shares subscribed as aforesaid, * * * shall be issued and held.

Under the provision just quoted, when construed in connection with section 10 of the Act as amended by chapter 249, Statutes of 1921, we are of the opinion that any dividends declared upon preferred stock without par value should be computed upon the *value* of the stock *as fixed by the board of directors*, in lieu of a par value.

INQUIRY

(c) Does subdivision 4 of section 4 of the general corporation law, as amended by chapter 206, Statutes of 1923, authorize the incorporation of a company with part of its stock at par value and part of it without par value?

OPINION

Our answer is, No. Subdivision 4 of section 4 of the general corporation law, as originally enacted, provided only for the issuance of stock with par value. That part of the section above referred to was reenacted without any change, but a “proviso” was added which authorizes the incorporation of companies whose authorized capital stock may be *without par value*, but nowhere does it provide for the incorporation of companies whose authorized capital stock may be part with par value and part without par value, and, in the absence of such authorization, it cannot be done.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, Deputy Attorney-General.

HON. W. G. GREATHOUSE, Secretary of State, Carson City, Nevada.

SYLLABUS

37. Taxes Delinquent--Certifying.

Rev. Laws, 3646, 3651, as amended Stats. 1919: Tax receiver should certify delinquent taxes after first Monday in June next succeeding such delinquency.

INQUIRY

CARSON CITY, April 13, 1923.

You advise that in 1919 sections 3644, 3646, and 3651, Revised Laws of 1912, were amended; that by reason thereof certain changes were made in reference to the sale of property for delinquent taxes. You desire to be advised at what time the tax receiver is required to certify delinquent taxes where the amount involved exceeds \$300.

OPINION

Section 32 of the Act of 1919 provides that, in the event the first installment of taxes were not paid at the time designated therein, the entire tax should become due. Section 34 of this Act provides a follows:

A penalty of 3 per cent per month shall be added and collected by the tax receiver on all such delinquent property from the date of delinquency until paid, or if still unpaid on the first Monday in June next succeeding, such penalty of 3 per cent per month shall be added to the original tax, together with the penalty of 15 per cent hereinbefore provided, and the same shall become a lien on the property so assessed; and the tax receiver shall immediately prepare a delinquent list which shall include this property, together with any property that may become delinquent on account of the failure to pay the second installment of taxes.

It is my opinion, therefore, under the provisions of this section, the tax receiver should certify delinquent taxes after the first Monday in June next succeeding such delinquency.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. E. E. WINTERS, District Attorney, Fallon, Nevada.

SYLLABUS

38. State Engineer--Salary.

(1) Repealing clause of general appropriation Act does not affect salaries of officers, as fixed by prior statutes.

(2) State Engineer is entitled to \$4,000 salary and \$1,000 as ex officio member of Public Service Commission.

(3) Failure of Legislature to allow sum sufficient for salaries of officers does not deprive them of right to collect where Legislature has designated the amount thereof.

INQUIRY

CARSON CITY, April 13, 1923.

You desire to be advised as to what compensation you are directed to pay to the State Engineer and to his assistant.

The apparent confusion in reference to the compensation in the State Engineer's office is due to the fact that the general appropriation bill passed by the 1923 Legislature has appropriated a sum of money for the State Engineer's department which would authorize payment to the State Engineer of a salary of \$4,000 per annum and the Assistant Engineer \$2,400 per annum. The appropriation bill further contains a repealing clause.

I hand you herewith an opinion rendered by this office under date of April 2, 1923, wherein it is held that the repealing clause of the general appropriation bill has no force or effect in so far as it might be considered an attempt to repeal former statutes fixing the salaries of officers.

OPINION

It is therefore my opinion that the State Engineer is entitled to compensation as fixed in the Statutes of 1919, to wit, a salary of \$5,000--\$4,000 for his services as State Engineer and \$1,000 as an ex officio member of the Public Service Commission. The Assistant State Engineer is entitled to compensation in the sum of \$3,600 per year.

It has been held by the Supreme Court of this State that, where the Legislature has fixed the salaries of an officer, the failure on the part of the Legislature in the appropriation bill to allow a sum sufficient to pay the salaries so fixed would not thereby prevent the officer from collecting his salary.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. GEO. A. COLE, State Controller of the State of Nevada.

SYLLABUS

39. School Building, Repair of--Vote by Heads of Families.

(1) Stats. 1921, p. 29, sec. 67, subd. 2: Repairs to school building may be made by Trustees where amount does not exceed \$500.

(2) Same, sec. 1521: When cost of repairs exceeds \$500, heads of families must authorize repairs by vote.

INQUIRY

CARSON CITY, April 14, 1923.

You advise that the Trustees of the Eureka School District desire to repair the district schoolhouse, and in this connection they estimate that the costs thereby will amount to approximately \$3,500. An opinion is requested from this office as to the necessity of the School Board requiring a vote of the heads of the families before this amount of money is expended.

OPINION

This office heretofore rendered an opinion, under somewhat similar provisions of law, that where the board, after having been duly authorized in the manner provided for by law, had commenced the construction of a school building, it was not necessary for the School Board, or the Trustees thereof, where the funds for erecting the school building had become exhausted, to submit the matter to the voters of the school district in order to expend an amount in excess of \$500 for completing the school building. (Opinions of the Attorney-General, 1909-1910, p. 26.)

The question presented in this inquiry, however, does not involve the same facts as the matter embraced within this opinion. In the School Code, 1921, p. 29, subdivision 2 of section 67, it is provided:

The Trustees, without such vote, may make necessary repairs on any school building when the expense of such repairs will not exceed \$500; *provided*, that in districts of the first class the Trustees may make all necessary repairs without a vote of the electors.

Section 1521/2, School Code of 1921, provides:

If the Trustees of any school district shall certify to the Superintendent of Public Instruction that a new building or repairs to an old school building are necessary to the district, and that the Trustees have been authorized by a vote of the district, if a vote is required, to build such new school building or to make such needed repairs, etc.

It is my opinion, therefore, that before any repairs can be made on a school building where the cost of same exceeds \$500, the matter must be submitted to a vote of the heads of families of the district.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. EDGAR EATHER, District Attorney, Eureka, Nevada.

SYLLABUS

40. Chiropractor May Give Certificate of Death--Conflict in Decisions--"Physician."

Stats. 1923, p. 20, chap. 25, secs. 4, 5; Rev. Laws, 2958:

(1) "Physician" has not been defined by Nevada statute.

(2) Chiropractor may issue certificate of death, if he was the attending physician during lifetime of deceased. Such certificate should be received by the Board of Health.

INQUIRY

CARSON CITY, April 14, 1923.

You request an opinion as to whether or not chiropractors may issue and sign certificates as to the cause of death under the provisions of section 2958.

OPINION

The question presented is one that presents considerable difficulty to correctly answer, in view of the fact that the statutes of the State of Nevada have in no place defined definitely the meaning of the word "physician."

Chapter 25, Statutes of Nevada, 1923, p. 20, is entitled "An Act to create a Board of Chiropractic Examiners and to regulate the practice of chiropractors, and to provide penalties for a violation of this Act, and to prohibit the practice of any other mode or system under the name of 'Chiropractic.'"

The provisions of this statute authorize and create a Board of Chiropractic Examiners. The duties of this board are definitely set forth in said Act, under the provisions of section 4 of the Act, and a person desiring to be examined touching his qualifications to practice must be a graduate of a chiropractic school. This section provides that a successful applicant can practice nothing but chiropractic.

Section 5 defines "chiropractic" to be--

The science of palpating and adjusting the articulations of the human spinal column by hand only.

Section 2958, Revised Laws of Nevada, provides:

The certificate of death that shall be used is of the United States standard form as approved by the Bureau of the Census. * * * The medical certificate shall be signed by the physician, if any, last in attendance on the deceased, who shall specify the time in attendance, the time he last saw the deceased alive, and the hour of the day at which death occurred, and he shall further state the cause of death so as to show the

course of the disease or sequence of courses resulting in the death, giving first the name of the disease causing death (primary cause), the contributaries (secondary cause), if any.

To answer your query it is necessary to determine whether a chiropractor can be denominated a physician, within the meaning of section 2958.

The question here presented has been presented to other courts in the United States in but three instances, and is one of first impression in the State of Nevada.

In the case of *Neiningham v. Blake*, 109 Atl. 65, the Legislature of the State of Maryland, in creating a board to license the practice of osteopathy, enacted a provision that those practicing osteopathy were not qualified to issue death certificates. The question was presented to the Supreme Court of Maryland, and the Supreme Court of Maryland held that this provision of the statute did not subject those engaged in the practice of osteopathy to an arbitrary and unconstitutional discrimination. The reasoning of this case would seem to answer the present case in the negative.

The Supreme Court of Illinois, in the case of *Peole v. Simon*, held that an osteopathic physician was a legally qualified physician and came within the meaning of the word "physician" as used in their public-health law, and as one, therefore, qualified to issue a death certificate. *People v. Simon*, 150 N. E. 817; *Ex Parte Rust*, 183 Pac. 548; *In Re Opinion of the Justices*, 107 Atl. 102.

The matter was squarely presented to the Supreme Court of Minnesota in the case of *State ex rel. Wentworth v. Fahey*, 188 N. W. 260. The Supreme Court of Minnesota held, with two Judges dissenting that a chiropractor could not give the certificate of death required under the provisions of their statutes.

The case of *In Re Opinion of the Justices of the Supreme Court of Rhode Island*, 107 Atl. 102, is instructive on the definition of the word "physician," and this Court held that an osteopath was authorized to sign certificates as to the cause of death.

Notwithstanding the decision of the Supreme Court of Minnesota, *supra*, I am of the opinion that a chiropractor is authorized to sign a certificate of death, under the provisions of section 2958, Revised Laws of Nevada, 1912. My reason for this conclusion might be briefly stated as follows: The State, by its examination and certificate, has certified to the ability of a chiropractor to discover the cause of the disease while the patient is alive. The reasoning which prompts the holding that, after the patient is dead, a chiropractor is not authorized to issue a death certificate when he is the only attending physician, seems to be fallacious. The effect of this reasoning would be to impose, in many instances, unnecessary hardship and pain on the relatives of the deceased. It is my opinion, therefore, that a chiropractor may issue certificates of death, and that the same should be received by the Board of Health when the chiropractor was the attending physician or doctor during the lifetime of the deceased.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. W. L. SAMUELS, M.D., City Health Officer, Reno, Nevada.

SYLLABUS

41. Gasoline Tax--Dealer--Sale to Government.

(1) The dealer, not the purchaser, is responsible for the tax on all sales of gasoline, including those to the Government. If the burden falls on the Government, it does so only indirectly.

INQUIRY

CARSON CITY, April 18, 1923.

You advise that the several oil companies engaged in selling gasoline have presented their monthly reports in compliance with the law. These reports show that no tax was paid by the respective dealers on gasoline sold to the Government.

You also hand me certain briefs presented on the question of the State's right to collect excise tax on gasoline sold by dealers, where the sale is made to the Government. A request is submitted for a reexamination of the question, in view of the briefs presented.

OPINION

The apparent confusion existing in construing the provisions of the Nevada Act is due to the false assumption that the collection of this excise tax is an attempt upon the part of the State to tax government property or any agency or instrumentality of the Government.

The excise tax is placed upon, and to be collected from, the dealer in gasoline, as defined in the Act. Failure to pay the tax works no penalty upon the purchaser. The dealer only is the party to be sued under the Act, where the tax is not collected.

Sec. 2. That, in addition to the taxes now provided for by law, each and every dealer, as defined in this Act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of his representatives or agents in this State, in the sale or distribution, as dealers and distributors, of motor-vehicle fuel as herein defined, shall, not later than the fifteenth day of each calendar month, render a statement to the Nevada Tax Commission of all motor-vehicle fuel sold or used by him or them in the State of Nevada during the preceding calendar

month, and shall pay an excise tax of 2 cents per gallon on all motor-vehicle fuel so sold or used, as shown by such statement in the manner and within the time hereinafter provided.

* * * * *

Sec. 6. Any dealer, association of persons, firm or corporation violating any of the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed \$500 or by imprisonment in the county jail for a period not to exceed six months, or both.

* * * * *

Sec. 9. If any person, association of persons, firm, or corporation shall fail to pay such license tax herein provided for a period of thirty days from and after the date when the same should have been paid as required by this Act, the amount thereof shall be collected of such person, association of persons, firm, or corporation for the use of this State, and the Attorney-General of the State, or the District Attorney of any county within this State, shall forthwith commence and prosecute to final determination in any court of competent jurisdiction an action at law to collect the same.

The State of Arizona has a statute somewhat similar to the Nevada Act. The Arizona statute, however, specifically recites that the tax is to be paid the *purchaser*. Notwithstanding this provision, the Circuit Court of the Eighth Circuit, construing the nature of this tax, stated:

The Supreme Court of Arkansas, in the case heretofore cited, declared that the tax was not imposed upon the gasoline as property, nor upon the sale, not upon the purchase, but was laid upon the privilege of the use of the vehicles mentioned in the Act upon the public highways. However, it also stated that:

“The purpose of the statute is twofold, namely, to impose a tax upon the purchaser of gasoline for the use of the car and to regulate the business of the dealer by requiring him to collect the tax and pay it over to the County Treasurer. It is certainly within the power of the Legislature, for it does not involve the payment of any fee nor the performance of any unreasonable task.”

It becomes necessary to ascertain the actual effect of the statute, whatever name or description has been applied to it by the State Supreme Court (*Standard Oil Co. V. Graves*, 249 U.S. 389, 394, 37 Sup. Ct. 320, 63 L. Ed. 662), in order to determine whether it violates the Constitution of the United States. It is doubtless true that the amount of the tax usually does fall finally upon the purchaser, because the seller will naturally fix a price or an amount to be collected for the commodities sold which will include the amount of tax. *Clark v. Titusville*, 184 U. S. 329, 333, 22 Sup. Ct. 382, 46 L. Ed. 569. It may also be conceded that what is ultimately gained by the

purchaser for the amount of tax so included is the use of the highways for automotive vehicles propelled by gasoline. In addition there are some of the essential elements of a tax upon the sale, or the privilege of the sale, of the gasoline. The seller is required to register and to file a report of his sales, and show therein "the amount of tax due by said seller." The seller must pay the tax, unless he collects the same from the purchaser. While the first section required the seller to collect 1 cent a gallon from the purchaser in addition to the usual charge therefor, no usual charge is fixed by the statute, and the effect of the Act is to allow the seller to fix any price he wishes, and to require him to pay 1 cent a gallon for the gasoline so sold. The penalties provided in the Act are all levied against the seller. The purchaser is not required to do anything by the Act, although the result may incidentally cause an enhanced price for the gasoline.

The conclusion that the tax is not levied against the purchaser disposes of the basis of the only contention made by appellant of a violation of the Fourteenth Amendment; but it may be added that the conclusion that the tax is an excise tax on the privilege of making sales of the named products, although measured by the gallons sold for a designated use, brings the Act within the proper exercise of the State's power of taxation, when the commerce clause is not involved (see *Standard Oil Co. v. Graves*, 249 U. S. 389, 39 Sup. Ct. 320, 63 L. Ed. 662; *Askren v. Continental Oil Co.*, 252 U. S. 444, 449, 40 Sup. Ct. 355, 64 L. Ed. 654; *Bowman v. Continental Oil Co.*, 256 U. S. 642, 41 Sup. Ct. 606, 65 L. Ed. 1139; *Texas Co. v. Brown*, 258 U. S. ___, 42 Sup. Ct. 375, 66 L. Ed. ___, April 17, 1922), and such taxation is not in violation of the Fourteenth Amendment. *Woodruff v. Parham*, 8 Wall. 123, 140, 19 L. Ed. 382; *Wagner v. City of Covington*, 251 U. S. 95, 102, 103, 40 Sup. Ct. 93, 64 L. Ed. 157; *Bowman v. Continental Oil Co.*, *supra*; *Altitude Oil Co. v. People*, 70 Colo. 452, 202 Pac. 180; *Pierce Oil Corp. v. Hopkins*, 252 Fed. 253.

As stated above, the Nevada law, in contradistinction to the Arizona law, imposes an excise tax on the *dealer*, not on the purchaser.

The tax, under the Nevada statute, is not laid upon either the property or any instrumentality of the Government. If it reaches the Government, it does so indirectly. The tax is laid as an excise tax upon the dealer for the importation of gasoline, and, while the dealer will probably pass it on to the consumer, the tax is not laid upon the consumer. The burden, therefore, if it falls upon the government, does so indirectly.

I am not without precedent in the position taken here in reference to the collection of this tax from the dealer. The Attorney-General of the United States, in an opinion rendered to the Secretary of the Treasury, has adopted the same theory in reference to the payment by the State of an excise tax imposed by the Government on certain manufactured articles. The question propounded to the Attorney-General was whether the excise tax imposed by section 900 of the Revenue Act, February 24, 1919, in 40 Stat. 1122, upon the manufacturer, producer, or importer, upon the price for which articles enumerated within the section are sold, applies upon sales of

such taxable articles to a State or a political subdivision thereof.

In answering this question the Attorney-General stated:

The United States, of course, cannot tax the property or the instrumentalities of a State, but here the tax is not laid upon either the property or the instrumentalities of the State. If it reaches the State at all, it does so only in an indirect manner. The tax is laid upon the manufacturer, and, while it is probable that he will pass it on to the consumer, the tax itself is not laid upon the consumer. The burden, therefore, if it falls upon the State, does so indirectly. Such an incidental and indirect effect results from the payment of all taxes, and while this tax may be traced more directly into the cost of the State, yet the fact remains that it is an incidental and indirect burden upon the State and not the taxation of either its property or its instrumentalities. *Snyder v. Bettman*, 190 U. S. 249; *Baltic Mining Co. V. Massachusetts*, 231 U. S. 68; *Kansas City, Fort Scott and Memphis R. R. Co. v. Kansas*, 240 U. S. 227; *The American Manufacturing Co. v. The City of St. Louis*, decided by the Supreme Court on June 9. (63 L. Ed. 108.)

The theory advanced by me in the first opinion I rendered in reference to this matter was adopted from the case of *Standard Oil Co. v. Brodie*, 239 S. W. 753. The Court in that case held that the tax, under the provisions of the Arizona law in reference to gasoline, was a charge for the use of the public highways by those vehicles which are propelled by gasoline. If this theory is adopted, there is some respectable authority, holding that the State has a right to collect a charge for the maintenance of its public highways, and that this charge may be collected from the Government. This theory is well expressed by Mr. Justice McLean in the case of *Searight v. Stokes*, 11 L. Ed. 547, 551, where the Court stated:

Now, can the United States claim the right to use such road or bridge free from toll? Can they place locomotives on the railroads of the States or of companies, and use them by virtue of their sovereignty? Such acts would appropriate private property for public purposes without compensation, and this the Constitution of the Union prohibits.

It is my opinion, therefore, inasmuch as this is an excise tax placed upon the dealer, that the dealer is responsible for the tax to the State of Nevada for all sales of gasoline made by him, including sales made to the Government.

You are therefore requested to mail to the several oil companies a memorandum showing the amount of tax that is due to the State, by reason of the several sales, and request payment. In the event that payment is not made, you will please advise this office, so that proper proceedings may be instituted to collect same.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

NEVADA TAX COMMISSION, Carson City, Nevada.

SYLLABUS

42. Board of Examiners--Employees of Highway Department.

Stats. 1923, p. 258, sec. 2: State Board of Examiners determines salaries, compensation, and number of employees of Highway Department. (See Opinion No. 43.)

INQUIRY

CARSON CITY, April 17, 1923.

For the guidance of your department you request an opinion in reference to the applicability to your department of those provisions of the Statutes of 1923, chap. 146, p. 258.

OPINION

Statutes of 1923, p. 258, sec. 2, provide as follows:

It shall be the duty of the State Board of Examiners, and it is hereby empowered, to determine what employees may be necessary, and to establish the salaries or compensation thereof, in all state offices, departments, institutions, commissions, and bureaus of the state government, except positions and salaries specifically authorized by statute or under the control of elective boards.

Section 4 of the state highway law provides as follows:

The State Highway Engineer may employ such assistant engineers, clerks, and other assistants as may be necessary to the proper conduct of the Department of Highways, and fix their compensation. Such compensation, however, shall first be approved by the Highway Directors.

Inasmuch as the Highway Department is not under the control of an elective board, it is my opinion that the provisions of the Act of 1923 in reference to establishing salaries and compensation and the number of employees of the State Highway Department is under the supervision of the Board of Examiners, and that the provisions of the Act of 1923, supra, applies to the Department of Highways.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. GEO. W. BORDEN, State Highway Engineer, Carson City, Nevada.

SYLLABUS

43. Highway Department Employees, Number and Salaries Of.

(1) Stats. 1917, p. 310, sec. 4, authorizing State Highway Engineer to employ assistants and fix their compensation, does not bring fixing of compensation within exception stated in Stats. 1923, sec. 2.

(2) Stats. 1923, sec. 4, while authorizing employment of assistants, does not fix compensation, but delegates that duty to State Highway Engineer and Directors of Highway Department.

(3) Stats. 1923, p. 258, makes it mandatory duty of Board of Examiners to fix compensation of Highway Department employees.

