SYLLABUS

110. Criminal Procedure—Fixing Penalty for First-Degree Murder—Opinion Affirmed by Supreme Court.

(1) Stats. 1919, p. 468: Where a jury returns a verdict of first-degree murder and does not fix the penalty at life imprisonment to Court must fix the penalty a death.

(2) This opinion affirmed by Supreme Court in In Re Russell, 47 Nev. 263, 222 Pac. 569.

INQUIRY

CARSON CITY, January 21, 1924.

You advise that in the of State of Nevada v. Thomas Russell a verdict of murder in the first degree was rendered by the jury and, by the judgment of the Court upon this verdict, the penalty of death was inflicted. The judgment was affirmed by the Supreme Court, and the lower court is now called upon to issue a writ of execution and fix the date of same.

An opinion is requested as to whether the Judge should proceed and fix the date for execution, in view of the fact that the jury by its verdict did not fix the punishment.

OPINION

Section 6386, Crimes and Punishments Act, as amended by Statutes of 1919, p. 468, provides:

> Every person convicted of murder in the first degree shall suffer death or confinement in the State Prison for live, at the discretion of the jury trying the same. * * *

Under this provision of the statute the jury must exercise its discretion and fix the penalty of life imprisonment when a verdict of guilty of murder of the first degree is rendered, and, when the jury fails to fix the punishment by its verdict, and finds the defendant guilty of murder in the first degree, the Court has no discretion but to fix the penalty at death.

People v. French, 10 Pac. 378;
People v. Rollins, 179 Pac. 209.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

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SYLLABUS

111. Officers—Salary of Lieutenant-Governor—Old-Age Superintendent—Legislature May Change the Law.

(1) Stats. 1921, chap. 117, fixing salary of Lieutenant-Governor at $3,600 per year, is amended by Stats, 1923, chap. 70, making him Old-Age Superintendent at a salary not exceeding $1,200 per year, and he is entitled to both amounts, though the 1921 statute declared $3,600 should be in full payment for ordinary and all other duties required of him.

(2) To hold otherwise would be to declare that the Legislature might bind subsequent Legislatures and prevent them from changing law.

INQUIRY

CARSON CITY, January 21, 1924.

An opinion is requested as to whether chapter 117, Statutes of 1921, which established the salary of the Lieutenant-Governor at $3,600 per annum, and declared the same "shall be in full payment of all duties now or hereafter required of such officer," affects the payment of salary to the said Lieutenant-Governor, as "Old-Age Superintendent" by the operation of chapter 70, Statutes of 1923, known as the "Old-Age Pension Act."

OPINION

Statutes of 1921, chap. 117, fixed the salary of the Lieutenant-Governor at $3,600 per annum. Section 2 of this statute provides:

> The foregoing salaries shall be in full payment for all duties now or hereafter required of such officers, not only for the ordinary duties of such officers, but for all other duties required of such officers in any manner whatever.

By Statutes of 1923, chap. 70, the Lieutenant-Governor is made "Old-Age Superintendent," and paragraph c of section 1 provides that:

> The Commission shall fix the salary of the Superintendent, which shall not exceed the sum of $1,200 per annum.

It is my opinion that, if the salary of the Lieutenant-Governor as "Old-Age Superintendent" has been established by the Commission, this officer is entitled to the compensation so fixed, in addition to the salary as Lieutenant-Governor. To hold otherwise would be to affirm the doctrine that the Legislature might bind subsequent Legislatures, and prevent them from amending or changing the law.

These two laws must be read together, and section 2, Statutes of 1921, chap. 117, must be considered modified and amended by the provisions of Statutes of 1923, chap. 70.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. GEO. A. COLE, *State Controller, Carson City, Nevada.*

SYLLABUS

112. University of Nevada—Constitution—Statute—Land-Grant Fund—Regents—State Treasurer—Custodian.

(1) Constitution, sec. 8, art. 11: The Board of Regents is authorized to invest the proceeds of the public-land grant of 1862.

(2) Constitution, sec. 3, art. 11: The proceeds from this grant are part of permanent school fund.

(3) Rev. Laws, 3384: The State Treasurer is the legal custodian of the fund.