(See, also, Opinion No. 42.)

INQUIRY

CARSON CITY, April 20, 1923.

Reference is made to Opinion No. 42.

You state that it is quite evident to you that section 4 of the state highway law provides a special authorization for employing assistant engineers, clerks, and other assistants as may be necessary for the proper conduct of the Department of Highways, and further makes provision for fixing their compensation.

You also state that inasmuch as I did not give an opinion on that portion of section 2, chapter 146, Statutes of 1923, which refers to special authorization, you desire an opinion as to whether or not section 4 or any other provisions of the state highway law (1917) is not a specific authorization for the purpose of employing assistants and fixing their compensation.

OPINION

Section 4, Statutes of 1917, p. 310, authorizes:

The State Highway Engineer to employ such assistant engineers, clerks, and other assistants as may be necessary to the proper conduct of the Department of Highways and fix their compensation.

It is my opinion that this provision of law in reference to authorizing the State Highway

Engineer to employ assistants and fix their compensation does not bring the fixing of compensation of persons so employed within the exception as stated in the Statutes of 1923, sec. 2. While section 4 authorizes the employment of assistant engineers, etc., by the State Highway Engineer, it nowhere fixes the compensation of those so employed, but delegates to the State Highway Engineer and the Directors of the Highway Department the right to fix the salary.

The “positions and salaries specifically authorized by statute” which do not come within the supervision of the Board of Examiners are those positions and salaries which are created by the Legislature, and the salaries appertaining to such positions are specifically fixed by the Legislature and not delegated to any persons or board.

It is my opinion, therefore, that the provisions of section 4 of the state highway Act not having fixed and designated by virtue of its provisions the salary of those to be employed by the State Highway Engineer, it becomes a mandatory duty, under the Statutes of 1923, p. 258, for the Board of Examiners to fix the compensation of those so employed.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. GEO. W. BORDEN, State Highway Engineer, Carson City, Nevada.

SYLLABUS

44. Inspector of Mines--Assistants--Board of Examiners Fixes Compensation.

(1) This law empowers Inspector of Mines to employ assistants, but not to fix compensation.

(2) Stats. 1923, p. 258, authorizes Board of Examiners to fix such compensation.

INQUIRY

CARSON CITY, April 20, 1923.

You call my attention to section 31 of the laws relating to Inspector of Mines. This section provides:

The Inspector of Mines is hereby empowered to purchase all supplies that may be required to carry out the provisions of this Act, and, if necessary, to employ additional help, the expenses thereof to be paid out of that said hoisting engineer's license fund in the usual course of claims against the State.

You call my attention to section 2, Statutes of Nevada 1923, p. 258, and request an

opinion as to whether the Board of Examiners, under the provisions of this Act, has the power to fix the compensation of help employed by you in connection with the duties of your office.

OPINION

The purpose of the Statutes of 1923, was to confer upon the Board of Examiner the duty of determining the help necessary and to establish the salaries or compensation in all state offices except positions and salaries specifically authorized by statute or under the control of elective boards.

Inasmuch as the statutes do not fix the compensation for the help employed by you, it is my opinion that the salaries and compensation of those employed in your office is to be fixed and regulated by the Board of Examiners under the provisions of the Act of 1923, supra. The provisions of section 31, quoted above, simply authorize you to purchase supplies and employ additional help. It is the duty of the Board of Examiners to fix the compensation of the help so employed, and in addition thereto it is the duty of the Board of Examiners to determine what help is necessary and to authorize the same when the facts warrant.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. A. J. STINSON, Mine Inspector, Carson City, Nevada.

SYLLABUS

45. Hoisting Engineer's License--Experience Required.

Stats. 1921, p. 316: Applicant for engineer's license must have had actual experience in operating mine hoisting engine.

INQUIRY

CARSON CITY, April 20, 1923.

You call my attention to section 1, Statutes of Nevada, 1921, p. 316. This section provides, in part:

It shall be unlawful for any person to operate any steam, electric, gas, air, or any other hoisting machinery over six horsepower when either is used in the lowering or hoisting of men---

My attention is also directed to the provisions of section 9 of this Act, which reads, in part, as follows:

Licenses issued under this Act shall be divided into three classes, namely, first class,

second class, and third class. No person shall be granted a first-class license who has not taken and subscribed to an oath that he has had at least two years experience in the operation of at least one of the engines named in section 1 of this Act and whose knowledge of the construction and operation of the machine he is to be licensed to take charge of is such as to justify the belief of the Board of Examiners that he is competent to take charge of and operate such machinery.

You request an opinion in reference to these two sections and whether a person filing an application for license must have experience in the operation of an engine described in section 1 in and about the operation of a mine.

OPINION

It is my opinion that it was the intention of the Legislature, in adopting sections 1 and 9, of this Act, to require an applicant to have the experience described in the operation of the classes of engine designated and that such experience must include that which would be gained by reason of the operation of one of these engines while used in operating a hoisting machine in or about the mine.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. A. J. STINSON, Mine Inspector, Carson City, Nevada.

SYLLABUS

46. Public Service Commission--Common Carriers--Certificates of Public Convenience--Motor Vehicles and Trucks--County Commissioners.

(1) Sec. 9, Stats. 1923, p. 320, authorizing an appeal from decision of County Commissioners to Public Service Commission is not unconstitutional, as the party is not deprived of his day in court, neither are judicial powers conferred on an administrative board.

(2) Applications for certificates of public convenience filed with the Commission should be transferred to the various Boards of County Commissioners, and hearings and rehearings now pending before the Public Service Commission should be submitted to the County Commissioners.

(3) The legislative intent was to have the issuance of certificates of public convenience transferred to the County Commissioners.

INQUIRY

CARSON CITY, April 20, 1923.

You call my attention to the Act approved March 21, 1923, which transfers from the Public Service Commission to the various Boards of County Commissioners the authority to issue certificates of public convenience.

You request an opinion:

(a) Whether sections 7, 18, and 36 ½, Statutes of 1919, p. 198, are in conflict in any respect with the Act of 1923.

(b) Section 9 of the Act of 1923, supra, provides that appeals may be had from the decision of the Board of County Commissioners to the Public Service Commission, and you request an opinion as to whether this provision is constitutional.

(c) You advise that one or two cases are now pending before the Public Service Commission, and in reference to the duties of the Public Service Commission you desire advice:

(1) Should the applications heretofore filed with the Commission be transferred to the various Boards of County Commissioners?

(2) Should matters now pending before the Commission involving hearings and rehearings be submitted to the several County Commissioners for determination?

OPINION

You are advised that there is no serious conflict, in my opinion, between the provisions of sections 7, 18, and 36 ½, Statutes of 1919, p. 198, and the provisions of the present law.

In reference to this second query, I am of the opinion that those provisions of the law authorizing an appeal to the Public Service Commission from the decision of the Board of County Commissioners is not unconstitutional. This section does not deprive the party aggrieved from his day in court, neither does it confer judicial power on an administrative board.

In respect to the questions set forth under subdivisions 1 and 2, I am of the opinion they should both be answered in the affirmative. Section 9 of the Statutes of 1923 provides:

Said Public Service Commission is hereby directed, as soon as possible after the approval of this Act, to transmit to the Clerks of each of the counties in the State certified copies of all certificates of public convenience heretofore issued, affecting the respective counties. The right to issue such certificate heretofore granted to the Public Service Commission shall cease upon approval of this Act, but all other laws regulating operation of common carriers using motor vehicles or trucks shall be in full force and effect until July 1, 1923.

It was the intention of the Legislature, as expressed herein, to have all matters in connection with the issuance of certificates of public convenience transferred to the Boards of County Commissioners.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

PUBLIC SERVICE COMMISSION, Carson City, Nevada.

SYLLABUS

47. Animals--"Owner" Defined.

(1) Stats. 1923, sec. 1, chap. 26: An owner [of live stock] is one having one or more classes of live stock assessed or which will be assessed at next annual assessment.

INQUIRY

CARSON CITY, April 17, 1923.

You direct my attention to section 1, chapter 26, Statutes of Nevada, 1923, which provides:

Section 1. Every owner of horses, mules, asses, cattle, or hogs in this State may design and adopt a brand or brands.

You advise that you construe the word "owner" to mean "those having one or more classes of live stock as disclosed by the assessment rolls, or those whose live stock will be placed on the assessment rolls at the next annual assessment."

OPINION

I agree with your interpretation.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. EDWARD RECORDS, Secretary State Board of Stock Commissioners.

SYLLABUS

48. Fish and Game--Sale by Indians--Tags.

All resident Indians, not citizens, may sell fish caught in Pyramid, Walker, and Winnemucca Lakes, in season and in limited quantities. All fish so sold must be tagged.

INQUIRY

CARSON CITY, April 17, 1923.

You request an opinion as to the constitutionality of that certain Act entitled:

An Act relating to the marketing and sale of fish by Indians, under certain restrictions, and providing penalties for the violation thereof (Stats. 1923, p. 357).

OPINION

Under the provisions of section 1 of this Act, Indians residing in this State have the privilege of selling and marketing, according to the seasons and bag-limits prescribed by law, the fish that they may take from Pyramid, Walker, and Winnemucca Lakes.

While the term "Indian" is used in this Act, and it would appear that the Legislature intended to grant the privilege of selling fish to all Indians who are residents of this State, it is my opinion that, if all Indians in this State, irrespective of whether they were citizens or not, were permitted to sell fish, such a construction would make the Act unconstitutional, for the reason that, inasmuch as some Indians are citizens, privileges would be granted to Indians who are citizens that would not be granted to all other citizens.

The granting of such special privilege would be a violation of the provisions of the Constitution.

The term "Indian," as used in this Act, is to include only such as have not assumed the duties and obligations of citizenship. *State v. Lewis*, 88 Pac. 940.

In reference to those Indians who are not citizens, they may sell fish according to the seasons, and, when such Indians fish, the amount they catch will be controlled by the laws existing in reference to citizens.

It is necessary that your Commission secure the metal tags under the provisions of section 1, and all fish sold must have upon it these tags.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. J. E. JOHNSON, Secretary Nevada Fish and Game Commission.

SYLLABUS

49. Official Bonds--Mineral County--Chief Deputy Sheriff and Superintendent of Power System--Premium on Bonds.

Stats. 1917, p. 340: Bond of Chief Deputy Sheriff is not required by statute. If Sheriff demands bond, premium therefor is not charge against county.

Stats. 1923, p. 366, sec. 17, provides for appointment of superintendent of power system and requires the filing of a bond. Under Stats. 1917, p. 340, premium on such bond is a charge against the county.

INQUIRY

CARSON CITY, April 21, 1923.

You request an opinion as to whether the Board of County Commissioners of Mineral County:

- (1) Can pay the premium on the bond of the Chief Deputy Sheriff;
- (2) Can pay the premium on the bond of the superintendent of the Mineral County power system.

OPINION

The statutes nowhere provide that the Chief Deputy Sheriff of Mineral County must execute a bond, and I am of the opinion, therefore, that, if the Sheriff of Mineral County desires a bond from his chief deputy, the premium on said bond is not a proper legal charge against the county, for the reason that it does not come within the definition of section 1, Statutes of 1917, p. 340. (See *Polk v. James*, 68 Ga. 128; *State v. Jennings*, 49 N. E. 404.)

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. J. H. WHITE, District Attorney, Hawthorne, Nevada.

SYLLABUS

50. Mineral County--Rebate to Consumers of Electric Power.

- (1) Stats. 1923, p. 366: The provisions are very ambiguous. The intent appears to be to

rebate total cost of construction, yet provisions are made to rebate 15 per cent per year for four years, a total of 60 per cent. The 15 per cent is to be computed on “their monthly bills for service,” yet such construction would make the provisions without meaning.

(2) The 15 per cent is to be deducted for four years from monthly bills for service.

(3) Contributor who used no electricity would not be entitled to any rebate.

INQUIRY

CARSON CITY, April 23, 1923.

Request submitted for an opinion as to the proper construction of that portion of section 3, p. 368, Statutes of 1923, relative to the percentage required to be rebated to consumers of electric power under the provisions of this section.

You suggest that the total percentage to be rebated is the amount of 60 per cent based on the total cost of such construction.

OPINION

That portion of section 3, Statutes of 1923, p. 368, which is important and material in the construction of this question, reads as follows:

and that such total cost may be rebated back to such consumer or consumers at not to exceed 15 per cent annually, computed upon their monthly bills for service, incurred within a period of four years immediately following the construction of such high-tension extension of such system.

The provisions of this section are very ambiguous and inconsistent. It would appear that the intent expressed was to rebate the total cost, and yet, when a scheme is devised whereby the cost is to be rebated, it appears that provisions are made for rebating 15 per cent of the cost per year for four years, or the total of 60 per cent of the cost is authorized.

It would further appear that the 15 per cent was to be computed upon “their monthly bills for service.” Although the words of the statute would convey this intention, it would be apparent that such construction would practically make the provisions of the Act without meaning.

I am of the opinion that the 15 per cent recited in the statute is to be allowed each year for a period of four years, and the same is to be deducted from the monthly bills for service rendered.

In the event that the party constructing such line or extension did not consume any power, the Board of County Commissioners would not be authorized to make any rebate, for the reason that the rebate provided for is to be made only in the manner described, to wit, to be computed upon the monthly bills for service.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. J. H. WHITE, District Attorney, Hawthorne, Nevada.

SYLLABUS

51. Statutes--Sufficiency of Title--Constitutionality--Hospitals for Disabled Persons.

(1) Section 1, Stats. 1923, p. 304, chap. 172, provides for manner of establishing such hospitals. Money raised is to be credited to proper fund and paid out on order of Trustees.

(2) Section 16 extends control of Trustees to existing county hospitals.

(3) Section 18 is of doubtful constitutionality since the title appears insufficient, no method is adopted for raising funds, and probably established hospitals would not come under its provisions.

INQUIRY

CARSON CITY, April 23, 1923.

You call my attention to the Statutes of Nevada, 1923, p. 340, chap. 172. The title of this Act reads as follows:

An Act to enable counties to establish and maintain public hospitals, levy a tax and issue bonds therefor, elect hospital trustees, maintain a training-school for nurses, and provide suitable means for the care of such hospitals and of disabled persons.

OPINION

Section 1 of this Act provides that when a petition is filed with the Board of County Commissioners, signed by a certain percentage of the taxpayers of such county, requesting that an annual tax be levied for establishing and maintaining a public hospital, such Board of County Commissioners shall submit the question to the electors of the county.

The money raised by such tax levy, if the same is authorized by vote, is to be credited to the hospital fund and is to be paid out on the order of the hospital trustees. The hospital trustees have exclusive control of the expenditures of all moneys to the credit of the hospital fund. Section 16 of this Act provides that all provisions of the Act with reference to the administration and government of the county or counties hospitals erected under its provisions shall extend to and be applicable for the administration and government of all county hospitals heretofore erected in the several counties of the State, under and by virtue of any Act of the Legislature.

Section 18 provides in part that the Board of County Commissioners is directed to forthwith appoint a board of trustees for such county hospitals and it makes the provisions of the Act applicable in respect to the future control of such hospitals, and also further provides that no election is necessary under its provisions for the taking over of such county hospitals, but that it will be presumed that an election was had and a majority of all the votes cast had been in favor of establishing such hospital.

It seems to me that these are the sections of this law which are to be considered in attempting to arrive at a conclusion as to the validity of this enactment.

The purpose of the Legislature as expressed in this statute was to place the operation, management, and control of county hospitals under the control of a board of trustees, and to take the same from the Board of County Commissioners. I agree with you in your contention that the title of the Act is not sufficient to give notice that the Legislature intended to adopt the provisions as set forth in section 18 of the Act. [State v. Hallock, 19 Nev. 384](#); [State v. Commissioners, 22 Nev. 399](#); [State v. Gibson, 30 Nev. 353](#).

Again, if the provisions of section 18 are to be construed as making it the mandatory duty of the Board of County Commissioners to appoint a board of trustees for a county hospital, as described in section 18 of the Act, the conclusion adopted by you is not debatable that under the provisions of section 18 the Board of County Commissioners are compelled to appoint a board of trustees to manage such hospital, and no method is provided for the board to secure funds for the operation and maintenance of said hospital.

You will also note that, under the provisions of section 18, the Legislature had in mind the county hospitals that had been erected under or by virtue of any Act of the Legislature. The question presents itself if this designation would include hospitals that had been erected by virtue of the power conferred upon the Board of County Commissioners under the general law.

The provisions of this statute, with the exception of section 18, were adopted from the State of Missouri. A review of legislative enactment in this State discloses that county hospitals were established in this State by direct legislative enactment and not through the Board of County Commissioners. I entertain serious doubts, if a strict construction was placed upon section 18 of this law, if any hospitals now established in the counties of this State would come within the provisions of section 18.

For the reasons stated and for the reasons included in your opinion presented to me, I have serious doubts as to the validity of section 18, and feel that the matter should be presented to the Supreme Court for decision, if some theory can be worked out to present such a case.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. L. D. SUMMERFIELD, District Attorney, Reno, Nevada.

SYLLABUS

52. Revenue--Tax for School Purposes--Duty of County Commissioners.

It is the duty of County Commissioners to levy a tax necessary to meet expenses of county high school as fixed in budget furnished by educational board.

INQUIRY

CARSON CITY, April 26, 1923.

An opinion is requested as to whether or not it is the mandatory duty of the Board of County Commissioners, in fixing the tax rate for the current year, to include therein an amount sufficient to raise money for the purpose of meeting the requirements of the County Board of Education for the support of the county high school, and also whether the Board of County Commissioners have a right to reduce the amount as fixed by the Board of Education.

OPINION

Section 180, School Code of 1921, provides:

It shall be the duty of the Board of County Commissioners to include in their annual tax levy the amount estimated by the County Board of Education, as needed to pay the expenses of conducting the county school, etc.

I am of the opinion that this provision of the statute is mandatory upon the Board of County Commissioners, and it is the duty of the County Commissioners to levy such tax as will be required to meet the expenses set forth in the budget as furnished by the County Board of Education.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. HOWARD E. BROWNE, District Attorney, Austin, Nevada.

SYLLABUS

53. Corporations--Building-and-Loan Association--Insufficiency of Articles of Incorporation.

Stats. 1915, p. 341, authorizes formation of building-and-loan associations.

Rev. Laws, 1108, as amended Stats. 1923, p. 370: Articles of incorporation of domestic corporation which omit statement as to whether or not capital stock, after the subscription price or par value has been paid in, shall be subject to assessment to pay debts, are insufficient.

INQUIRY

CARSON CITY, May 8, 1923.

You hand me articles of incorporation, and request an opinion as to whether the articles recite all the necessary stipulations required by law.

OPINION

Building-and-loan associations and the incorporation of the same are authorized by Statutes of Nevada, 1915, p. 341.

Section 1 of this Act authorizes the incorporation of building-and-loan associations and provides that they may be incorporated under the provisions of the general corporation law of this State. Subdivision 8, Rev. Laws, 1912, section 1108, as amended Statutes of 1923, p. 370, provides:

Whether or not capital stock, after the amount of the subscription price or par value has been paid in, shall be subject to assessment to pay debts of the corporation.

The articles presented for filing contain no statement in reference to this provision of the statute.

It has been heretofore held by this office that this provision of law is essential. (Opinions of Attorney-General, 1917-1918, No. 30.)

It is my opinion, therefore, that the articles presented are insufficient for the reasons stated.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. W. G. GREATHOUSE, Secretary of State, Carson City, Nevada.

SYLLABUS

54. County--County Commissioners--Lease of County Property.

Rev. Laws, 1508, makes no provision for lease of county property to individuals not engaged in county work.

INQUIRY

CARSON CITY, May 8, 1923.

Has the Board of County Commissioners the power to rent trucks and wagons, owned by the county, to private individuals who are not engaged in performing work for the county?

OPINION

Section 1508, Revised Laws of Nevada, 1912, sets forth the powers of the Board of County Commissioners of the several counties of this State.

In the powers enumerated there is no special provision which authorizes the Board of County Commissioners to lease county property.

It is my opinion, therefore, that the Board of County Commissioners has no power or authority to lease county property as stated in your inquiry. (See Specialty Company v. Washoe County, [24 Nev. 359](#).)

Vol. 15, Corpus Juris, sec. 221, p. 537, contains the following statement:

Boards [boards of county commissioners] have no power to rent or to lease property or franchises owned by the county, in the absence of statutory authority so to do. (See State v. Hart, 144 Ind. 107.)

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. BOOTH B. GOODMAN, District Attorney, Lovelock, Nevada.

SYLLABUS

55. Chattel Mortgage on Movable Personal Property--Recording.

Stats. 1923, p. 153: Chattel mortgage covering movable personal property, irrespective of use made thereof, should be filed with Secretary of State.

INQUIRY

CARSON CITY, May 10, 1923.

Section 6 and section 7, Statutes of 1923, p. 153, require the Recorders of the several

counties of this State, when a chattel mortgage is filed, purporting to create a lien upon live stock, vehicles, or other migratory chattels, to record the same with the Secretary of State.

Where a chattel mortgage is executed, covering a ranch and a few head of live stock, would the live stock come within the provisions of this law, requiring the chattel mortgage to be filed with the Secretary of State?

OPINION

I heretofore gave you an oral opinion construing these two sections to the effect that he same only applied where it appeared that the live stock or other chattels were migratory in their nature; this upon the theory that the words "and other migratory chattels" limited the words "live stock" to the migratory kind. If, therefore, a rancher desired to mortgage his ranch and dairy stock, it could not be said that the dairy stock, although they may come within the classification of live stock, would be within the definition of a migratory chattel.

After a careful review of the Act, and the arguments presented by Hon. Lester D. Summerfield, District Attorney of Washoe County, and Hon. Booth B. Goodman, District Attorney of Pershing County, to the contrary, I am of the opinion that the provisions of the Act apply to all live stock irrespective of the use made of same.

The theory of Mr. Summerfield in construing the provisions of this Act appears to me as being cogent, where he states:

The plain wording of the Act and its obvious intent lead me to believe that chattel mortgages, on all personal property which shall, if living, move of itself, or, if inanimate, is self-propelled, or adapted to being moved by wheels or other mechanical instrumentalities, should be recorded by the Secretary of State under this Act.

It is my opinion, therefore, where a chattel mortgage is executed purporting to cover live stock or vehicles or other property that can be moved, irrespective of the use made of said live stock or vehicles, that the same should be filed with the Secretary of State.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. W. G. GREATHOUSE, Secretary of State, Carson City, Nevada.

SYLLABUS

56. Animals--Transfer of Brand--Recording.

Stats. 1923, p. 25: It is not necessary that brand or mark be recorded with County Recorder on sale of live stock.

INQUIRY

CARSON CITY, May 10, 1923.

You request an opinion as to the mode of procedure in reference to transferring a brand from the seller to the purchaser of live stock.

OPINION

Under the provisions of section 11, Statutes of 1923, p. 25, it is necessary: First, that the instrument evidencing such transfer must be acknowledged as deeds to real estate are required by law to be. Second, said instrument must be recorded in the office of the board (Board of Stock Commissioners) in a book to be kept by the board for that purpose. The board must, when such an instrument is presented, and before the transferee can act under said brand or mark, be notified that the said transfer has been approved by the board. The brand or mark so transferred must be such a brand or mark that has been rerecorded in compliance with the provisions of section 13 of the Act.

It is not necessary that such brand or mark be recorded with the County Recorder.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. EDWARD RECORDS, Secretary State Board of Stock Commissioners.

SYLLABUS

57. Revenue--Poll-Tax--"Civilized American Indians" Defined.

(1) Constitution, sec. 256, provides for poll-tax, but exempts uncivilized American Indians.

(2) All Indians, residing in this State, not otherwise exempted, are civilized and subject to payment of poll-tax.

(3) Rev. Laws, 3711, provides for taxing male residents over age of 21 (uncivilized American Indians excepted).

INQUIRY

CARSON CITY, May 10, 1923.

Section 3711 of the Revised Laws of 1912 provides:

Each male resident of this State over 21 and under 60 years of age (uncivilized American Indians excepted), and not by law exempted, shall pay an annual poll-tax, for the use of the State and county, of \$3.

An opinion is requested seeking to define the words “uncivilized American Indians.”

OPINION

It will be noted that our Constitution, sec. 256, provides that a poll-tax shall be collected, but exempts uncivilized American Indians from any law seeking to impose this tax. The Constitutional Debates are of interest in attempting to ascertain what the framers of the Constitution had in mind in making this exemption. Mr. Brosnan made the following suggestion when this matter was before the convention:

I would suggest that in the case of an educated American Indian, if he becomes also a man of property, then, if he is to be taxed, it seems to me he should also have the right of suffrage.

Mr. Collins stated:

The time may not be very distant when the Indians of this Territory may become a civilized body of men. As soon as that is done, it seems to me that they should become citizens--at least, so far as to share in the support of the government. I think that, by using the words “wild American Indians” or “uncivilized American Indians,” we shall make a clear distinction between Kanakas and Mongolians and the Indian tribes whom we do not desire to tax.

It is evident that the framers of the Constitution had in mind that, when they used the words “uncivilized American Indians,” they referred to those Indians who had no education and no occupation. I am of the opinion that in this State today we have no Indians who might be classified as “uncivilized American Indians.” It is therefore my conclusion that all Indians residing in this State, and who are not otherwise exempted, are civilized, and must therefore pay a poll-tax.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. CHAS. A. CANTWELL, Assistant U. S. Attorney, Reno, Nevada.

SYLLABUS

58. Motor Vehicles--License to Operate.

Stats. 1923, p. 320, secs. 2 and 4: Only motor vehicles used as common carriers need pay license.

INQUIRY

CARSON CITY, May 11, 1923.

An opinion is requested in reference to the provisions of sec. 4, chap. 181, p. 320, Statutes of Nevada, 1923, and whether or not the same applies to all motor vehicles or only to those defined in the Act as being used as common carriers for hire.

OPINION

Section 2 of this Act defines motor vehicles and motor trucks as those used for the transportation of persons or merchandise for hire, or used in the business of a common carrier of freight, merchandise, or passengers.

It is my opinion, therefore, that the provisions of this section apply only to those motor vehicles as defined in section 2.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. J. H. WHITE, District Attorney, Hawthorne, Nevada.

SYLLABUS

59. Motor Vehicle--Nonresident Owner--Registration--Penalty for Violation.

(1) Stats. 1921, p. 375, subd. G, sec. 9, as amended Stats. 1923, p. 387: Only nonresident owners of motor vehicles must register their cars.

(2) Rev. Laws, 6288, making a violation of a statute to which no penalty is attached a misdemeanor, would apply in case a nonresident failed to register his car as required.

INQUIRY

CARSON CITY, May 11, 1923.

An opinion is requested as to whether the penalty provisions of paragraph g of sec. 9, chap. 212, Statutes of Nevada, 1923, p. 387, apply to all motor vehicles or only to those belonging to nonresidents.

You state that the statute of 1921, p. 375, which is an Act regulating automobiles, and requiring a license for the same, contains no penalty provisions for a violation of the Act.

OPINION

In reference to your first inquiry, it is my opinion that subdivision g of sec. 9, Statutes of 1921, p. 375, as amended Statutes of 1923, p. 387, applies only to motor vehicles belonging to nonresidents.

Replying to your second inquiry, the Act of 1921, in reference to motor vehicles, contains no penalty clause. However, your attention is directed to section 6288 of the Revised Laws of Nevada, 1912, which in substance enacts:

That the performance of any act which is prohibited by statute, and no penalty for the violation of such statute being imposed, the committing of such act will be a misdemeanor.

It is my opinion, therefore, that this provision would cover a violation of the Statutes of 1921, *supra*.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. J. H. WHITE, District Attorney, Hawthorne, Nevada.

SYLLABUS

60. Fish and Game Caught by Indians--Sale.

(1) Resident Indians may sell fish caught by them in Pyramid, Walker, and Winnemucca Lakes to all persons, but no such fish may be resold by any one other than an Indian.

(2) Restaurants may serve fish bought of Indian to patrons, but cannot dispose of them otherwise.

INQUIRY

CARSON CITY, May 17, 1923.

(1) Under chapter 201, Statutes of Nevada, 1923, may fish, caught and sold by an Indian as therein authorized, be resold either by an Indian or by any other person?

(2) May fish be purchased from an Indian and served by restaurants and cafes, conducted by persons other than Indians, to patrons with meals?

OPINION

(1) Under the provisions of the first paragraph of sec. 1, chap. 201, Statutes of 1923, providing that Indian residents of this State shall, under regulations prescribed by the State Fish and Game Commission, have the privilege of *selling and marketing* the fish they may take from Pyramid, Walker, and Winnemucca Lakes. Indians may sell to all persons other than Indians, and may buy and sell among themselves the fish taken by them as above specified, but no such fish is subject to be resold by any person other than an Indian. That is, the Indians who catch the fish may, if they so desire, sell to other Indians, who may take the fish and market them, either by maintaining a fishmarket or selling them from house to house (provided always they comply with local regulations). But no person other than an Indian may sell or engage in marketing any such fish.

(2) Under the provisions of paragraph 2 of section 1 of said Act, it is our opinion that all cafes and restaurants may be considered as "consumers," and may serve fish purchased from Indians to their patrons as food with meals, but may not serve, sell, or dispose of them otherwise.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, Deputy Attorney-General.

NEVADA FISH AND GAME COMMISSION, Reno, Nevada.

SYLLABUS

61. County--Liability for Tort.

A county is not liable for a tort. (See, also, Opinions of Attorney-General, 1921-1922, p. 48.)

INQUIRY

CARSON CITY, May 23, 1923.

Is a county liable for a tort?

OPINION

This office heretofore has held that a county is not liable for a tort. (See Opinions of Attorney-General, 1921-1922, p. 48.)

This opinion is affirmed in all respects.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. J. H. WHITE, District Attorney, Hawthorne, Nevada.

SYLLABUS

62. Corporations, Foreign--Assessable and Nonassessable Stock--Secretary of State.

Stats. 1915, p. 34: Articles of incorporation of domestic corporation must declare whether stock is assessable or not. (See Opinion No. 53, supra.) Foreign corporations are not required to make this statement, and, if legal in other respects and approved by the Bank Examiner, Secretary of State must file their articles.

INQUIRY

CARSON CITY, May 25, 1923.

You hand me certified copy of the articles of incorporation of the Fidelity Building and Loan Association, a corporation, organized and existing under and by virtue of the laws of the State of Utah.

You call my attention to the fact that the certified copy of the articles of incorporation of the Fidelity Building and Loan Association, a corporation, organized and existing under and by virtue of the laws of the State of Utah.

You call my attention to the fact that the certified copy of the articles of this association contains nowhere a statement as to whether the capital stock of said company is assessable or nonassessable. You desire an opinion as to whether these articles should be filed by you.

OPINION

This office has heretofore held that a domestic building-and-loan association must set forth in its articles a statement disclosing whether the capital stock of said corporation is

assessable or nonassessable. (Opinions of Attorney-General, 1923-1924, No. 54.)

Section 6, Statutes of 1915, p. 34, provides in substance that “it shall be unlawful for any building-and-loan association, not organized under the laws of this State, to transact business in this State unless such association or company shall have first complied with the statutes of this State relating to foreign corporations, and shall have submitted a statement of its condition and affairs showing: (then follows a command of what matters are essential to be included in said statement).

The Legislature of this State has enacted no provision of law requiring the articles of foreign corporations to contain those provisions of the statutes of this State which are applicable to domestic corporations. The question then presented for determination is whether a foreign building-and-loan association can file its articles with the Secretary of State when those articles do not contain the matters and things required to be set forth by domestic corporations.

From a reading of our statutes, in an effort to be advised of the public policy of this State, it can readily be determined that we have adopted a most liberal comity toward corporations organized under the laws of other States. It would appear, therefore, when such foreign corporations desire to be admitted to this State, and their articles provide powers and a business not opposed to our laws, but such as we grant to our own corporations, it seems to me that there is nothing else to do but to admit such corporations.

The Supreme Court of Missouri determined a question somewhat similar to the one here presented: The State of Missouri had a statute which in effect provided that no corporation would be admitted to do business in the State of Missouri unless such corporation could have been organized under the laws of the State of Missouri. The Standard Tank Car Company, a corporation, was organized under the laws of the State of Delaware, and the articles of incorporation of the company did not provide for a par value of the stock of said company. Under the laws of the State of Missouri corporations were required to have a par value, and a statement of the amount of the par value was required to be set forth. The Supreme Court of Missouri, in issuing an order commanding the Secretary of State to issue a license to said corporation, quoted from the case of *Cowell v. Colorado Springs*, 100 U. S. 55, where the Supreme Court of the United States stated:

If the policy of the State or Territory does not permit the business of the foreign corporation in its limits, or allows the corporation to acquire or hold real property, it must be expressed in some affirmative way. It cannot be inferred from the fact that its Legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general laws. *State ex rel. Standard Tank Car Co. v. Sullivan*, 221 S. W. 728. (See, also, *North American Petroleum Co. v. Hopkins*, 181 Pac. 625.)

Inasmuch as the Legislature of this State has not in terms prohibited foreign corporations from doing business in this State or from filing its articles in this State, when the articles of said

corporation are not in accord with those provisions required of domestic corporations, it is my opinion that the articles presented by this building-and-loan association, if in all other respects they comply with the law, and have the approval of the State Bank Examiner, must be received and filed by you.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. W. G. GREATHOUSE, Secretary of State, Carson City, Nevada.

SYLLABUS

63. Revenue--Corporation License Tax.

Stats. 1923, p. 342, sec. 1: All corporations, domestic and foreign, excepting only those which are required by law to pay annual tax, must pay license tax under provisions of this statute.

INQUIRY

CARSON CITY, May 25, 1923.

Where a foreign corporation has paid an annual license tax in the State of its domicile, must such corporation pay the license tax in the Secretary of State of the State of Nevada under the provisions of the Statutes of 1923, p. 342?

OPINION

Section 1, Statutes of 1923, p. 342, provides:

SECTION 1. Every corporation organized under the laws of this State and every foreign corporation doing business in this State shall, on or before the first day of July of each year, pay to the Secretary of State a license tax of \$10; *provided, however*, that corporations already required by law to pay an annual license shall not come under the provisions of this Act.

I am of the opinion that the provisions contained in said section, exempting corporations already required by law to pay an annual tax, refer to those corporations, such as a building-and-loan association, which are required by the laws of this State to pay an annual license tax of \$100.

I am of the further opinion that, where a foreign corporation pays an annual license tax under the provisions of the law of its domicile, it does not come within the exemption or proviso enumerated in said section, and that such corporation must pay the license tax provided for in

this statute.

When the Legislature refers to “a law,” or uses the expression “required by law,” it means the law of this State.

Expressions in statutes, such as “required by law,” “prescribed by law,” “regulated by law,” refer to statutory provisions only; and so it is held that the expression “liability created by law” in Code Civ. Proc., sec. 394, providing that that chapter shall not affect an action against a director or stockholder of a moneyed corporation, to recover a penalty or a forfeiture or to enforce a liability “created by law,” refers to a statute of the State, and not to the general law recognized therein. *Brinckerhoff v. Bostwick*, 1 N. E. 663.

As used in the collateral inheritance-tax Act, which provides that certain named societies exempt by law from taxation should not be liable to the tax, “law” means the law of New York; and hence a legacy to an institution falling within those exemptions, but located in and incorporated under the laws of another State, is subject to the tax. In *Re McCoskey’s Estate*, 1 N. Y. Supp. 782.

A law is a rule of conduct prescribed by the lawmaking power of the State. 1 Kent. Comm. 477.

The term “law” is confined to enactments of the Legislature of the State. When the Legislature speaks in general terms of laws, or of things authorized by law, the expression must be understood as having exclusive reference to the laws of this State. *People v. Sturdevant*, 23 Wend. 418.

It is my opinion, therefore, that all corporations, domestic or foreign, excepting only those which are required by the laws of this State to pay an annual tax, must pay the license tax under the provisions of this statute.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. W. G. GREATHOUSE, Secretary of State, Carson City, Nevada.

SYLLABUS

64. Constitutional Law--Statute--Delegation of Legislative Power--County Ordinance Regulating Motor Vehicles--Public Service Commission.

(1) Stats. 1923, p. 320: The Act is valid excepting section 9 thereof.

(2) Power conferred by Legislature on County Commissioners to fix license charge and regulate motor vehicles by issuing certificates is not delegation of legislative power.

(3) Section 9--Right given to Public Service Commission to annul ordinances adopted by County Commissioners is unauthorized.

This opinion was affirmed by Supreme Court in Ginocchio v. Shaughnessy, [47 Nev. 129](#), [217 Pac. 581](#).

INQUIRY

CARSON CITY, May 31, 1923.

An opinion is requested as to the constitutionality of Stats. 1923, p. 320, chap. 181.

It is urged that this statute is unconstitutional for two reasons:

First--The authority granted to counties to enact ordinances regulating motor vehicles, as defined in the statute, is an unauthorized delegation of legislative power.

Second--The authority granted to the Public Service Commission to review, modify, annul, or approve the ordinances enacted by the various counties, is an unauthorized delegation of legislative power.

OPINION

First--Is the Act unconstitutional as a delegation of legislative power to the County Commissioners?

On the general proposition that the Legislature cannot delegate power to make purely substantive law, there can be no question. There can be no difference of opinion as to the soundness of the correlative proposition that the Legislature can delegate the power to determine the facts or state of things upon which the law makes its own operation depend.

The difficulty lies not in determining the governing principle, but in its application to concrete cases.

The title of this Act recites:

“An Act to regulate the use and operation of motor trucks; to define and classify them; to protect the public roads and highways of Nevada; to secure revenues for their improvement and maintenance; to provide for the issuance of certificates of public convenience, and licenses, by the Boards of County Commissioners, and the enactment of ordinances therefor,” etc.

Section 1 of the Act provides that the power conferred upon the County Commissioners is

one to be exercised for the purpose of protecting the public roads and highways and to secure revenue for their improvement and maintenance. Section 1 further authorizes the County Commissioners to enact ordinances licensing and regulating the use of motor trucks.

Section 2 defines motor trucks and motor vehicles.

Section 3 attempts to place restrictions and make classifications for the guidance of the County Commissioners in fixing a license fee on the several motor vehicles and the kind and character of business as well as the road over which said vehicle is to travel.

Section 4 makes it unlawful for a motor vehicle to be operated without a license, and provides a penalty for such violation.

The Legislature therefore authorized the Boards of County Commissioners to classify motor trucks and establish a license fee to be paid by those operating motor trucks or vehicles in the business, as defined in section 2 of the Act.

Can it be said that, when the Legislature authorized the Boards of County Commissioners to classify motor trucks and fix a license to be collected for the operation of said trucks on the public highway, they thereby delegated legislative power to the County Commissioners?

The courts, passing upon questions similar to this, have differentiated between those statutes which delegate to boards or officers the right to make rules and regulations and those cases where the Legislature attempted to delegate to boards the right to make a law and prescribe a punishment for a violation.

The Supreme Court of the United States, in the case of *United State v. Grimand*, 55 L. Ed. 563, held that the Act of Congress authorizing the Secretary of Agriculture to adopt rules and regulations covering forest reservations was not unconstitutional as a delegation of legislative power. Quoting from the case of *Marshall Field & Co. v. Clark*, 36 L. Ed. 310, it was stated:

The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.

In the case of *State v. Duval County*, 79 South. 693, the Court held that an Act of the Legislature authorizing the County Commissioners to fix toll charges for the use of a bridge was not a delegation of legislative power, but rather an administrative function that might be delegated by the Legislature.

The Supreme Court of Alabama, in the case of *Terry v. State*, 92 South. 85, decided that an Act of the Legislature conferring power on the Commissioner's Court to fix license charges for the use of the public highway, was not a delegation of legislative power. The Court stated:

While the Legislature cannot delegate its power to make a law, it can make a law to

delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things, upon which wise and useful legislation must depend, which cannot be known by the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation. *Ingram v. State*, 39 Ala. 247, 34 Am. Rep. 782; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716. If the appellant is guilty in this case, and is punished under the affidavit, he will be punished by the will and command of the Legislature of Alabama, and not by the will and command of the Commissioner's Court of Bibb County.

The County Commissioners are not authorized to fix a punishment for a violation of any ordinance enacted under the provisions of this statute. The only punishment for acts of omission is that prescribed by the Legislature in section 4.

In the case of *Brobine v. Revere*, 66 N. E. 607, the Court called attention to the fact that the punishment was not fixed by the board, saying:

that the making of the rules was administrative, while the substantive legislation was in the statute which provided that they should be punished as breaches of the peace. *Terry v. State*, 92 South. 85; *McClure v. State*, 88 South. 35; *Parke v. Bradley*, 86 South. 29; *Commonwealth v. Slocum*, 119 N. E. 687; *State v. Duval County*, 79 South. 693.

The only power to regulate that is conferred consists in the issuing of certificates of public convenience. This right is restricted by section 9, and the County Commissioners in issuing certificates "are authorized and directed to follow as closely as practicable the rules and regulations under which such certificates are now issued by the Public Service Commission.

Any other attempted regulation, or the issuing of a certificate of public convenience not in conformity to the laws and regulations under which such certificate was issued by the Public Service Commission, would be void as unauthorized.

The Act simply authorizes the Board of County Commissioners to (a) fix a license charge; (b) regulate motor vehicles by issuing certificates.

It is my opinion that the power conferred by the Legislature upon the County Commissioners is not a legislative power, but it simply authorizes the County Commissioners to make rules and regulations, and thereby function in an administrative capacity.

Second--It is urged that those provisions of section 9, which give the Public Service Commission the right to review, modify, or annul the ordinances enacted by the various counties, are an unauthorized delegation of legislative power.

This attempt upon the part of the Legislature to confer upon the Public Service Commission the right to annul ordinances adopted by the several County Commissioners of the respective counties of this State is clearly unauthorized and contrary to the Constitution.

Section 10 of the Act, however, provides:

Each section of this Act is hereby declared to be separate and independent, and if one section be declared unconstitutional it shall not invalidate the other sections of this Act.