(4) The Constitution and statute are not in conflict.

INQUIRY

CARSON CITY, January 21, 1924.

You submit to me a communication from the Secretary of the Board of Regents of the University of Nevada, wherein the request is made that all securities in connection with the 90,000-Acre-Grant Fund be delivered to the Board of Regents. The provision of section 8, article 11, of the Constitution of the State of Nevada is the authority relied upon for such request. An official opinion on this matter is respectfully requested.

OPINION

Section 8, article 11, of the Constitution of the State of Nevada provides in part:

> *provided*, that all the proceeds of the public lands donated by Act of Congress approved July second, A.D. eighteen hundred and sixty-two, for a college for the benefit of agriculture, the mechanic arts, and including military tactics, shall be invested by the said Board of Regents in a separate fund to be appropriated exclusively for the benefit of the first-named departments to the University as set forth in section 4 above; * * *

Under this provision of the Constitution there can be no uncertainty as to the power of the Board of Regents to invest the proceeds derived from this grant.

Under the provisions of section 3, article 11, of the Constitution the proceeds from this particular grant are made a part of the permanent school fund.

Section 3384, Revised Laws of 1912, provides:

> The State Treasurer shall be the legal custodian of all state and national securities in which the moneys of the state permanent school fund of the State of Nevada, are, or may hereafter be, invested, and for their safe-keeping he shall be liable on his official bond.

While section 8, article 11, of the Constitution authorizes the Board of Regents to invest the money derived from this grant, there is no provision therein contained which authorizes the Board of Regents to have custody of said securities, and therefore section 3384, supra, cannot be said to conflict with the constitutional provision, and, inasmuch as the Legislature could lawfully

enact this statute, the conclusion must follow that these securities must remain in the possession of the State Treasurer.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

113. Highways—Tax Levy—Valid.

(1) Stats. 1923, p. 381: Act directing County Commissioners to levy tax for road purposes at direction of Department of Highways is constitutional, although Commissioners have no voice in expenditure of fund so raised, that power being vested in Department of Highways.

INQUIRY

CARSON CITY, January 29, 1924.

You submit the following inquiry, and request an opinion:

The Department of Highways has notified the Board of County Commissioners of its desire to have a levy of 10 cents made this year for road purposes in this county. Under the Act it is mandatory that the Commissioners comply with the direction. The law, however, gives the County Commissioners no say concerning the expenditure of the money which is to be expended upon the roads within the county. The question presented is: Under these facts, is the law constitutional?

OPINION

Confining myself simply to the question stated, it is my opinion that the Act is constitutional. While it is true the County Commissioners may have no power or authority in reference to the expending of the money so collected, this authority is given to a state agency—to wit, the Department of Highways—and I can see no violation of any constitutional right by reason thereof.

In giving this opinion, however, it is not to be understood that I affirm the matters of law stated in the interrogatory.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

114. Revenue—Soft-Drink License in Unincorporated Town—County Commissioners May Fix.

(1) Rev. Laws, 877, as amended Stats. 1919, p. 408: County Commissioners may fix license of soft-drink establishments.

(2) Stats. 1921, p. 194, are amended by Stats. 1923, p. 62. County Commissioners, acting as Town Board for unincorporated town, may enact ordinance fixing license of soft-drink places.

INQUIRY

CARSON CITY, January 29, 1924.

You call my attention to Stats. 1921, p. 194, which provide:

> An Act creating a County License Board to regulate the issuance and revocation of licenses for billiard-balls, dance-halls, bowling alleys, theaters, or soft-drink establishments, in unincorporated cities and towns of this State.

You advise that no law can be found authorizing the collection of licenses on soft-drink establishments, and you request information as to the powers of the Board of County Commissioners to fix the amount of license fee to be collected on soft-drink establishments.

OPINION

Statutes of 1921, p. 194, have been amended by Statutes of 1923, p. 62.

Your attention is directed to Statutes of 1919, p. 408, chap. 228, wherein the Act approved February 26, 1881, being section 877 of the Revised Laws, has been amended.

Under the ninth subdivision of this amendment the Boards of County Commissioners are authorized to adopt ordinances fixing a license tax on the several businesses mentioned by you in your letter, including soft-drink establishments.