The Supreme Court of Arkansas in the case of Snetzer v. Gregg, 196 S. W. 925, in construing a section similar to this, declared, quoting from 6 R. C. L. 123:

Occasionally the Legislature expressly states its will that the valid provision of a statute shall be enforced in spite of any judicial determination that certain sections of the Act are unconstitutional. Such an expression of the will of the Legislature is generally carried out by the courts.

The Supreme Court of Arkansas held that a declaration of this kind constitutes a legislative determination of its full purpose, and that that declaration can and should be carried into effect. State v. Clawson, 117 Pac. 1101.

Indulging in the presumption that every law enacted by the Legislature is constitutional until the same clearly appears to the contrary, beyond a reasonable doubt, I am not prepared to say that the provisions of this Act are unconstitutional. It is my opinion, therefore, that, excepting that portion of section 9 which gives the Public Service Commission the right to annul ordinances, the other provisions of the Act are valid.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. L. D. SUMMERFIELD, District Attorney, Reno, Nevada.

SYLLABUS

65. Statute--Title--Humboldt County Highway Bonds--Tax Levy Valid.

Stats. 1923, p. 235: While title of Act should have authorized tax levy to redeem Humboldt County highway bonds, failure to do so did not invalidate tax levied, since bonds were authorized, and it must be implied that repayment will be made.

INQUIRY

CARSON CITY, June 7, 1923.

You advise that the Nevada Industrial Commission contemplates purchasing certain

bonds of Humboldt County, and an opinion is requested as to the legality of the bonds issued under the provisions of Statutes of 1923, p. 235.

OPINION

Statutes of 1923, p. 235, provide:

An Act to authorize, employ, and direct the Board of County Commissioners of Humboldt County, Nevada, to issue bonds to provide funds for constructing and improving roads and highways, and constructing bridges in Humboldt County, Nevada.

Section 5 of the Act authorizes the creation of a fund for the redemption and payment of said bonds and authorizes the Board of County Commissioners to levy an annual tax for the payment of said bonds.

It will be noted that the title of this Act nowhere discloses the purpose to authorize the Board of County Commissioners to levy a tax or create a fund for the payment of these bonds. The question then presented is whether the title of the Act conflicts with section 17, article 4 of the Constitution of the State of Nevada.

The Supreme Court of Nevada, in the case of Klein v. Kinkead, 17 Nev. 194, has passed upon a similar question, and in this case the Court construed an Act entitled as follows:

An Act to provide for the taking care of the insane of the State of Nevada.

In the body of this statute provisions were made for a state loan and for the investment of moneys of the state school fund, and, holding this title was sufficient, the Court quoted from a decision of the Supreme Court of Illinois in the case of Ottawa v. People, 48 Ill. 233, where it was stated:

That an Act entitled “An Act to authorize the town of Ottawa to erect two bridges across the Illinois-Michigan Canal,” was sufficient, notwithstanding the fact that no provision for raising money to defray the cost of such bridges was indicated in the title of this Act.

Also, in the case of People v. Rochester, 50 N. Y. 525, it was held that an Act entitled “An Act in relation to the erection of public buildings for the use of the city of Rochester,” and provision for the selecting and procuring of a site for the contemplated building, was valid. The Court stated:

But buildings can no more be erected without sites than without materials or means to defray the expenses. All these are details, and no reference thereto in the title is required.

It is my opinion, therefore, that, while the title of this Act should have authorized the Board of County Commissioners of Humboldt County to levy a tax, the failure so to do under the decision, supra, did not invalidate the tax levied by the County Commissioners, for the reason that where bonds are authorized to be issued it must be implied that repayment will be made.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

NEVADA INDUSTRIAL COMMISSION, Carson City, Nevada.

SYLLABUS

66. Revenue--Apportionment of High-School Funds a Ministerial Act which May Be Made Nunc Pro Tunc.

Stats. 1921, p. 52-54, as amended Stats. 1923: Matter of apportioning money collected from taxes for high school is simply ministerial and can be performed nunc pro tunc.

Sec. 4a, Stats. 1921, was repealed by Stats. 1923.

INQUIRY

CARSON CITY, June 8, 1923.

You advise that at the time of making the semiannual apportionments in January, 1923, the relief apportionments called for under section 151, paragraphs 2c, 3a, 3b, 4a, and 4b, could not be made because of the lack of necessary funds. You further advise that by Statutes of 1923, section 4a, providing an apportionment for the relief of high schools, was repealed. You state that there is now money available for this delayed apportionment, and request an opinion if the apportionment should be made for the relief of high schools under section 4a, inasmuch as this section has been repealed.

OPINION

The various sections cited by you are contained in the School Code of 1921, as amended, pp. 52-54.

Section 4a provides:

In addition to the apportionments already provided for in this Act, the Superintendent of Public Instruction shall apportion from the state school reserve fund to any county which shall have levied a county high-school tax, when this county high-school tax rate taken with the rate required of the county for elementary

schools (any relief rate having been deducted) makes a rate in excess of 40 cents on the \$100 assessed valuation of such county, a special high-school relief apportionment equal in amount to that raised by the county by such tax in excess of 40 cents on the \$100 assessed valuation in the county as specified above, for the county high-school fund. But in no case shall he apportion from the state school reserve fund at any semiannual apportionment an amount in excess of \$12.50 per pupil as determined by the average monthly enrollment in such county high school for the preceding school year.

It is my opinion that the apportionment provided for under section 4a of section 151 should be made at this time, notwithstanding the fact that section 4a has been repealed by the Statutes of 1923.

The Legislature, by reason of the provisions of section 4a and the sections in addition thereto, quoted by you, has authorized the apportionment of taxes collected, and the taxes so collected are apportioned in accordance with the provisions of law which authorized their collection. The matter of apportioning the money is simply a ministerial act and can be performed nunc pro tunc.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

SUPERINTENDENT OF PUBLIC INSTRUCTION, Carson City, Nevada.

SYLLABUS

67. Revenue--Exemptions--Charitable Organizations--License.

(1) Stats. 1919, p. 125, exempts personal property of charitable organizations from taxation.

(2) Stats. 1923, p. 342, provides that "every" corporation (except those that pay an annual license tax) shall pay Secretary of State \$10 as license tax, but history of legislation shows it was never intention to tax charitable organizations.

(3) Masons, Odd Fellows, Elks, and similar organizations need not pay annual license tax.

INQUIRY

CARSON CITY, June 8, 1923.

An opinion is requested as to whether fraternal organizations, such as the Masons, Odd

Fellows, Elks and similar associations and other corporations, eleemosynary in character, are required to pay the annual license fee of \$10 under the Statutes of 1923, p. 342.

OPINION

Section 1 provides that “every” corporation organized under the law of this State shall pay to the Secretary of State a license tax of \$10.

Section 2 provides that, when the annual license tax has been paid, the Secretary of State shall issue to each corporation a certificate authorizing it to transact and conduct its business within this State for the period of one year.

This Act, by reason of its provisions, exempts no corporation from the payment of this tax, with the exception that corporations required by law to pay an annual license tax shall not come within provisions of this Act.

The Legislature of the State of Nevada has heretofore exempted from taxation the furniture, funds, and other personal property owned by “any lodge, or the Order of Free and Accepted Masons, or of the Independent Order of Odd Fellows, or any similar charitable organization.” (Statutes of 1919, p. 125.) These corporations are not compelled to pay a fee when they organize under the laws of this State; neither are they doing business of such character as would authorize the Secretary of State, under section 2, to issue to them or either of them a certificate.

While the Legislature has not exempted corporations of this character from the payment of this annual license tax by direct permission, a history of the legislative action in this State clearly discloses an intent to exempt these organizations, not only from corporation taxes that may be imposed, but also exempt them from paying property tax.

It is my opinion that these organizations and corporations of similar character are not required to pay the annual license tax.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. W. G. GREATHOUSE, Secretary of State, Carson City, Carson City, Nevada.

SYLLABUS

68. Schools--Discharge of Teacher for Cause--Liability of Trustees for Libel or Slander--Recall Election.

School Trustees may discharge teacher for good cause and are not liable for damages,

though conclusions reached may cast aspersions on character of teacher. Nothing would prevent such discharged teacher, thinking himself aggrieved, from commencing action for damages, though the result of such suit might or might not be successful.

Recall election may be had for any cause in accordance with law.

INQUIRY

CARSON CITY, June 8, 1923.

You submit the following query and request an opinion:

1. When a Board of School Trustees in the fulfillment of its duties deems it best to discharge a teacher for reasons which may reflect on the professional standing of such teacher, what protection have members of the School Board, and are they liable to the discharged teacher for the recitals contained in the resolution discharging said teacher when the recitals may possibly reflect upon the character or professional standing of the teacher?
2. In a case submitted to the State Board of Education for the suspension or revocation of a teacher's certificate, what protection is there afforded the members of said board in the discharge of their official duties, where they decide that the evidence of unprofessional conduct is sufficient to warrant the conclusion that a teacher's certificate should be suspended or revoked?
3. Is there any protection as against a recall election on the one hand, or suit for damages by the teacher on the other hand, against the members of either board for their action?

OPINION

The case of *Branaman v. Kinkle*, 37 N. E. 546, decided by the Supreme Court of Indiana, seems to outline a doctrine that answers the first and second questions propounded by you.

In this case an action for libel and slander was instituted by a school-teacher against a township trustee and a County Superintendent for charging him with incompetency, cruelty, and neglect in the exercise of his duties. The Court, in deciding this case, stated:

In the opinion [referring to a case decided by the Supreme Court of Indiana, 4 N. E. 197] the Court say that the office of County Superintendent belongs to the executive department of the State, and the statute does not confer upon the incumbent either judicial or quasijudicial power in the matter of licensing persons to teach in the common schools; that it confers upon the County Superintendent a discretion on the subject of licensing teachers, which is so far analogous to judicial discretion, or error in judgment, either in granting or withholding a license. It is a wise and salutary rule

that there can be no action maintained against this class of officers where they act without malice. An honest mistake in judgment, either as to their duties under the law, or as to the facts submitted to them, ought not to subject such officers to a suit for damages. They may judge wrongly, and so may a judicial tribunal, but the party injured can have no cause of action when they act in good faith and in the line of what they believe is honestly their duty. Any other rule might result in great hardship to conscientious men who, with the purest of motives, have faithfully endeavored to perform the duties of their trust. Although of great importance to the public, no considerable profits attach to these offices, and the duties are usually performed by persons sincerely desiring to do right by their neighbors, without hope or expectation of personal gain, and it would be a harsh rule that would subject such officers to a suit for damages for every mistake they may make in the good-faith discharge of their official duties. In order to charge a liability, it must be averred and proved that such action was taken either wantonly or maliciously; that is, from wilful and wicked or corrupt motives. *Elmore v. Overton*, supra, 548.

In the case of *Galligan v. Kelly*, 31 N. Y. Supp. 561, the Court stated the following doctrine in reference to the action of School Trustees in discharging a teacher and the liability of such officers for damages in connection with their official duties:

In fine, they were privileged to take testimony to ascertain whether there ought to be a trial by the Board of Education, and that board has sustained them by a vote overwhelmingly prepondering against the plaintiff. It would be monstrous to hold that the testimony thus taken, and thus furnished to the Board of Education, was a mere libelous statement made by the defendants maliciously to punish the plaintiff. Such a doctrine would be most disastrous in its effect upon the proper administration of our public-school system. If, under such circumstances, these Trustees could be treated as libelers, and punished in damages for doing what they did, it would simply prevent all such officers from fearlessly guarding the sacred interests entrusted to them by the law. These officers are responsible for the due administration of the school system, and they should be upheld in all proper efforts to maintain discipline, and to compel obedience to the rules and by-laws laid down by the Board of Education. It would be strange indeed if they were to be held to a stricter rule of law than is held against a person who charges another with a crime in the ordinary criminal courts of the country. In that class of cases the person making the charge cannot be held for damages for malicious prosecution, even if the defendant is acquitted, unless the charge was made wantonly, maliciously, and without reasonable or probable cause to believe it to be true. Here the charges were certainly made with probable cause to believe them to be true, because they were made upon formal testimony, and because the plaintiff was actually removed by the appropriate tribunal. If such an action as this could be maintained upon such facts, it would be impossible to induce any prudent citizen to accept such a position as that of School Trustee. He would either be held responsible by the people for failure to do his plain duty, or he would be held responsible by the courts for doing his plain duty. Fortunately for the good government of the schools, the Trustee is not between these

alternatives. In my judgment, this action was ill advised, and should never have been brought. It certainly cannot be sustained upon any principle or precedent appertaining to the law of libel. The complaint must accordingly be dismissed.

It is my opinion, therefore, that, if the findings made by the respective boards are made in good faith and without malice, the officials would not be liable to the teacher so discharged, even though the conclusions reached may cast aspersions on the character of the teacher.

In reference to the third inquiry it may be stated that there is no protection against a recall election. Neither is there protection against a suit for damages in the event a teacher should be discharged. Recall elections may be held for any cause, the only requirement being that the percentage of signers to the recall petition be in accordance with law. It is needless for me to say that it is impossible to protect any one from a suit for damages. Your only interest, however, is in ascertaining whether such a suit could be successfully maintained. This question I have answered in the negative.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. W. J. HUNTING, Superintendent of Public Instruction.

SYLLABUS

69. Revenue--City and County Ordinance--Corporation Tax "Required by Law" Defined.

(1) Stats. 1923, p. 342, sec. 1: A corporation paying a city or county license would be compelled to pay the \$10 annual license fee required by this section, the exemption in the Act providing that corporations already "required by law" to pay an annual license does not include ordinances of city and county governments.

(2) City and county ordinances are not usually classed as laws within the scope of the phrase "required by law."

INQUIRY

CARSON CITY, June 8, 1923.

Section 1, Statutes of 1923, p. 342, provides:

Every corporation organized under the laws of this State, and every foreign corporation doing business in this State, shall, on or before the 1st day of July of each year, pay to the Secretary of State, a license tax of \$10; *provided, however*, that *corporations already required by law to pay* an annual license shall not come under

the provisions of this Act.

You request an opinion as to whether a corporation that pays an annual license tax under and by virtue of an ordinance enacted by a city or Board of County Commissioners would thereby be under the provision above stated.

OPINION

The question presented is whether the ordinance of a city may be called a “law,” and whether, if a city ordinance requires the payment by a corporation of a license tax, that such ordinance would be synonymous with, and within the scope of, the phrase in the statement “required by law.”

In the case of *Wright v. The City of Macon*, 64 S. E. 807, it was held that “ordinances” are mere rules or by-laws of a municipal corporation. The word “law” does not ordinarily include a “municipal ordinance.” See, also, *Stott v. City of Chicago*, 68 N. E. 726; *People v. Gardner*, 106 N. W. 540; *Clinger v. Bickell*, 11 Atl. 555.

It is my opinion, therefore, where a corporation pays an annual license tax under or by virtue of any city or county ordinance, that it would be compelled to pay the license tax as provided for in section 1 of this Act, for the reason that the words “required by law” do not include ordinances enacted by a city or a county government.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. W. G. GREATHOUSE, Secretary of State.

SYLLABUS

70. Criminal Law--Slot Machine.

Rev. Laws, 6518: It is illegal to maintain a slot machine played for money, or for checks or tokens redeemable in money.

INQUIRY

CARSON CITY, June 19, 1923.

An opinion has been requested as to whether a public display and use of slot machines which are being played for cash money constitute a violation of the state law.

OPINION

Section 6518, vol. 3, Revised Laws of 1919, provides:

It shall be unlawful for any persons * * * to play, maintain, or keep any slot machine, played for money or for checks, or tokens redeemable in money.

It is my opinion, therefore, that operating slot machines, in the manner specified, is a violation of the law.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. J. G. SCRUGHAM, Governor, Carson City, Nevada.

SYLLABUS

71. Animals--Wild Horses--Estrays.

Stats. 1923, p. 31, does not repeal Stats. 1913, chap. 95. Wild horses may be destroyed; estrays that have owners are protected.

INQUIRY

CARSON CITY, June 21, 1923.

You call my attention to the fact that the Commissioners of Humboldt County, acting under the provisions of Statutes of Nevada, 1923, p. 95, issued to an individual a permit to destroy wild horses.

It is suggested by you that chapter 27, Statutes of Nevada, 1923, automatically repeals Statutes of 1913, supra, and you request an opinion.

OPINION

It is my opinion that the statute of 1923, p. 31, does not repeal statute of 1913, chap. 95. The provisions of the 1923 Act, supra, contemplate those animals that may have an owner, while this Act refers to stray animals that may be marked or branded. Wild horses cannot come within this classification.

By the provisions of the statute of 1923 rules were enacted which had for their object the protection to owners of the animals mentioned that might stray.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

HON. EDWARD RECORDS, Secretary State Board of Stock Commissioners.

SYLLABUS

72. United States Statute--Sheppard--Towner Act--Maternity and Infancy Cases--Expenditures.

Sheppard-Towner Act: The bureau at Washington in charge of the enforcement of this Act should be consulted as to expenditures of funds by those in charge of this bureau in this State.

INQUIRY

CARSON CITY, June 27, 1923.

An opinion is requested as to whether the Child-Welfare Division of the State Board of Health, acting under the state law and the Sheppard-Towner Act, can give or afford material relief in maternity and infancy cases.

OPINION

In the bulletin issued by the Children's Bureau of the Department of Labor, subd. 3, p. 3, it is stated:

As originally introduced, the Act provided that the funds were to be expended by the States for provisions of instruction in the hygiene of maternity and infancy, through public health nurses, consultation, and other suitable methods and the perfection of medical and nursing care for mothers and infants at home or at a hospital, when necessary, especially in remote areas.

These specific provisions do not appear in the Act as passed. Section 10 of the Sheppard-Towner Act provides:

that the Children's Bureau may withhold any further certificate provided for in section 10 hereof, whenever it shall be determined as to any State that the agencies thereof have not properly expended the money paid to it or the moneys herein requested to be appropriated by such State for this purpose.

It is my opinion, therefore, that it is incumbent upon those in charge of the operation of this bureau in the State of Nevada to submit to the bureau at Washington its plan of operation, and have the expenditures approved by the Department at Washington. It appears to me that the question involved is one entirely of policy, and the Act of Congress gives to the head of the

bureau at Washington discretion in exercising the policy to be adopted. It is therefore suggested that, before any moneys be expended along the lines suggested by you, permission be obtained as indicated.

Respectfully submitted,

M. A. DISKIN, Attorney-General.

MRS. MAUD WHEELER, Secretary Child-Welfare Division.

SYLLABUS

73. County—Highways—City and County Road Funds.

Rev. Laws, 842 and 3006, as amended Stats. 1921, chap. 236:

(1) A city with population of less than 2,500 is entitled to portion of general road fund of county.

(2) In counties containing cities of more than 2,500 population the amendment fixes maximum and minimum levy and provides different distribution of road funds.

INQUIRY

CARSON CITY, July 6, 1923.

Is the city of Fallon, with a population of less than 2,500 entitled to a portion of the general road fund of Churchill County, under the provisions of section 842, Revised Laws of Nevada?

OPINION

Yes. The city of Fallon is entitled to such proportion of the total road fund of Churchill County as the valuation of the property within the city limits bears to the total valuation of all property within the county, including the city.

Section 3006, Revised Laws of Nevada, as amended by Statutes of 1921, chap. 235, does not affect the rights of cities with a population less than 2,500.

But, for counties containing cities with a population of more than 2,500, this amendment fixes a minimum levy of 1/8% as well as a maximum levy of 1/4% for road purposes, and further provides that one-half of such city's proportion of such road fund shall be placed in the "general fund" of such city, instead of, as required by section 843, expending it all upon the streets, alleys, and public highways.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General.*

Hon. E. E. WINTERS, *District Attorney, Fallon, Nevada.*

SYLLABUS

74. Election—Notice—School Bonds, Validity Of.

Notice of election informing voters that interest on proposed school bonds would not exceed a certain percent per annum is not too indefinite or uncertain under sec. 193 of School Code.

INQUIRY

CARSON CITY, July 12, 1923.

You submit to me certified copy of the several resolutions adopted by your honorable board, in connection with the proposed issue of \$30,000 school bonds, School District No. 10, Washoe County, Nevada.

You also submit the notice published calling for an election which would authorize the issuance of these bonds.

You call my attention to that portion of the notice of election wherein is recited "that the amount of said school bonds shall be \$30,000, bearing interest at a rate not to exceed 6% per annum."

You request an opinion as to the validity of the proceedings, calling my attention particularly to the stipulation contained in said notice of election, in reference to the amount of interest the bonds shall bear, and request an opinion as to whether the provision in this notice of election complies with section 193, School Code of Nevada, 1921.

OPINION

Your honorable board is to be complimented for the efficient manner in which all of the resolutions, notices, and other documents in connection with this proposed bond issue have been prepared.

The Supreme Court of this State has not passed upon the provisions of section 193, School Code, as to what statement is a sufficient compliance with this section. It must be kept in mind, however, that the purpose of this notice is to provide information to the voters, so that they may intelligently vote on the question as to whether bonds should issue or should not issue. It is my opinion that, inasmuch as the notice of election informed the voters that the rate of interest would not exceed 6%, it would be a sufficient authorization for the collection of a lesser rate of interest, and I am of the opinion that the fixing of a rate not to exceed 6% could not be criticized as being too indefinite, or uncertain, and not a compliance with section 193.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

BOARD OF SCHOOL TRUSTEES, *Reno, Nevada.*

SYLLABUS

75. Corporation—Par and Nonpar Value—Change of Articles.

General corporation law, as amended Stats. 1923, p. 370: A corporation organized prior to March 26, 1923, may amend its articles to provide for nonpar-value stock to same extent as newly formed corporation might so provide, but same corporation may not have both par- and nonpar-value stock.

Affirmed by Supreme Court in State ex rel. Goodman v. Greathouse, 47 Nev. 198, 217 Pac. 957.
(See, also, Opinion No. 36, supra.)

INQUIRY

CARSON CITY, July 25, 1923.

Can a corporation existing prior to March 26, 1923, amend its articles so as to provide for nonpar-value stock, in the same manner that a newly formed corporation can provide under the provisions of the amendment appearing in Statutes of Nevada, 1923, at page 370?

OPINION

Yes. Under the language contained in section 40 of the general corporation law, reading as follows:

Every corporation organized under this Act may change the nature of its business, and make such other amendments, changes or alterations as may be desired; *provided*, that such certificate of amendments, change or alteration, shall contain only such provisions as it would be lawful and proper to insert in an original certificate of incorporation made at the time of making such amendment--

it is our opinion that corporations existing prior to March 26, 1923, may amend their articles of incorporation so as to provide for the issuance of nonpar-value stock, to take the place of its par-value stock.

This office has heretofore rendered its opinion that, under the provisions of paragraph 4 of article 4 of the General Corporation Law, as amended by chapter 206, Statutes of 1923, corporations may be organized having stock either with or without par value, but that the same corporation may not have both. So that, under the views of this office, amended articles of incorporation may provide that all shares of the capital stock of such corporation shall be without par value, but may not provide that part of such shares may, and part may not, have par value.

However, this matter has been submitted to the Supreme Court in a certain mandamus proceeding, and a final decision thereon should be forthcoming in the

near future.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General.*

HON. W. G. GREATHOUSE, *Secretary of State.*

SYLLABUS

76. Revenue—Business License in Unincorporated City or Town.

Rev. Laws, 877, as amended Stats. 1923, chap. 50: No other city or town license may be collected from businesses in unincorporated city or town than that imposed by County License Board.

INQUIRY

CARSON CITY, July 25, 1923.

In view of the provisions of chapter 50, Statutes of 1923, may the Board of County Commissioners of any county, under the provisions of paragraph 9 of section 1 of "An Act providing for the government of the towns and cities of this State," being section 877, Revised Laws of Nevada, fix and impose a license fee for the benefit of any unincorporated town or city for the carrying on in any such unincorporated town or city of the businesses named in chapter 50, Statutes of 1923, in addition to the county license fixed and imposed, or to be fixed and imposed, by the County License Board, as provided for by said chapter 50?

OPINION

It is our opinion that chapter 50, Statutes of 1923, by giving to the *County License Board the exclusive power to license and regulate* certain businesses named therein, in unincorporated cities and towns, and further requiring all applicants who desire to engage in any such business or businesses to make application to the County License Board of the county in which any such business is to be conducted for a county license of the kind desired, and file the same, together with the required license fee, with the county license collector, without making any provision for the fixing and imposing of a *city or town license* by such board, precludes the imposition and collection of any license fee other than that mentioned in said chapter 50, Statutes of 1923.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General.*

HON. W.T. MATHEWS, *District Attorney, Elko County, Nevada.*

SYLLABUS

77. Corporations—Fees—Interstate Commerce Corporation Filing Fee.

Rev. Laws, 1348, 1350, as amended Stats. 1923, pp. 66, 380:

Foreign corporation engaged in interstate commerce need not pay filing fee based on amount of capital stock.

INQUIRY

CARSON CITY, August 2, 1923.

You hand me articles of incorporation of Oregon Short Line Railroad Company, and request an opinion as to the amount of fees you are to collect for filing these articles.

OPINION

It appears, from the articles presented, that the Oregon Short Line Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Oregon; that said railroad company is engaged in the railroad business in Oregon, Utah, and Idaho, and contemplates running a railroad into the State of Nevada from Rogerson, Idaho, to Wells, Nevada. It appears, therefore, that this railroad company is engaged in interstate commerce.

The statute which requires the filing of a certified copy of the articles of incorporation of a foreign corporation in the office of the Secretary of State, is section 1348. Section 2 of the Act provides for the payment of the fees for the filing of articles of incorporation, and section 3, being section 1350 of the Revised Laws, provides a penalty for the failure or neglect to file. Statutes of Nevada, 1923, p. 65, fix the amount of fees required to be paid for the filing of certificates or articles of incorporation. Section 102, General Corporation Act, was amended Statutes of 1923, p. 380. The fees fixed by Statutes of 1923, p. 380, are dissimilar from those fixed by Statutes of 1923, p. 66. Without deciding which fee law should govern, where a railroad company decides to file articles, it is my opinion that the Oregon Short Line Railroad Company is *not* required to pay any fee for the filing of its articles.

In the case of *Pullman v. Kansas*, 21 U.S. 57, the Supreme Court of the United States held:

A corporation organized in one State, and doing an interstate business, is not bound to obtain the permission of another State to transact interstate business within its limits.

Again, in the case of *Ludwig v. Western Union*, 216 U.S. 148, the Court stated:

A state statute, which requires a foreign corporation, engaged in interstate commerce, to pay, as a license tax or fee, for doing interstate business, a given amount on its entire capital stock, whether employed within the State or elsewhere, directly burdens the interstate business of such corporation and its property outside the jurisdiction of the

taxing State, and is unconstitutional and void.

This corporation, therefore, being engaged in interstate commerce, any statute which would seek to require the corporation to pay a charge based upon the amount of its capital stock would be imposing a burden on such corporation as a condition upon the right of said corporation to do business in this State.

Respectfully submitted,

M.A. DISKIN, *Attorney-General*.

HON. W.G. GREATHOUSE, *Secretary of State*.

SYLLABUS

78. Health—Burial—Records.

Sections 2960, 2961, and 2962 of the Revised Laws require permit for interment of body to secure data for public records, and must be complied with.

INQUIRY

CARSON CITY, August 1, 1923.

You advise that some trouble is encountered in reference to burial permits, and desire an opinion as to the necessity of obtaining these permits.

OPINION

Sections 2960-2962, Revised Laws of Nevada, 1912, require that burial permits be obtained. It is provided:

That no sexton, or person in charge of any premises in which interments are made, shall inter, or permit the interment of, any body, unless it is accompanied by a burial, removal, or transit permit.

The purpose of these provisions is to obtain data for public records, and this law must be complied with.

Respectfully submitted,

M.A. DISKIN, *Attorney-General*.

DR. J.W. GEROW, *Reno, Washoe County, Nevada*.

SYLLABUS

79. Recording—Notice—Sale and Attachment of Real Property.

Stats. 1923, p. 198: Certificate of sale and notice of attachment affecting real property must be recorded.

INQUIRY

CARSON CITY, August 2, 1923.

An opinion is requested as to whether, under Statutes of 1923, p. 198, chap. 120, it is necessary to record, in the office of the County Recorder, certificates of sale and notices of attachment.

OPINION

Prior to the adoption of this statute it has always been the practice to simply file certificates of sale and notice of attachment. The Legislature in 1923 enacted a law which adopted general recording provisions, and, among other things, provided:

Each of the County Recorders of this State must, upon the payment of the statutory fees for same, record separately, in a fair hand, or typewriter, in large well-bound, separate books: * * * (i) Notices of attachment upon real estate. * * * (p) Certificates of sale.

Section 9 of the Act provides:

Instruments affecting real property must be recorded in the office of the County Recorder of the county in which the real property is situated.

Provision is further made in the Act imposing a penalty for a Recorder who fails to properly record the several documents required.

It is my opinion, therefore, that a certificate of sale affecting real property and notices of attachment affecting real property must be recorded in this office.

Respectfully submitted.

M.A. DISKIN, *Attorney-General*.

HON. LILLIAN S. BINGHAM, *Recorder and Auditor of Churchill County, Fallon, Nevada*.

SYLLABUS

80. **Nevada Industrial Commission—Workmen's Compensation—Injury Proximate Cause of Death—Time for Filing Claim.**

Where an employee received an accident, while in the employ of a company insured under the Act, from which accident a disease developed which caused his death three years afterwards, and where a request to file a claim for compensation was made two years later, and additional proof was later presented, and received. held:

(1) The Industrial Commission is estopped to allege the claim was

not filed in due time.

(2) The facts warrant a settlement of the claim.

INQUIRY

CARSON CITY, August 6, 1923.

You submit to me the records of your office, wherein is set forth the correspondence and other data, including affidavit and medical reports concerning the injury and death of George R. Miller, and the claim of his wife, Ethel May Miller, for compensation.

OPINION

It appears without dispute that George R. Miller was on May 7 employed by the Western Ore Purchasing Company; that the Western Ore Purchasing Company, by reason of a full compliance with the law, was under the protection, so far as accidents were concerned, of the Nevada Industrial Commission.

This matter was acted upon by George D. Smith, formerly chairman of the Industrial Commission, and compensation was refused: First, for the reason that the claim was not presented within a statutory period of one year from date of death. Second, that it had not been affirmatively established that the death resulted from personal injury by accident arising out of the course of employment, and that the accident on May 7, 1916, was not the proximate cause of the death.

In connection with the first contention, your attention is respectfully called to a letter dated February 8, 1921, to the attorney for Mrs. Miller, wherein he was requested to file a claim against the Commission and to present such proof as he could to establish his contention. It appears thereafter that additional proof was presented to the Commission, and I am of the opinion, therefore, that the Commission, having reopened this case, is estopped to now allege that the claim was not filed in time, especially in view of the fact that the claimant expended considerable money in presenting further proof.

In reference to the second contention, it appears from the affidavit of Dr. Turner, who at the time of the accident reported to the Nevada Industrial Commission that George R. Miller was injured by the explosion of a giant cap, and that, by reason of the injury, orchitis developed.

Dr. Turner submitted the patient to a Wasserman test as a means to arrive at a diagnosis, and the patient was sent to R.L. Rigdon of San Francisco, who, on January 11, 1917, performed an orchectomy.

It appears, from Dr. Turner's affidavit, that on July 6, 1917, he wrote the Industrial Commission that the injury received by Miller was of such nature that the patient could not recover.

It appears, thereafter, that Mr. Miller contracted the flu, or rather flue pneumonia, and on January 12, 1919, he died. In concluding his report, Dr. Turner states:

It is my opinion that in a large number of cases pneumonia is a so-called terminal disease, and there is no doubt at all but what the cause

of his death (Miller's) primarily was tubercular orchitis, and an extension of the tuberculosis to a general infection, and that the pneumonia was only contributory to his death.

It appears, therefore, that the contention of claimant is sustained by this medical proof submitted. As to the questions of law involved, your attention is called to the following cases:

Where an employee strained himself by lifting and later died of pneumonia, the board was justified in finding that the subsequent death was due to an accident arising out of, and in the course of, employment. *Folts v. Robertson*, 188 N.Y. 359.

An employee suffered a frost-bite while performing his duties in the service of the master, and developed erysipelas as a result of the injury, which caused his death. His death was held to be due to an accidental injury arising out of the employment. *Larke v. Hancock Mutual Life Insurance Co.*, 97 Atl. 320. (See, also, *Kinjan Co. v. Ossan*, 121 N.E. 289.)

It is my opinion, therefore, that the facts and the law warrant a settlement of this case, and I so advise.

Respectfully submitted.

M.A. DISKIN, *Attorney-General*.

INDUSTRIAL COMMISSION OF THE STATE OF NEVADA, *Carson City*.

SYLLABUS

81. Banks and Banking—Nonjudicial Day.

- (1) Rev. Laws, 4870, as amended, automatically makes day declared to be such by Governor's proclamation a nonjudicial day.
- (2) State banks should close on that day.

INQUIRY

CARSON CITY, August 8, 1923.

An opinion is requested as to whether August 10 is a nonjudicial day, the Governor having issued a proclamation declaring that said day be observed as a nonjudicial day, out of respect to the memory of the late President Harding.

OPINION

It is my opinion that the Governor's proclamation of August 4 makes Friday, August 10, 1923, a nonjudicial day.

Section 4870 of the Revised Laws, as amended, governs, and automatically makes a nonjudicial day in the case of the proclamation of the President or the

Governor, and the origin of the words "fast," "thanksgiving," or "holiday" is immaterial.

All state banks should close on that day.

Respectfully submitted,

M.A. DISKIN, *Attorney-General*.

HON. J.G. SCRUGHAM, *Governor, Carson City, Nevada*.

SYLLABUS

82. Highways—"Through" Defined.

"Highway Law." The word "through," used in describing highway routes, means into and out of a town at different points, and not merely to or into.

INQUIRY

CARSON CITY, August 20, 1923.

Could the word "through," as used in describing the various routes of the state highways in section 8 of the highway law as amended, be construed to mean that the routes of the highways described therein might merely run to, or into, the towns therein named, or that the main routes of said highways may not even run to or into such towns, if spurs were constructed to connect the routes of such main highways with the towns named?

OPINION

The word "through" is defined in *Cyclopedia of Law and Procedure* to mean:

From end to end, or from side to side of; into or out of at the opposite, or at another, point; between the sides or walls of; within; from one side to the opposite side; from one surface or limit to the other surface or limit.

We have examined all the authorities cited upon the various shades of meaning set forth in the above definitions, and we are firmly of the opinion that the word "through," as used in section 8 of our highway law as amended, means "from end to end; from side to side; or into or out of at the opposite, or at another, point"; and not merely to or into.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General*.

HON. G.W. BORDEN, *State Highway Engineer*.

SYLLABUS

83. Revenue—Lease of Mining Ground as Unit for Bullion-Tax Assessment.

Rev. Laws, 3687, 3690: Original lease and each sublease of mining ground are separate mining units for bullion-tax assessment purposes. Separate statements must be filed and taxes paid.

INQUIRY

CARSON CITY, August 21, 1923.

Where a lessee of mining ground or tailings dump subleases the same or parts thereof to sublessees, should the lease and subleases be treated as one mining unit for the purpose of bullion-tax assessment, and but one statement required from the lessee; or should the lease and each sublease thereunder be treated as a separate mining unit for such purpose, and a statement and payment of bullion tax be required from the lessee and each sublessee, when either the lease or any sublease shows a net profit, as defined by section 3687 of the Revised Laws?

OPINION

It is our opinion that the original lease and each sublease thereunder should be treated as a separate mining unit for the purpose of bullion-tax assessment, and that the lessee and each sublessee under him should be required to file with the Assessor of his county a statement, as required by section 3690 of the Revised Laws, showing the gross and net proceeds of ore produced on his particular mining unit, and to pay the bullion tax upon any net proceeds of ore produced therefrom as shown by any such statement, as provided in section 3687 of the Revised Laws.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General*.

NEVADA TAX COMMISSION, *Carson City, Nevada*.

SYLLABUS

84. Revenue—Widows' and Orphans' Exemption—Statutes in Conflict—Construction.

Stats. 1891, as amended Stats. 1923, chap. 203: These statutes are in irreconcilable conflict, and the latter must prevail. Property of widows and orphan children not to exceed \$1,000 to one family should be exempt from taxation, provided the total value of their

property does not exceed \$6,000.

INQUIRY

CARSON CITY, September 5, 1923.

Under the provisions of the sixth subdivision of section 5 of "An Act to provide revenue for support of the State of Nevada, and to repeal certain Acts relating thereto," approved March 23, 1891, as amended by chapter 203, Statutes of 1923, which provides that "the property of widows and orphan children not to exceed the sum of \$1,000 to any one family shall be exempted from taxation; *and provided further*, that no such exemption shall be allowed any one, the total value of whose property within the State exceeds \$4,000; *and provided further*, that no such exemption shall be allowed any one, the total value of whose property within the State exceeds \$6,000," which of the above-quoted conflicting provisos shall be given effect in the assessment and taxation of the property of widows and orphan children?

OPINION

It will be noted from the above-quoted provisos that they are in irreconcilable conflict, and that one or the other of the two must fall. In such circumstances it is the well-settled rule of statutory construction that where one part of a statute is in conflict with another, and they cannot be brought into harmony by any rule of construction, the one being later in position must be deemed to render the other nugatory or repeal it. Being later in position, the prevailing provision is deemed later expression of the legislative will. In the reading of a bill, the matter near the close may be presumed to receive the last consideration, and, if assented to, is a later conclusion. Sutherland's Statutory Construction, sec. 349.

In harmony with the above well-settled rule of statutory construction, it is our opinion that the property of widows and orphan children not to exceed the amount of \$1,000 to any one family should be exempted from assessment and taxation, provided that the total value of the property belonging to any such widow or orphan children shall not exceed the sum of \$6,000.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General.*

NEVADA TAX COMMISSION, *Carson City, Nevada.*

SYLLABUS

85. Health—Physicians—Optometry—Unlicensed Persons.

Stats. 1913, chap. 106, as amended Stats. 1923, chap. 100: No unlicensed person may perform any branch of optometry for the

public.

INQUIRY

CARSON CITY, September 5, 1923.

Under the provisions of chapter 106, Statutes of 1913, commonly known as "the Optometry Law," as amended by chapter 100, Statutes of 1923, may be regularly licensed physician, or a regularly licensed optometrist, employ a person who is not a regularly licensed optometrist, to do refraction work for the public?

OPINION

After a close examination of the provisions of the law above referred to, it is our opinion that neither a regularly licensed physician, nor a regularly licensed optometrist, may lawfully employ an unlicensed person to do for the public any of the things included within the provisions of section 1 of the optometry law, above referred to, whether such unlicensed person works under the supervision of a licensed physician or optometrist, or otherwise.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General*.

HON. CHAS. O. GASHO, *President of Nevada State Board of Examiners in Optometry, Reno, Nevada*.

SYLLABUS

86. Labor—Banks and Banking—Eight-Hour Law for Women.

Stats. 1917, sec. 1, chap. 14, does not apply to women working in banks, as they are not "mercantile establishments."

INQUIRY

CARSON CITY, September 6, 1923.

Inquiry is made for construction of section 1 of chapter 14, Statutes of 1917, which limits the hours of labor of women to eight hours in any twenty-four-hour period. An opinion is requested as to whether the banking business is included in the words "mercantile establishment," so as to include women employees of banks.

OPINION

Section 1 of the Act provides:

No female shall be employed in any manufacturing, mercantile, or

mechanical establishment, laundry, hotel, public rooming-house, apartment house, place of amusement, or restaurant * * * more than eight hours during any one day or more than fifty-six hours in one week.

To answer this question it is necessary to determine whether the banking business would come within the provisions of the words "mercantile establishment."

In the case of *Zugalla v. International Mercantile Agency*, 142 Fed. 927, the Court held:

The term "mercantile pursuits" in bankruptcy Act. 1898, chapter 41, making corporations principally engaged in such pursuits subject to the Act, is to be given its common and generally understood meaning, and includes only corporations engaged in the buying and selling of commodities.

In the case of *New York Building and Loan Banking Co.*, 127 Fed. 471, it was held that the phrase "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits" did not include a building-and-loan association.

The word "bank," in its most enlarged sense, includes the business of receiving deposits, paying checks, lending money. *Weed v. Bergh*, 25 L.R.A. 1217.

I am of the opinion, therefore, that the words "mercantile establishment" do not include the business of banking, and the provisions of section 1, *supra*, do not apply to banks.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. FRANK INGRAM, *Labor Commissioner, Carson City, Nevada.*

SYLLABUS

87. Revenue—License for Automobile Not in Use.

Stats. 1923, p. 54, does not require payment of license by owner of automobile not being used, but he must file statement of ownership as required.

INQUIRY

CARSON CITY, September 18, 1923.

A ruling is requested as to whether or not the owner of an automobile is liable for the payment of a license to the State, where the automobile is not used at any time during the entire year.

OPINION

Statutes of 1923, p. 54, provide:

"An Act to amend an Act entitled 'An Act regulating automobiles or motor vehicles in public roads,' " etc.

Under subdivision a of section 2 it is provided:

The owner of every automobile, motorcycle, etc., shall, within ten days after the acquisition of the same, file with the Secretary of State, three copies of a statement containing his name and address.

The second paragraph of section 2 provides that immediately upon receipt of the statements the Secretary of State shall forward a copy of the same to the Tax Commission.

It is my opinion that, unless the owner of an automobile uses the same on the public highways of this State, he is not liable for the payment of a license fee. He is required, however, within ten days after the acquisition of an automobile to file a statement with the Secretary of State as provided in section 2, subdivision a.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. BOOTH B. GOODMAN, *District Attorney, Lovelock, Nevada.*

SYLLABUS

88. Fish and Game—Pheasants and Quail—County Commissioners.

Stats. 1923, chap. 195, provides that County Commissioners may fix open and closed seasons for pheasant and valley quail.

INQUIRY

CARSON CITY, October 8, 1923.

Our attention is called to the fact that the several County Commissioners of this State, in fixing the open season on pheasants and valley quail, have prescribed different periods of time for hunting the same. An opinion is requested as to the legality of these orders, and whether the same is authorized by law.

OPINION

Your attention is directed to section 3, Statutes of 1923, chapter 195, which provides:

The Board of County Commissioners of the several counties of this State may declare the open or closed season on pheasants and on valley quail, and, keeping within the limits prescribed in this Act, may regulate the number of same to be killed * * * ; and it shall be unlawful for any person to take, or to attempt to take, * * * except between those dates set by the Board of County Commissioners.

It appears, therefore, from the provisions of this section that the Board of County

Commissioners may, by ordinance, establish the season for pheasants and valley quail.

Respectfully submitted,

M.A. DISKIN, *Attorney-General*.

HON. BOOTH B. GOODMAN, *District Attorney, Lovelock, Nevada*.

SYLLABUS

89. Public Officers—Deputy Recorder's Compensation.

(1) Rev. Laws, 2848, as amended Stats. 1921, p. 151: Recorder of Humboldt County may appoint deputy, but county would not be liable for his salary.

(2) If deputy made and certified an abstract in official capacity, fee therefor should be paid to county; if he made abstract in individual capacity, not affixing Recorder's seal, he might retain fee.

INQUIRY

CARSON CITY, October 8, 1923.

You request an opinion relative to employing a Deputy Recorder in your county, whether the same is authorized by law, and, further, if such deputy could retain fees for making abstracts.

Opinion

Section 2, Statutes of 1921, p. 151, provides:

The County Recorder and Auditor shall receive \$3,000 per annum, which shall be compensation in full for all services.

There is, of course, no authority for employing a deputy, in this statute.

Section 2848, Revised Laws of 1919, vol. 3, provides:

All * * * County Recorders are hereby authorized to appoint deputies who shall have power to transact all official business appertaining to said office, to the same extent as their principals.

It appears, therefore, that you, under the law, are authorized to appoint a deputy. Humboldt County, of course, would not be liable for compensation of such deputy. The same must be paid by you. If this deputy should prepare abstracts of title and certify to the same in his official capacity, as Deputy County Recorder, the fees derived therefrom would have to be paid to the county. If such work, however, is performed by him in his individual capacity, the fees might be retained by him, providing, of course, that the seal of the County Recorder is not placed on any of the instruments so prepared.

Respectfully submitted,

M.A. DISKIN, *Attorney-General*.
HON. F. GERMAIN, *Recorder and Auditor, Winnemucca, Nevada*.

SYLLABUS

90. Mines and Mining—Hoisting Engineer.

Rev. Laws, 4233: Hoisting engineer should not leave post of duty when men are at work in mine.

INQUIRY

CARSON CITY, October 9, 1923.

May a hoisting engineer, while men are at work in a mine, lawfully perform other duties, such as looking after the batteries, generators, etc.?

OPINION

Section 4233, Revised Laws of Nevada, 1912, provides:

At all times when men are in a mine, worked through a shaft equipped with hoisting machinery, an engineer shall be kept on duty to answer signals.

It is my opinion that the purpose of the above and foregoing provision is to insure the presence of the hoisting engineer at all times when men are in the mine, in close proximity so that he may answer calls given to him from men underground. It would be a violation of the spirit of the law to permit a hoisting engineer to engage in other duties that would take him away from the hoisting machinery, and I conclude, therefore, that the question must be answered in the negative.

Respectfully submitted,

M.A. DISKIN, *Attorney-General*.

HON. A.J. STINSON, *Inspector of Mines, Carson City, Nevada*.

SYLLABUS

91. Public Officers—Compensation of District Attorney of Elko County.

Rev. Laws, 3677, Stats. 1917, p. 295, as amended Stats. 1919, p. 37: District Attorney is not entitled to fee in delinquent-tax case.

INQUIRY

CARSON CITY, October 29, 1923.

My attention is directed to Statutes of Nevada, 1919, p. 37, wherein provision was made for compensating the District Attorney of Elko County.

In connection with this section reference is made to section 3677 of the Revised Laws of Nevada, which authorizes the collection of attorney fees in cases instituted for the purpose of collecting delinquent taxes.

An opinion is requested as to whether the District Attorney is entitled to retain the compensation that is paid as attorney fees in delinquent-tax proceedings.

OPINION

Section 1, Statutes of 1917, p. 295, provides:

From and after the passage and approval of this Act the county officers of Elko County, Nevada, named in this Act, shall receive the following salaries in full compensation for all services rendered by them.

Section 2, Statutes of 1917, p. 295, was amended by Statutes of 1919, p. 37, and under the amendment the salary of the District Attorney was fixed in the sum of \$3,000 per annum. Further provision was made that the said \$3,000 per annum is "for all services as such officer."

In the early history of legislation of this State compensation of the several county officers was placed upon a fee basis. Within the last ten years the Legislature has compensated the several officers upon a salary basis, and the provisions in reference to fees have been entirely eliminated.

It is my opinion that the District Attorney is not entitled to retain attorney fees collected in delinquent-tax cases under section 3677.

The doctrine of law applicable to the facts here presented is stated in 18 C.J. 1328, as follows:

A constitution or statute fixing a salary in full payment of all services abolishes all fees pertaining to the office. (See, also, Tilden v. Esmeralda County, 32 Nev. 319.)

The Supreme Court of California, in the case of *Kern County v. Fay*, 56 Pac. 857, supports the text recited, supra.

The case of *Nolan v. Ellis County (Kan.)*, 68 Pac. 1068, appears to hold to the contrary, but an examination of this case discloses that the statute of Kansas provided that, in addition to the compensation as fixed, the officer was entitled to fees.

The question presented, therefore, must be answered in the negative.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. W. T. MATHEWS, *District Attorney, Elko, Nevada.*

SYLLABUS

92. Revenue and Taxation—Property in Two Counties.

Rev. Laws, 3628: Owner of property assessed by two counties may select one to which he pays taxes. Production of tax receipt by one county entitled him to dismissal of action by other county, free of costs.

INQUIRY

CARSON CITY, November 7, 1923.

You advise that the Assessor of Lander County has raised the question of the location of the boundary-line between Lander County and Eureka County. It is said that several assessments in reference to the same property have been levied in both counties, and you request an opinion as to what a taxpayer should do in reference to payment of taxes where his property has been assessed by both counties.

OPINION

Section 3628, Revised Laws of Nevada, 1912, provides:

When real property is assessed by the County Assessors of two counties on territory claimed by both, the owner of the real estate assessed is hereby authorized to pay said taxes in either county that he may select, and, in case of suit being brought for the nonpayment of said taxes in the county in which said suit may be brought, the production of a tax receipt for the current year on said property, signed by the proper authority, although in an adjoining county claiming jurisdiction, of a date prior to the commencement of said action, shall entitle said taxpayer to a dismissal of said suit free of costs.

This provision of the law clearly outlines a method of procedure in the matter indicated.

Respectfully submitted,

M.A. DISKIN, *Attorney-General*.

NEVADA TAX COMMISSION, *Carson City, Nevada*.

SYLLABUS

93. Schools—Athletics—Physical Examinations.

(1) Rev. Laws, 3311, 3313: School Trustees and County Boards of Education have power to establish rules for the welfare of pupils.

(2) Scholars desiring to engage in athletic contests, where physical examination is desired and permission therefor is refused, should

present written permission of parents.

(3) The right of Trustees or boards to make reasonable rules in cases of emergency is not denied.

INQUIRY

CARSON CITY, November 16, 1923.

Your request an answer to the following inquiry:

Has the County Board of Education the power to compel pupils attending the high school, who desire to participate in scholastic contests, to submit to an examination before they are allowed to play on the school team?

OPINION

Section 3311 of the Revised Laws of 1912 provides that the Board of School Trustees is given such reasonable and necessary powers as may be necessary to attain the ends for which the public schools are established and to promote the welfare of school children.

Section 3313, Revised Laws of 1912, confers the same power on the County Boards of Education.

It must be remembered that the pupils who attend the public schools represent every religious denomination. It must also be borne in mind that certain religious denominations may object to the action contemplated. Without questioning the right of the board to insist on the physical examination, I respectfully suggest that consent of the parents be first obtained in every instance where a physical examination is desired, and, if consent for the physical examination is refused, that, before the child be permitted to engage on a high-school athletic team, written permission from the parents of the child be first obtained.

This opinion is not to be taken or construed as a denial of the right of the board in cases of emergency, or when the welfare of the public might require the exercise of that power conferred under section 3311.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. HOWARD E. BROWNE, *District Attorney, Austin, Nevada.*

SYLLABUS

94. Public Officers—Residence Qualification.

Stats. 1866, as amended Stats. 1921, p. 5: Where state boundary-line runs through small town, and School Trustee, formerly residing on Nevada side, removed across line to another part of same town, in

view of fact that residence is matter of intention and under all the circumstances of the case, Trustee is not disqualified.

INQUIRY

CARSON CITY, November 19, 1923.

You call my attention to the geographic status of one of the School Districts in the northern part of this State. It appears that the stateline dividing Oregon and Nevada runs through the center of a small town, with the result that persons living on one side of the street are residents of the State of Oregon, and those on the other are residents of the State of Nevada.

Directing my attention to these facts, you advise that the Clerk of the Board of School Trustees, while formerly residing on the Nevada side, has now moved, and for five or six months has resided on the Oregon side of the street.

You request an opinion as to whether this Trustee, by reason of these facts, has become disqualified to hold the office of School Trustee.

OPINION

In addition to the facts above recited, it appears from your letter that the School Trustee did not remove all the furniture from the house located in the State of Nevada. Subdivision 6, section 35, of an Act entitled "An Act relating to officers, their qualifications, times of election, terms of office, official duties, resignations, removals, vacancies in office, and the mode of supplying same, misconduct in office, and to enforce official duty," approved March 9, 1866, as amended February 10, 1921, p.5, provides:

SEC. 35. Every office shall become vacant upon the occurring of either of the following events before the expiration of the term of such office: * * * 6th: The ceasing of the incumbent to be a resident of the State, district, county, city, or precinct in which the duties of his office are to be exercised, or for which he shall have been elected or appointed.

The reasons which prompted the Legislature to adopt this salutary provision of law are very apparent. To perform efficiently the duties of an office requires a sufficient interest in the welfare of a county or State, which can only be appreciated and understood by a resident of the State. The abandonment of such residence discloses a mental state inconsistent with an understanding of the best interests of the State and with desire to serve.

It cannot be said that, with this standard view, the Trustee in question, by the mere fact of moving fifty or one hundred feet to the State of Oregon from her former residence in Nevada thereby became disqualified to hold the office of School Trustee.

Residence is a matter of intention, and, under the circumstances stated, and in view of the peculiar state of facts existing, it would be a harsh rule that would disqualify under the circumstances. It would be placing a strict and rigid construction

upon section 35, supra, to hold that for the reasons indicated the Trustee was disqualified, and I decline to so construe the provisions of this Act. It is my opinion, therefore, that, under the facts stated, the School Trustee is not disqualified.

Respectfully submitted,

M.A. DISKIN, *Attorney-General*.

HON. W.J. HUNTING, *Superintendent of Public Instruction*.

SYLLABUS

95. **Animals—Brands.**

Stats. 1923, chap. 26, sec. 2: Application for new brand should contain recital of abandonment of old brand.

Stock Commissioners may make rules not inconsistent with law.

INQUIRY

CARSON CITY, November 19, 1923.

You call my attention to Statutes of 1923, chap. 26, providing for the adoption and recording of brands, etc., and direct an inquiry concerning the right of an individual after obtaining a mark or brand under sections 11 and 13 to abandon the same for legitimate reasons and secure a new mark or brand.

OPINION

Although there is no specific provision authorizing the procedure indicated, I am of the opinion that, under section 2 of this Act, the Board of Stock Commissioners is authorized to make rules and regulations not inconsistent with the Act, and a rule governing the facts in the case stated would be authorized.

Of course, it would be necessary for the person desiring to abandon a mark or brand to execute a certificate of abandonment containing the proper statement of fact, which certificate should be acknowledged as required by section 11. The certificate should then be recorded in your office. When the application for a new brand is filed with the board, notice of the application should contain a recital of the abandonment of the old mark or brand.

Respectfully submitted.

M.A. DISKIN, *Attorney-General*.

HON. EDWARD RECORDS, *Secretary State Board of Stock Commissioners*.

SYLLABUS

96. Revenue and Taxation—Inheritance-Tax Exemption.

Constitution, sec. 1, art. 10, Stats. 1913, p. 411, subd. 2: \$10,000 is all that should be deducted in fixing amount upon which inheritance tax is based in the classification stated.

INQUIRY

CARSON CITY, November 19, 1923.

Section 4, Statutes of 1913, p. 411, known as the "Inheritance-Tax Law," and subdivision 2 thereof, provide as follows:

The following exemptions from the tax are hereby allowed:

Subdivision 2: Property of the clear value of \$10,000 transferred to any or all of the persons described in the second subdivision of section 2 shall be exempted.

Subdivision 2 of section 2 provides:

Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or a descendant of a brother or sister of the decedent, a wife or widow of a son, or the husband of a daughter of the decedent, at the rate of 2 per centum of the clear value of such interest in such property.

In arriving at the tax to be paid the State in the Dromiack estate we, in an oral opinion, held that an exemption of \$10,000 was allowable to all the persons described in subdivision 2 of section 2, as a class or group. It is insisted by attorneys representing the parties that our construction of this section is erroneous, in that all who inherit \$10,000 are not treated alike. For example, if there is one person in subdivision 2, such person could claim an exemption of \$10,000; but, if there are four persons in subdivision 2, these four persons could claim only \$2,500 each as an exemption. It is urged that our interpretation of this section might be contrary to the Federal Constitution, giving to all persons of a class equal protection of the law; that it would violate the provisions of the Nevada Constitution in section 352, vol. 1, Rev. Laws, providing, in part, "that the Legislature shall provide by law for a uniform and equal rate of assessment and taxation."

In order to clear up any misunderstanding in reference to this section, an official opinion is requested as to whether an exemption is allowed of \$10,000 to all persons specified in said provision, or if each person is entitled to an exemption of \$10,000.

OPINION

The contentions presented are based upon a false premise--to wit, it is assumed that the inheritance-tax provisions come within section 1, article 10 of the Constitution of the State of Nevada. This section provides:

The Legislature shall provide by law for a uniform and equal rate of assessment and taxation * * *.

The Supreme Court of this State has held that the tax contemplated within the

provisions of the inheritance-tax law is not a property tax, but excise tax on privilege of transfer. In Re Williams, [40 Nev. 241](#); Cole v. Nickel, [43 Nev. 12](#).

The Supreme Court of the United States, in the case of Magoun v. Illinois Trust and Savings Bank, 170 U.S. 283, stated:

The constitutionality of inheritance taxes is based upon two principles: (1) An inheritance tax is not one on property but one on succession. (2) The right to take property by devise or descent is a creature of the law and not a natural right, * * * a privilege, and, therefore, the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective Constitutions requiring uniformity and equality of taxation.

The Constitutions of most of the States require equality and uniformity in taxation; but these provisions are held to apply only to property taxes and not to inheritance taxation.

Booth v. Comm., 113 S.W. 61.

Tyson v. State, 28 Md. 577.

Beals v. State, 121 N.W. 347.

Dixon v. Ricketts, 72 Pac. 947.

The general rule has been that exemptions shall be strictly construed against the exemption and in favor of the tax.

Re Bull, 96 Pac. 366.

Matter of Francis, 148 N.Y. Supp. 1116.

The Supreme Court of the State of Washington has had occasion to pass upon a statute of that State where the provision of the statute in reference to the exemption, as to a particular class, was ambiguous. The Court stated:

When we construe this language strictly, notwithstanding the fact that it is a change in language from the original Act granting the exemption of \$10,000, we are of the opinion that the statute manifestly meant that only one exemption of \$10,000 should be allowed, and not as many exemptions as there were heirs or legatees, if there were more than one. In Re Ferrel's Estate, 192 Pac. 10; in Re Weller's Estate, 194 Pac. 541.

There is no ambiguity in the language used by the Legislature of this State in allowing exemptions. Subdivision 2 of section 4 provides:

Property of the clear value of \$10,000 *transferred to any or all of the persons described in the second subdivision of section 2 shall be exempted.*

It is my opinion, therefore, that an exemption of \$10,000 is allowed to any or all of the persons described in the second subdivision of section 2. This is true if there is but one of said persons or if they number more than one. The conclusion is, therefore, that in the given case one exemption of \$10,000 is all that should be deducted in fixing the amount upon which the tax is to be based.

Respectfully submitted,
M.A. DISKIN, *Attorney-General*.
HON. GEO. A. COLE, *State Controller, Carson City, Nevada*.

SYLLABUS

97. Nevada Industrial Commission—Provisions of Act Mandatory on State Agencies.

Stats. 1913, chap. 111, subd. b: The provisions of the Act are mandatory in all contracts by State or state agencies.

INQUIRY

CARSON CITY, November 20, 1923.

An opinion from your office is requested as to whether or not it is mandatory upon contractors under State, county, municipal corporations, or school districts, to comply with the provisions of the Nevada Industrial Insurance Act.

OPINION

Subdivision b, Statutes 1913, chapter 111, as amended, provides:

(b) Where the State, county, municipal corporations, school districts, cities under special charter, or commission form of government is the employer, the terms, conditions, and provisions of this Act for the payment of compensation and amount thereof, for such injury sustained by an employee of such employer, shall be exclusive, compulsory, and obligatory, upon both employer and employee.

The Supreme Court of this State in the case of Nevada Industrial Commission v. Washoe County, [41 Nev. 450](#), in upholding the constitutionality of the Industrial Commission Act, as applied to agencies of the State, stated:

Unquestionably the county is an employer of workmen. In my judgment, the spirit as well as the letter of the whole Act manifests an intention to provide for a systematic arrangement for compensation for injured or afflicted workmen in whatever capacity such might be employed, and to provide that where, as in counties and municipalities, the State is sovereign, such arrangement should be compulsory. This is but following out the fundamental ideas basic to all compensation Acts; i. e., that the industry or employment which requires human agency for its operation should look to the care and upkeep of that agency no less than to other elements of efficiency.

It appears, therefore, that the terms and provisions of the Act are conclusive,

compulsory, and obligatory in respect to employees of the State and agencies of the State. The compulsory obligation so placed upon such State or state agency to provide for a systematic arrangement for compensation for injured workmen cannot be evaded by letting a contract to any person or corporation who has the right under the Act to reject its provisions.

All contracts, therefore, executed by the State or a state agency must be executed and entered into in view of the State or state agencies' obligation as to the protection of the workmen engaged.

It is my opinion, therefore, that the provisions of this Act are mandatory upon contractors under this State, or state agency, and the same must be complied with.

Respectfully submitted.

M.A. DISKIN, *Attorney-General*.

NEVADA INDUSTRIAL COMMISSION, *Carson City, Nevada*.

SYLLABUS

98. Animals—Trespass by Live Stock—Fence Law.

(1) Rev. Laws, 2335-2337: Unauthorized herding and grazing of live stock on another's land is unlawful. Trespasser is liable for damages and costs. Act does not apply to sock running at large.

(2) Stats. 1917, p. 415: Damages are not recoverable for trespass on unfenced land. "Fence" defined.

(3) Stats. 1919, p. 290: County Commissioners may prohibit stock running at large.

(4) Stats. 1915, p. 278: Stock must not contaminate water supply of towns.

(5) Stats. 1917, p. 124: Stock must not be herded on lands, at wells or springs, or within one mile of home or ranchhouse of another.

(6) No comment is necessary on the law.

INQUIRY

CARSON CITY, November 27, 1923.

You submit several complaints from parties residing at Logandale, Nevada, and vicinity. These complaints enumerate charges that the owners of cattle in that vicinity permit their stock to enter in and upon the ranches and cultivated farm lands, with the result that the practice is destroying the crops of almost every farmer.

Information is requested as to the respective rights of the cattleman and the farmer; the legal duty of the cattleman to keep his stock from trespassing upon the lands of another, and what remedy or redress the farmer has where cattle trespass on his land. Information is further requested as to what effective measures now exist on the statutes of this State which might remedy the situation here presented.

OPINION

The conditions enumerated are brought about no doubt by scarcity of range, with the resulting effect that cattle from necessity are required to trespass on any or all lands to secure sustenance.

I have made a careful study of the legislative enactments of this State in an effort to suggest a remedy.

Your attention is directed to the following provisions of law which are applicable as preventive measures.

Sections 2335, 2336, and 2337 of the Revised Laws of Nevada, 1912, provide:

SECTION 1. It shall be unlawful for any person or persons to herd or graze any live stock upon the lands of another without having first obtained the consent of the owner or owners of the land so to do; *provided*, that the person claiming to be the owner of said lands has the legal title thereto, or an application to purchase the same, with first payment made thereon.

SEC. 2. The live stock which is herded or grazed upon the lands of another, contrary to the provisions of the first section of this Act, shall be liable for all damages done by said live stock while being unlawfully herded or grazed on the lands of another, as aforesaid, together with costs of suit and reasonable counsel fees, to be fixed by the court trying an action therefor, and said live stock may be seized and held by writ of attachment issued in the same manner provided by the general laws of the State of Nevada, as security for the payment of any judgment which may be recovered by the owner or owners of said lands for damages incurred by reason of a violation of any of the provisions of this Act, and the claim and lien of a judgment or attachment in such an action shall be superior to any claim or demand which arose subsequent to the commencement of said action.

SEC. 3. This Act shall not apply to any live stock running at large on the ranges or commons.

In connection with these provisions of law, Statutes of 1917, p. 415, should be considered. They read as follows:

SECTION 1. No person, firm, or corporation shall be entitled to collect damages, and no court in this State shall award damages, for any trespass of live stock on cultivated land in this State if such land, at the time of such trespass shall not have been enclosed by a legal fence as hereinafter defined.

SEC. 2. A legal fence is hereby defined for the purposes of this Act as a fence with not less than three horizontal barriers, consisting of wires, boards, poles, or other fence material in common use in the neighborhood, with posts set not more than twenty feet apart. The lower barrier shall be not more than sixteen inches from the ground and the space between any two barriers shall be not more than sixteen

inches and the height of top barrier must be at least forty-eight inches above the ground. Every post shall be so set as to withstand a horizontal strain of two hundred and fifty pounds at a point four feet from the ground, and each barrier shall be capable of withstanding a horizontal strain of two hundred and fifty pounds at any point midway between the posts.

Statutes of 1919, p. 290, provide:

SECTION 1. The Boards of County Commissioners of the respective counties of the State are hereby authorized, upon petition of twenty per cent of the taxpayers residing in any district therein defined, to pass ordinances prohibiting horses, cattle, swine, goats, or sheep from running at large upon any portion of the roads and highways within said district which are fenced on both sides.

SEC. 2. Such petition may be presented at any regular or special meeting of any Board of County Commissioners of this State, and shall define the boundaries of the district sought to be established, and shall pray that such district may be established, and that an ordinance may be passed by said Board of County Commissioners prohibiting any of the live stock mentioned in section 1 of this Act from running at large therein.

SEC. 3. The said Boards of County Commissioners are hereby authorized and empowered to provide in such ordinances for the impounding and sale of any such live stock running at large within such district, and making a violation of any of the provisions of said ordinance a misdemeanor and punishable as such.

It is also urged that the cattle contaminate the water system of certain towns in Clark County. I direct your attention to Statutes of 1915, p. 278, which make it a misdemeanor to "herd, graze, or drive live stock on, over, or across certain lands." This Act provides:

SECTION 1. It shall be unlawful for any person, persons, firm, corporation, or association, owning or having charge of any live stock, to herd, graze, pasture, keep, maintain, or drive the same upon, over, or across any lands lying within one mile of any surface intake, intakes, water-boxes, or surface reservoirs, used for gathering, storing, and conducting water, when said lands are situated within the watershed of any stream, streams, springs, ponds, lakes, or reservoirs, waters from which, when so gathered and stored, are used for municipal, drinking, or domestic purposes by the residents and inhabitants of any city or town in the State of Nevada having a population of fifteen hundred or more people.

SEC. 2. Section 1 of this Act shall not be construed to apply to prospectors or other persons passing over or being temporarily upon said lands with not to exceed ten head of live stock. Neither shall said section apply to live stock running at large upon the ranges.

Statutes 1917, p. 124, provide:

SECTION 1. It shall be unlawful for any person owning, or having charge of, any live stock to drive or herd or permit the same to be herded or driven on the lands or possessory claims of other persons, or at any spring or springs, well or wells, belonging to another, to the damage thereof, or to herd the same or to permit them to be herded within one mile of a bona-fide home or a bona-fide ranchhouse; *provided*, that nothing in this Act shall prevent the owners from herding or grazing their live stock on their own lands; *and further provided*, that nothing in this Act shall be construed as to prevent live stock being driven along any public highway.

SEC. 2. The owner or agent of such owner of live stock violating the provisions of section 1 of this Act, on complaint of the party injured, in any court of competent jurisdiction, shall be liable to the person injured for actual and exemplary damages.

The various sections have been quoted for the reason that, if this opinion is distributed to all the parties interested, the law may be before them for examination.

No necessity appears for comment of the law.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. JAMES G. SCRUGHAM, *Governor of Nevada, Carson City, Nevada.*

SYLLABUS

99. Municipalities—Bonds of Caliente, by Whom Signed.

Stats. 1921, p. 71: City bonds should be signed by person in office at date of their negotiation and delivery.

INQUIRY

CARSON CITY, November 30, 1923.

You call my attention to an Act of the Legislature approved March 4, 1921, Statutes of 1921, p. 71.

This statute authorizes the issuing of bonds in the amount of \$30,000 by the Town of Caliente, State of Nevada.

You advise that the town has sold \$20,000 worth of these bonds, and it is now deemed advisable to sell the balance of the bonds.

Information is requested as to whether those bonds which have not been executed should be signed by the present Clerk of the Town Board, or whether they should be signed by the former Clerk.

OPINION

The Supreme Court of Washington, in the case of *Yesler v. Seattle*, 25 Pac. 1014, reviewed the point here presented and held:

A statute which requires city bonds to be signed by the Mayor of the city is sufficiently complied with by the signing of the bonds by the person occupying the office at the date of their negotiation and delivery, although he was elected after the day of their date.

It is my opinion, therefore, that the bonds should be executed by the present Town Clerk.

Respectfully submitted,

M.A. DISKIN, *Attorney-General*.

HON. F. E. WADSWORTH, *District Attorney, Panaca, Nevada*.

SYLLABUS

100. Constitutional Law—Animals—Loaning Public Funds—Expenditure of Public Funds by Private Association Disapproved.

(1) State Board of Stock Commissioners is advised not to pay money to private stock associations to promote industry, though section is not declared unconstitutional.

(2) Officers of such associations are not public officers.

(3) Only public officers may expend public funds.

INQUIRY

CARSON CITY, December 5, 1923.

Attention is directed to Statutes of 1923, chap. 57, p. 68, with request for an official opinion as to the constitutionality of the provisions therein contained. The Act reads:

SECTION 1. There is hereby added to the above-entitled Act a new section, to be numbered section 6b, and to read as follows:

Section 6b. The board shall have power to do all things it may consider necessary to encourage, promote, advance, and protect the livestock interests of the State, and may directly or indirectly, by expenditure, or by payment or otherwise to any association formed for any such purpose or objects, pay annually out of the stock inspection fund for any of such enumerated purposes not to exceed an amount equivalent to a levy of one mill on the dollar of total tax valuation for the preceding year on live stock under its jurisdiction. The board shall be the sole and exclusive judges of the expenditures of all sums directly or by the payment to any association, club, or other organization as herein provided.

SEC. 2. All Acts and parts of Acts in conflict with this Act are

hereby repealed.

OPINION

The history of legislative activity seeking to aid and promote the livestock industry of this State shows that legislative cognizance was first taken in 1915 (Stats. 1915, p. 396). This Act created the State Board of Stock Commissioners, the members of which were appointed by the Governor, to hold office for a term of four years. Their duties consisted of exercising general control over live stock by inspection and enforcement of quarantine measures, appointing livestock inspectors, and assisting in enforcement of criminal statutes in reference to branding and stealing of live stock.

Section 4 of this Act (Stats. 1915, supra) provides:

The Board of County Commissioners, at the time of the annual levy of taxes, must, at the request of the board, levy the rate of tax recommended by the board, *not to exceed 6 mills on the dollar, on all cattle, horses, and hogs, assessed in their respective counties, according to the assessed valuation of the same, the said tax to be collected as other taxes and paid to the State Treasurer, who must keep the same in a separate fund to be known as the "Stock Inspection Fund."*

Various sections of this Act were amended by Statutes of 1919, p. 41. The amendments gave to the board additional regulatory powers. The provision of section 4, supra, was amended authorizing tax to be levied annually.

The amendment of 1923 (Stats. 1923, p. 68) empowered the board "directly or indirectly by expenditure or by payment, or otherwise, to any association formed for any such purpose or object (viz: to encourage, promote, advance, and protect the livestock industry of the State) pay annually, out of the stock inspection fund, for any such enumerated purposes, not to exceed an amount equivalent to a levy of one mill on the dollar of the total tax valuation for the preceding year on live stock under its jurisdiction."

It further provides that "the board shall be the sole and exclusive judges of the expenditures of all sums of money directly or by the payment to any association, club, or other organization as herein provided."

Section 4 (Stats. 1915 and 1919, supra) commands the Boards of County Commissioners in their respective counties at the request of the board, to levy a tax not to exceed 6 mills per annum on all cattle, horses, and hogs, the said tax to be collected as other taxes and paid to the State Treasurer, who must keep the same in a separate fund to be known as the stock inspection fund.

The funds to be used by the board in making payments to associations or clubs under section 6b, supra (Stats. 1923), are derived from the tax authorized and collected under section 4 (Stats. 1915 and 1919, supra).

In adding section 6b the Legislature has authorized the Board of Stock Commissioners to donate money, which has been collected by the taxing power of the State, to associations which have for their purpose and object the promotion of

the livestock interest.

Section 9 of article 8 of the Constitution of the State of Nevada provides:

The State shall not donate or loan money or its credit, subscribe to, or be interested in the stock of any company, association, or corporation, except corporations formed for educational or charitable purposes.

The question to be determined is whether section 6b violates this provision of the Constitution.

In the early history of this State the Supreme Court, in considering the limitations of our Constitution, affirmed the principle that all political power originates with the people, but it cannot be claimed that either the legislative, executive, or judicial powers can be exercised by them. The supreme lawmaking power, the Legislature, may do anything not prohibited in the organic law, by which it is created, and, unless its acts are "clearly, palpably, and plainly in conflict with some provision of the Constitution, they will not be declared unconstitutional."

Ash v. Parkinson, 5 Nev. 15;

Gibson v. Mason, 5 Nev. 283;

State v. Arrington, 18 Nev. 415.

The appropriation of public money for other than strictly governmental purposes and its expenditure through *any other than official channels have been most carefully limited* by section 9 of article 8 of the Constitution of the State of Nevada, supra.

The Board of Stock Commissioners is a state agency, controlled by the officers appointed by the Governor, and its right to expend money for the public purposes enumerated cannot be doubted.

The amendment (sec. 6b, Stats. 1923, supra) authorizes the payment of money derived from taxation "to any association." The only legislative restriction placed upon the board in making the donation is that the association entitled to the funds must be one formed for the purpose of encouraging, promoting, or advancing the livestock interests. No provision is made in the amendment denominating the association to whom the money is donated a part of the Stock Commission, or any agent thereof. No provision is made giving the State any supervision over such association. No officer of the State has any control or authority over the affairs of such association. Those managing the association are not public officers. The associations are separate and distinct, composed of private individuals, managed and controlled by officers and agents of their own, and for the money entrusted to them no account is required to be made or given to any state agency.

The Board of Stock Commissioners in making these appropriations entirely abdicates all discretion over the subject-matter of the application and expenditure thereof. They become, therefore, mere donations. The payments so made to said associations are to be expended by individuals who are not municipal agents, or subject to any control or accountability as to the use and application of the money. It is plain that the board could have no power to make appropriations or donations to these associations simply as such, nor because merely of the laudable objects and purposes for which they were created by their founders and promoters; it is only because of the actual services and benefits rendered to the livestock of the State that

any claim could be urged for their support from the state treasury. And if this be so, what guarantee has the State that service or benefits will accrue commensurate with the donations that are made? The same principle that would sustain these appropriations would equally sustain donations to every corporation or association engaged in what might be termed the "public good" throughout the State. When once we concede the power to make gifts of this kind, it will be in vain to invoke the courts to exercise a discretion as to any limit in the amount or extent of them.

The Legislature, by this amendment, authorizes a donation to private associations. Such associations are private in the sense that they proceed from the voluntary action of the individual citizen alone. The agents or officers of such association are appointed or selected from its membership. All those who are called upon to pay this tax may, or may not, have a voice in directing the affairs of the same. It cannot be said that the agents of such association are invested, by virtue of their agency alone, with the power of public officers. Such a theory in substance devolves the choice of public officers on a few of the citizens, while, under the Constitution, all public officers must be elected or appointed by other public authorities, and thus trace their title to power and authority back to the people.

It is very dangerous legislative precedent which establishes and sanctions the distribution of money, legally collected as taxes, to a private corporation. It may be admitted that the object or purpose of the association thus formed is a public purpose, in the sense that it is being conducted for the public benefit, but it cannot be said to be a public purpose within the meaning of our taxing laws, unless it is managed and controlled by the public.

Under the provisions of section 6b, as we have heretofore stated, the people upon whom is placed the burden of paying the tax may have no voice in the selection of servants of the association, who are permitted under the Act to expend the money. Neither have they any voice in the selection of a manager or a board of directors who might control and manage the affairs of such an association.

In the case of Attorney-General v. Board of Supervisors of Bay County, 34 Mich. 46, the Court stated:

Taxes and loans, when authorized to be raised for any public body, must be raised under the implied condition that they are to be applied to the public uses *under the control or care of that body*.

Again it is said:

It has always been the policy of our law, and no instance can be pointed out where one, other than a public official, either by election or appointment, *has had charge of the disbursements of public funds*.
State v. St. Louis, 115 S.W. 534.

In the case of University of Maryland v. Williams, 31 Am. Dec. 72, the Court stated:

While the uses or objects may in a certain sense be called public, yet the corporations, as distinguished from the uses or objects, are private.

Then, again, the Legislature, by enacting the provisions contained in Statutes of 1915 and 1919, *supra*, has "created a state agency for regulating, assisting, and

promoting, as well as protecting, the interests of the livestock industry of this State." A serious objection presented in considering the amendment of 1923 is that, under its provisions, there is a delegation to private associations of the powers heretofore conferred upon the state agency.

It is elementary, of course--

that political or police power cannot be delegated to private persons or corporations over whom, or which, there is no supervision, and no liability to act; nor can others be appointed to discharge the duties of public officers. *State v. Goldthait*, 87 N.E. 133.

It is apparent, therefore, that the authority which has been delegated to the board in reference to the livestock industry of this State is to be held and exercised by said board as a trust, as well for those who become the objects of it as those who support it by contributions in the form of taxes levied upon their property; and, being an important public trust, it cannot be delegated beyond the power and discretion of those to whom it is confided.

In the language of Judge Sanders, in the case of *State v. Churchill County*, 43 Nev. 290, it may well be said in reference to this amendment, by paraphrasing his language, that:

The general objection is that it is a deviation from the usual and the long course of usage of the taxing power.

Section 21 of article 5 of the Constitution provides in part:

The Governor, Secretary of State, and Attorney-General shall constitute a Board of State Prison Commissioners, which board shall have such supervision of all matters connected with the State Prison as may be provided by law. They shall also constitute a Board of Examiners with the power to examine all claims against the State * *

Section 6b, among other provisions, states:

The board shall be the sole and exclusive judges of the expenditures of all sums directly or by the payment to any association, corporation, or other organization as herein provided.

It can hardly be advanced successfully that, by reason of section 6b, the Legislature intended to, and by virtue thereof did, make an appropriation of the respective sums of money to the associations, organizations, or corporations designated in said section. One of the essential elements of an appropriation is certainty as to the amount and subject-matter, and these provisions fail to comply with this standard. If, by reason of this section, the appropriation is not directly made, the expenditures under the constitutional provision would have to be presented to and acted upon by the Board of Examiners. The Legislature could not violate any constitutional mandates contained in section 21 of article 5, supra, and delegate the power thus designated upon public officers other than those enumerated.

Notwithstanding the objections enumerated above, I hesitate to declare unconstitutional the solemn act of the Legislature. This is a prerogative intrusted to the Judicial Department of the government. For the reasons stated, however, I suggest that the Board of Stock Commissioners refuse to make contributions under

section 6b.

Respectfully submitted,

M.A. DISKIN, *Attorney-General*.

HON. EDWARD RECORDS, *Secretary State Board of Stock Commissioners*.

SYLLABUS

101. Schools—Name of High School—Separate Boards of Separate Districts.

(1) Any high school is entitled to take name of county in which it is located.

(2) Stats. 1919, p. 218, as amended Stats. 1921, p. 160: Separate school districts must have separate boards.

(3) Legislature provides for control and government of schools by Trustees.

INQUIRY

CARSON CITY, December 6, 1923.

You submit the following questions for an official opinion:

1. Is the high school at Las Vegas entitled to the name "Clark County High School"? Mr. Kelly of Overton makes the point that there are three high schools in Clark County, and that we are no more entitled to the name "Clark County High School" than the other two are. If this be true, what is the name of this high school? If it has no name, how shall we go about it to establish a name?

2. How, under existing laws, may School District No. 12, Las Vegas Grammar-School District, and Educational District No. 2 be governed by one school board? Or can we place Educational District No. 2 and Las Vegas Grammar School District under the jurisdiction of one school board, something similar to the one board existing in Educational District No. 1?

OPINION

Replying to your first interrogatory, you are advised that any high school established under the provisions of chapter 13, sections 173-184, School Code of 1923, would be entitled to take the name of the county in which said school is located.

In answer to your second question, you are advised that, under existing laws, School District No. 12, Las Vegas Grammar School, and Educational District No. 2 cannot be governed by one school board; this for the that, under the laws as they exist, provision is made for two separate and distinct boards to have control of the

separate school districts.

It will be noted that the Legislature by Statutes of 1919, p. 218, as amended 1921, p. 160, and under section 2 thereof, has made provision for the control and government of all high and elementary schools in said District No. 1, and the same was vested in a Board of Education composed of five Trustees. It will require the same legislative action to accomplish the result indicated in reference to Educational District No. 2 and School District No. 12.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. H.A. WHITENECK, *Principal Clark County High School, Las Vegas, Nevada.*

SYLLABUS

102. Schools—Increase in Census—Additional Teachers.

- (1) Trustees are warranted in taking census if they have reasonable ground to believe an increase of 30 has occurred since last census.
- (2) The increase is estimated from the last preceding school census.
- (3) Report of Trustees to Superintendent of Public Instruction must show increase and necessity for additional teachers.
- (4) Only those children not counted in preceding census need be counted.

INQUIRY

CARSON CITY, December 6, 1923.

You request an opinion in reference to the following interrogatories:

1. What action is contemplated that the School Trustees must have taken in order to "have ascertained that since the last regular school-census report there has been an increase of thirty or more census children in the district under their jurisdiction"? Must this be definite information or a mere estimate that there is such an increase of thirty or more census children?
2. In what manner is the increase of thirty or more to be reckoned? Does it mean a net increase of thirty or more census children above the census as reported for the last preceding school census, or does it mean that since the last preceding school census there are thirty or more additional census children who are now residents of the district?
3. Must the school board show that the employment of additional teachers is because the additional school census has increased the attendance so as to overcrowd the rooms as previously maintained, so

that additional schoolrooms have to be maintained to care for the children, or would the addition of new departmental work requiring one or more additional teachers be construed to come within the intent of the law?

4. In counting the census children in such a special census is it contemplated that the census of the entire school district shall be taken, or is it contemplated that only a census of those not counted in the last preceding school census shall be taken to ascertain such an increase of thirty or more?

OPINION

Interrogatory 1. You are advised that it is only necessary for the School Trustees to have reasonably good grounds for believing that an increase in census children exists to warrant them in taking the census. This may be imparted to them by virtue of their own investigation, or they may act upon information received from residents of the district.

Interrogatory 2. Replying to this interrogatory, reference is made to section 131a, School Code of 1923, which provides:

If any Board of School Trustees has ascertained that since the last regular school-census report there has been an increase of thirty or more census children. * * *

It is my opinion that the increase of census children is to be determined from the last preceding school census.

Interrogatory 3. Replying to this interrogatory, the statute provides (sec. 131a) that a correct report of such increase shall be presented to the Superintendent of Public Instruction, with a showing that there is a necessity for the employment of one or more additional teachers because of such increased school census. It is necessary, therefore, that, in addition to the report showing an increase of census children, there must be a further showing of necessity for the employment of additional teachers.

Interrogatory 4. In counting the census children it is not contemplated that the census of the entire school district shall be taken, but only a census of those not counted in the last preceding school census.

Respectfully submitted,

M.A. DISKIN, *Attorney-General*.

HON. W.J. HUNTING, *Superintendent of Public Instruction*.

SYLLABUS

103. Criminal Law—Fictitious Check—Gambling.

(1) Sec. 407, Crimes and Punishments Act, as amended Stats. 1917, p. 10: One who, having lost at poker, gives worthless check

covering amount, is guilty of felony, though not guilty of forgery.

INQUIRY

CARSON CITY, December 6, 1923.

One without money or credit, or with insufficient funds in the bank, makes a check out on the bank, and passes same to pay for chips which he had lost in a poker game. In other words, is one guilty of forgery or of a felony, who loses in a poker game and then gives his own check covering the amount, when he has no account with the bank or has insufficient money to cover the same?

OPINION

We have gone into the law quite fully and are of the opinion that, under the circumstances stated in this question, one would be guilty of a felony under the provisions of section 407, Crimes and Punishments Act, as amended by chapter 9, Statutes 1917. He would not be guilty of forgery.

We do not find any decisions directly in point, but find a number of analogous cases under the forgery statutes of several States, and we believe the same principles applied in those cases would be applicable to section 407, as amended.

The following cases hold:

In a prosecution for forgery of a check it is immaterial and not a defense that the accused used the proceeds in an unlawful gambling game conducted by the party who cashed the check. *State v. McBride*, 72 Wash. 390, 130 Pac. 486.

Though furnishing intoxicating liquors to Indians is prohibited by law, Indians may be convicted of forging an order to furnish liquor to "bearer." *People v. James (Cal.)*, 42 Pac. 497.

It was no defense to an information for forging a clearing-house certificate by raising its amount from \$1 to \$10 that the issue of said paper was contrary to public policy. *People v. Collins (Cal.)*, 99 Pac. 1109.

See also, *Dunn v. People*, 4 Colo. 126; *People v. Monroe (Cal.)*, 35 Pac. 326.

The true test of criminality in cases of this kind seems to be, not whether the instrument or the transaction in which it is uttered, passed, or published is unlawful, void, or against public policy, but whether the instrument is capable of defrauding or is efficacious to defraud, or might, in fact, defraud some innocent third person. It is obvious that, if the payee of the check in the case assumed in the inquiry should pass the check to some innocent third person in due course of business, such innocent third person would, or might be, defrauded.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General*.

HON. F.E. WADSWORTH, *District Attorney, Panaca, Nevada*.

SYLLABUS

104. Mineral County—Jurisdiction of County Commissioners—Operating Power System Outside of State—Status of County Ownership.

(1) Secs. 1501, 1529, Revised Laws; Stats. 1911, p. 10; Stats. 1921, p. 80, as amended Stats. 1923, p. 365; Jurisdiction of County Commissioners over power system is not limited to county boundaries, part of system being located in California.

(2) Stats. 1921, p. 80, as amended Stats. 1923, p. 365, amends Rev. Laws, 1508, in so far as Mineral County is concerned, and they are repugnant.

(3) Such amendment does not violate secs. 20, 21, and 25, art. 4 of Constitution.

(4) The operation of the power system outside the State is not a governmental function, but has character of private proprietor, according to California authorities.

(5) Stats. 1921 and 1923 mentioned authorize operation and maintenance of entire system within and without county, though that portion in California would be subject to its laws.

(6) The Acts authorize system to acquire property and distribute power "along the line" both in Nevada and California. In California, the operation of the line would be subject to its laws.

(7, 8.) (Answered above.)

(9) Mineral County derived its power to acquire extraterritorial property from Acts of 1921 and 1923.

(10) The power system is not distinct from the county. California might decide it has character of private corporation or individual.

(11) As to operation of system within Nevada, Mineral County would have status of private proprietor, either corporation or individual. In California it would be given status of private citizen amenable to its laws.

(12) Expression in Act that purpose is to supply certain towns in Nevada does not prevent extensions of line in Nevada or into California, which latter would be subject to assent and laws of California.

CARSON CITY, December 8, 1923.

1. *Inquiry*—The act of the Legislature of the State of Nevada (Stats. 1911, chap. 13, p. 10), having in express terms defined the territorial boundaries of and erected Mineral County within the same, is the Board of County Commissioners thereof restricted and limited to exercising the authority conferred by law (Stats. 1865, p.

257, secs. 1501-1029, Rev. Laws, 1912, vol. 1) upon them (and all other) Boards of Commissioners, to the territorial area as defined in section 1 of such Act (Stats. 1911, p. 10)?

Opinion—We are of the opinion that your Board of County Commissioners is not restricted or limited in the exercise of jurisdiction to the limits of Mineral County, in so far as the Mineral County power system is concerned, in view of the Act of 1921, relating thereto, as amended by chap. 205, Stats. 1923, which expressly authorized the purchase, maintenance, and operation of its power line, a part of which is located in the State of California.

2. *Inquiry*—Does the Act of 1921, chap. 45, p. 80, as amended by Stats. 1923, chap. 205, p. 365, amended the Act creating Mineral County and defining its boundaries, so as to authorize and permit such county to acquire extraterritorial realty and other property? (See Buck v. Boerlin, 45 Nev. 131.)

Opinion—In so far as the Mineral County power system is concerned, the statute above referred to, which is a special statute, must be construed to amend sec. 1508, Revised Laws, which is section 8 of the general law relating to the powers and duties of Boards of County Commissioners, as well as the Act creating Mineral County, in so far as they are repugnant to each other.

3. *Inquiry*—If you hold that such Act (Stats. 1911, p. 10) has been amended to that extent, would such amendment in any wise violate the provisions of secs. 20, 21, and 25 of art. 4 of the Constitution of Nevada, in so far as they relate to counties? (See Buck v. Boerlin, supra.)

Opinion—Your third inquiry would seem to be conclusively answered in the negative by the decision in Buck v. Boerlin, 45 Nev. 131.

4. *Inquiry*—Is the operation of the Mineral County power system as a public utility, by Mineral County, a governmental function, or, when acting a public utility, is Mineral County to be regarded, as to its rights and obligations, as having the same status as other private corporations engaged in a like business? (See Pasadena v. Pasadena, 93 Pac. 490; Sacramento County v. Chambers, 164 Pac. 614.)

Opinion—We are of the opinion that the operation of the Mineral County power system outside of the State of Nevada is not a governmental function, and such ownership and operation is in the character of a private proprietor, either as a private corporation or as an individual. This would have to be decided by the California authorities, though the cases seem to indicate that the status would be that of an individual.

5. *Inquiry*—Does the Act of the Legislature (Stats. 1921, chap. 45, p. 80), as amended by Stats. 1923, chap. 203, p. 366, by implication or in express terms limit the authority of the Board of County Commissioners of Mineral County, acting as a public utility, to "maintain and operate" the Mineral County power system, solely within Mineral County and the State of Nevada?

Opinion—We are of the opinion that the statutes named, particularly secs. 1, 2, and 3 of the Act, authorize the Board of County Commissioners of Mineral County, without limitation, to maintain and operate the Mineral County power system, either within or without the State, though ownership, maintenance, and operation within another State would be subject to consent or assent of California and to the laws and

regulations of that State.

6. *Inquiry*—Is there any authority conferred by the terms of such Acts, either expressly or by necessary implication, whereby Mineral County as a public utility can legally acquire property (a) outside of Mineral County (bounds as fixed by Stats. 1911, p. 10); (b) the State of Nevada?

Opinion—Section 1 of the Act of 1921, as amended by the Act of 1923, expressly authorizes the purchase of the power line extending from Lundy in Mono County, Calif., to Hawthorne, Nevada, and section 2 of the Act as amended expressly authorizes the Board of County Commissioners to "enter into contracts with consumers for the sale, distribution, and delivery of electrical energy along the line of said utility." The provision last above quoted is without limitation, and must be construed to mean "along the line" both in Nevada and California. Section 3 of the Act as amended authorizes the extension of the system without limitation as to place or locality, subject to the conditions named therein. At this point the question naturally arises as to the power of the Legislature to authorize the county to acquire title to property in another State.

A county, as distinct from a municipal corporation, is purely an agency of the State, created by the sovereign power of a State, without the solicitation, consent, or concurrence of the inhabitants of the territory thus set apart. In political and governmental matters counties are the representatives of the sovereignty of the State and auxiliary to it; in other matters relating to property rights and pecuniary obligations they have the attributes and distinctive legal rights of private corporations. 7 R.C.L. 923-924.

Counties, then, being but agencies of the State, they may do and perform, when properly authorized by statute, any act or thing which the State itself might do. This being true, may the State itself acquire property outside of its boundaries and within the boundaries of another sovereign State. This question has been before the courts very rarely, but, in every case, it has been decided that one State may acquire and hold property in another State, subject, however, to the consent or assent of such other State. In such cases it is held that the State owning such property holds it, not as a sovereign, but as an ordinary private proprietor. 36 Cyc. 870; *Dodge v. Briggs*, 27 Fed. 160; *Burbank v. Fay*, 65 N.Y. 57.

The authority of one State to own and hold property in another exists primarily by reason of the nonexistence of any constitutional or statutory law prohibiting it, but in the case under consideration the statute expressly authorizes the owning and holding by Mineral County of that portion of the power line located in California. In so far, then, as the law of this State is concerned, Mineral County has the authority to acquire, maintain, and operate its power line in the manner prescribed in the statute, either in the State of Nevada, or California, but its right so to own, maintain, and operate such power line in California is subject to the consent or assent and the laws and regulations of that State.

7, 8. *Inquiry*—If not, will express legislative sanction be necessary before such

power can be legally exercised? If no authority has been expressly or by necessary implication conferred upon Mineral County as a public utility to acquire property outside of such county, or outside of the State of Nevada, will the lack of such authorization be construed as inhibiting the exercise of such power?

Opinion—Your questions 7 and 8 are answered above.

9. *Inquiry*—If, under such Acts, such power to acquire extraterritorial properties is exercised by Mineral County as a public utility, (a) would the legal authority therefor be that conferred by such Acts, or (b) would it be under the authority conferred by the terms of pars. 9 and 13, sec. 8 (sec. 1508, Rev. Laws Nev. 1912. vol. 1), or (c) would it be such as any private corporation would be assumed to have if operating under like circumstances?

Opinion—Mineral County derives its express authority to acquire the extraterritorial property named therein from the statute of 1921, as amended in 1923.

10. *Inquiry*—Are such legislative Acts to be construed as being the charter or articles of incorporation of the Mineral County power system, a public utility owned and operated by Mineral County?

Opinion—We do not understand that the Mineral County power system is an entity separate and distinct from Mineral County, as the owner of a power line in California, should be decided to have the status of a private corporation, its charter would, without doubt, consist of those sections of the Constitution of Nevada relating to counties, the statute of 1911 creating Mineral County, and the statute of 1921 as amended in 1923. We do not, however, assert that its status would be that of a private corporation, for it might be held to be that of an individual, and that question would have to be decided by California.

11. *Inquiry*—Is Mineral County, acting as a public utility, under the terms of such Acts, merely a local legal subdivision of the State of Nevada, which has been created for civil and political purposes and exists to administer locally the power and authority of the State of Nevada, or (b) is it a public-service corporation, as that term is ordinarily understood, or (c) is it properly classed as a private corporation, or (d) is it a purely municipal corporation in either a broad or restricted sense?

Opinion—Assuming that question 11 refers to operations without the State of Nevada, the status of Mineral County would be that of a private proprietor--namely, either a private corporation or an individual--for, when one sovereignty seeks to own property within the territory of another sovereignty, the sovereign attributes of the first must be cast aside at the boundary-line, and it must enter the domain of the second merely as a private subject, amenable to all laws and regulations applicable to a private citizen of that sovereignty.

12. *Inquiry*—(a) Would the expression, "This Act contemplates primarily the purchase, distribution, and resale of electrical energy by said county acting as a public utility in the towns of Luckyboy, Hawthorne, Luning, Mina, Simon, and Candelaria, over the lines of the Mineral County power system" (sec. 3, p. 367, Stats. 1923), be construed as words of limitation limiting the power of such public utility to purchase, distribute and sell, to the points named (and within Mineral County); or (b) does the proviso following give Mineral County acting as a public utility the authority to contract for and build extensions of said system anywhere (within the

State and without the State) so long as the entire cost of such extension is advanced by the consumer or consumers whom it is proposed to serve?

Opinion—The expression, "This Act contemplates primarily the purchase, distribution, and resale of electrical energy by said county acting as a public utility in the towns of Luckyboy, Hawthorne, Luning, Mina, Simon, and Candelaria, over the lines of the Mineral County power system," is merely a statement of the primary purpose of the Act, and is not a limitation upon the incidental right to purchase, sell, and distribute electrical energy to other points than those named, either in Nevada or California, and the proviso contained in section 3 of the Act of 1921, as amended in 1923, confers the right to contract for and build extensions, in the manner therein provided, without limitation as to place or locality, though it must always be understood that any operations or extensions in the State of California must be subject to the consent or assent and the laws and regulations of that State.

The State of California has, apparently, tacitly assented to the ownership of that part of the Mineral County power system which is located in that State, and if Mineral County complies with all laws of that State relating to power-transmission lines, it would appear that there would be nothing further for Mineral County to do; but, before attempting to sell and distribute electrical power as a public utility in the State of California. Mineral County should make application to the Public Service Commission (or its equivalent) of that State, have its status determined, and obtain a permit the same as any other corporate or individual operator of a public utility in that State.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General*.

HON. J.H. WHITE, *District Attorney, Hawthorne, Nevada*.

SYLLABUS

105. Physicians—Optometry—License Revoked.

(1) Stats. 1913, p. 129: State Optometry Board may revoke or suspend certificate obtained by fraudulent misrepresentation in application.

(2) Person charged is entitled to notice and public hearing.

INQUIRY

CARSON CITY, December 11, 1923.

Where the State Optometry Board has issued a license, and, after the issuance of same, ascertains that the party to whom the license was issued made misrepresentations on his application blank in respect to material matters, what authority has the board in the premises, and may the license of such person be revoked?

OPINION

Your attention is respectfully called to section 13, Stats. 1913, p.129, which provides:

Any person registered as provided in this Act may have his or her certificate of registration revoked or suspended by the Nevada State Board of Examiners in Optometry for any of the following reasons:

1. His or her conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction, or certified copy thereof by the Clerk of the Court, or by the Judge in whose court the conviction is had, shall be conclusive evidence.

2. When his or her certificate has been secured by fraud practiced upon the board.

3. For unprofessional conduct, or for gross ignorance or inefficiency in the profession. Unprofessional conduct shall mean employing what is known as "cappers" or "steerers" to obtain business; the obtaining of any fee by fraud or misrepresentation; employing, directly or indirectly, any suspended or unlicensed optician or optometrist to perform any work covered by this Act; the advertising of optical business or treatment or advice in which untruthful or impossible statements are made; or habitual intemperance or gross immorality.

4. When the holder is suffering from a contagious or infectious disease; *provided, however*, that before any certificate shall be revoked or suspended the holder shall have notice in writing of the charge or charges against him or her, and at a date specified in said notice, at least five days after the service thereof, be given a public hearing, and have an opportunity to produce testimony in his or her favor, and to confront the witnesses against him or her. Any person whose certificate has been suspended may, after the expiration of ninety days, apply to have the same regranted, and the same shall be regranted him or her upon satisfactory showing that the disqualification has ceased.

It will be noted, therefore, that the board is authorized to revoke or suspend the certificate of any individual, theretofore issued by the board. You must be careful in following the provisions of paragraph 4 in giving the proper notice to the party, and also serve upon the person a copy of the charges.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. CHARLES GASHO, *President Nevada State Board of Optometry, Reno, Nevada.*

SYLLABUS

106. Motor Vehicle—Special Trip—Not Common Carrier.

Stats. 1923, p. 320:

(1) Automobile hired for special trip is not common carrier nor public convenience.

(2) County Commissioners may enact ordinances controlling automobile transportation for hire in their counties. Public Service Commission regulations should be followed as closely as practicable.

INQUIRY

CARSON CITY, December 13, 1923.

Where an automobile owner does not solicit business, nor make regular trips, but is hired to make a special trip, does such owner, by making the trip, violate the rights of persons holding certificates of public convenience?

OPINION

By Statutes of 1923, p. 320, the Boards of County Commissioners of the several counties of this State are authorized to enact ordinances classifying the kinds and character of motor vehicles which shall be licensed, fixing the license fee therefor.

By section 9 the Boards of County Commissioners, after July 1, 1923, are authorized to issue certificates of public convenience. In issuing such certificates the Commissioners are directed to follow as issuing such certificates the Commissioners are directed to follow as issuing such certificates the Commissioners are directed to follow as closely as practicable the laws and regulations under which such certificates were issued by the Public Service Commission.

Inasmuch as the Boards of County Commissioners have been authorized to enact ordinances covering these several matters, it will be necessary to examine the ordinances adopted by your County Commissioners, to answer the question presented.

Your attention, however, is directed to that portion of section 9 of the statute, supra, which authorizes the issuance of certificates of public convenience to "common carriers." It could hardly be contended that, under the facts stated in this inquiry, the individual who might make a special trip for hire would be a common carrier.

Respectfully submitted,

M. A. DISKIN, *Attorney-General.*

HON. BOOTH B. GOODMAN, *District Attorney, Lovelock, Nevada.*

SYLLABUS

107. Corporation—Insurance Company—Resident Directors.

(1) Stats. 1903, p. 121, as amended: Directors of Nevada corporation need not be residents of State.

(2) Sec. 1266, 1284, Revised Laws: Nevada insurance company may not assume risk as insurer unless at least five directors are residents and property owners of this State.

INQUIRY

CARSON CITY, December 19, 1923.

You request an opinion as to whether a corporation may be formed under the laws of this State to engage in the business of a surety-and-casualty company, and have as directors, persons who reside outside of the State of Nevada. It is stated in the inquiry that the proposed corporation desires to operate wholly without this State.

OPINION

Section 2, Statutes of 1903, p. 121, as amended 1923, provides:

SEC. 2. Notwithstanding the exceptions in the preceding section of this Act, a corporation may be incorporated under this Act to transact the business of an insurance company, life, fire, marine, or accident, or other form of insurance, or of a surety company, or of a railroad company, or for other cognate or other like purposes, to operate wholly without this State, and may unite the powers to conduct such business without this State with any powers which it is authorized to exercise without or within this State; *provided*, such corporation do not infringe the laws of such other State or country as it may intend to transact business in by so incorporating under this Act.

There are no provisions of the general corporation law by which directors of any corporation organized thereunder must be residents of this State.

Section 2 of the general insurance laws (Rev. Laws, 1266-1284) provides:

Corporations may be formed under the general laws of this State for the transaction of insurance business, but no such corporation shall be permitted to assume any risk as insurer unless the same shall have at least five directors who shall be residents and property owners of this State. * * *

It is my opinion, therefore, that a corporation may be organized under the general incorporation law; and the directors of said corporation may be nonresidents of this State, but that such corporation cannot do business or assume any risk in the State of Nevada.

Respectfully submitted,

M. A. DISKIN, *Attorney-General.*

HON. GEO. A. COLE, *State Controller, Carson City, Nevada.*

SYLLABUS

108. Schools—Transportation of School Children.

(1) Stats. 1915, p. 27: Transportation of school children must be authorized by electors of district.

INQUIRY

CARSON CITY, December 27, 1923.

An opinion is requested as to whether the Trustees of Sanders School District are authorized to pay transportation for certain children to and from school.

OPINION

Your attention is directed to Stats. 1915, p. 27, and sec. 6 thereof, which provides in part that transportation of school children must first be authorized at a regular or special election held in the district. You will also note that sections 4 and 5 of said Act are made applicable to all school districts.

Respectfully submitted,

M. A. DISKIN, *Attorney-General*.

EDWARD F. KNEMEYER, *Clerk School Board, Mason, Nevada*.

SYLLABUS

109. Officers—Holding Two Positions—County Commissioner Disqualified to Act as Postmaster, if Compensation Exceeds \$500.

(1) Constitution, sec. 9, art. 4: If County Commissioner should accept position of postmaster where salary is over \$500 per year, he would ipso facto be disqualified as Commissioner.

INQUIRY

CARSON CITY, December 27, 1923.

You advise that a County Commissioner of one of the counties of this State is about to receive an appointment as postmaster, and that the compensation for service as postmaster will exceed \$500 per annum. An opinion is requested as to whether the appointment as postmaster would disqualify the person from holding the office of County Commissioner.

OPINION

Section 9 of article 4 of the Constitution of Nevada provides:

No person holding any lucrative office under the Government of the United States or any other power shall be eligible to any civil office of profit under this State; *provided*, that postmasters whose compensation does not exceed \$500 per annum, or Commissioners of Deeds, shall not be deemed as holding a lucrative office.

As stated by you in your letter, this section of the Constitution has been passed upon by the Supreme Court of this State in three cases ([3 Nev. 566](#), [21 Nev. 333](#), [25 Nev. 322](#)).

The only matter to be decided is whether or not the office of County Commissioner is "a civil office of profit under this State."

The Supreme Court of California in the case of *Satterwhite v. Garrison*, County Auditor, 168 Pac. 1053, has squarely passed upon the question here presented, and decided it in the following language:

It is next urged by appellant that the constitutional inhibition does not apply to him, for the further reason that a Deputy District Attorney is not the holder of an "office, trust, or employment under this State."

While it must be conceded that a Deputy District Attorney is not one of the state officers provided for by the Constitution, and is what is generally known as a county officer, we think the terms of the Constitution "office, trust, or employment under this State" have a much broader signification than that contended for by appellant, and that his office must be held to be covered by them. In *People v. Leonard*, 73 Cal. 230, 14 Pac. 853, it was held that a Supervisor (who also is a county officer) is a holder of a "civil office of profit under this State." So, also, of a County Superintendent of Schools in *Crawford v. Dunbar*, 52 Cal. 39; and of a Sheriff in *Searcy v. Grown*, 15 Cal. 117.

It is my opinion, therefore, that the office of County Commissioner is one within the contemplation of sec. 9, art. 4, Constitution of Nevada, and that under the circumstances stated, if the County Commissioner should accept the appointment to the office of postmaster, he would ipso facto be disqualified to hold the position of County Commissioner.

Respectfully submitted,

M.A. DISKIN, *Attorney-General*.

HON. J.G. SCRUGHAM, *Governor, Carson City, Nevada*.