It will be necessary, therefore, for your Board of County Commissioners, acting as a Town Board for the unincorporated cities and towns of your county, to enact an ordinance fixing the license fee to be charged and collected from those engaged in the business of operating soft-drink places.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. F.E. WADSWORTH, *District Attorney, Pioche, Nevada.*

SYLLABUS

115. Constitution, How Amended.

(1) Sec. 3, art. 19, of the Constitution: Before amendment to the Constitution can be made, independent of the Legislature, it is necessary that a method of

procedure be adopted, even though provisions of section are declared to be self-executing.

INQUIRY

CARSON CITY, January 30, 1924.

You submit the following interrogatories, and request an official opinion:

In what manner is the power to propose amendments to the Constitution and to enact or reject the same at the polls, independent of the Legislature, to be exercised?

Is it by initiative petition of 10 per cent or more of the qualified electors, as provided in section 3, article 19 of the Nevada Constitution, and is the further action covered by either (1) Enactment by the Legislature, or (2) Upon the rejection by the Legislature, or its failure to act upon said petition, by majority vote of the qualified electors at the next ensuing general election?

OPINION

Section 3 of article 19 of the Constitution of the State of Nevada provides:

> The people reserve to themselves the power to propose laws and the power to propose amendments to the Constitution, and to enact or reject the same at the polls, independent of the Legislature, and also reserve the power at their option to approve or reject at the polls, in the manner herein provided, any Act, item, section, or part of any Act or measure passed by the Legislature, and section 1 of article 4 of the Constitution shall hereafter be construed accordingly. The first power reserved by the people is the initiative, and not more than 10 per cent of the qualified electors shall be required to propose any measure by initiative petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions, for all but municipal legislation, shall be filed with the Secretary of State not less than thirty days before any regular session of the Legislature; the Secretary of State shall transmit the same to the Legislature as soon as it convenes and organizes. Such initiative measures shall take precedence over all measures of the Legislature except appropriation bills, and shall be enacted or rejected by the Legislature, without change or amendment, within forty days. If any such initiative measure, so proposed by petition as aforesaid, shall be enacted by the Legislature and approved by the Governor in the same manner as other laws are enacted, the same shall become a law. If said initiative measure be rejected by the said Legislature, or if no action be taken thereon within said forty days, the Secretary of State shall submit the same to the qualified electors for approval or rejection at the next ensuing general election; and if a majority of the qualified electors voting thereon shall approve of such measure, it shall become a law and take effect from the date of the official declaration of the vote.

A careful study of the constitutional provisions of the States of Oklahoma and Oregon discloses that similar provisions have been enacted, but a method of procedure has been

indicated.

It will be noted that under the provisions of section 3, supra, no procedure is set forth as to the number or percentage of electors whose names must be affixed to the petition requesting an amendment to the Constitution; no time is designated when said petition must be filed; neither is the place for filing said petition set forth.

I am of the opinion that, in order to carry out the intent of the people in adopting section 3 to the Constitution, whereby proposed amendments could be enacted at the polls, independent of the Legislature, some form or method must be adopted by the Legislature. Section 3 of article 19 fails to outline a method.

In arriving at this conclusion I have not overlooked the fact that section 3, supra, provides:

> The provisions of this section shall be self-executing, but legislation may be especially enacted to facilitate its operation.

The Supreme Court of the State of Nevada, in the case of State v. Brodigan, 37 Nev. 43, quotes from a decision of the Supreme Court 896, where the Court states:

> Where the Constitution requires the performance of an act, but provides neither officer, the means, or the method in which the act shall be performed, in such a case there is no other means of carrying such a provision into effect but by appropriate legislation.

Notwithstanding the declaration contained in section 3, in reference to these provisions being self-executing, the Supreme Court in the Brodigan case held that legislative action was necessary.

I have examined, also, Statutes of 1915, p. 157, and Statutes of 1921, p. 108, but conclude that these provisions of the law apply to initiative petition as defined in the Constitution.

It is my opinion, therefore, that before amendments to the Constitution can be made, independent of the Legislature, in conformance to section 3, article 19, legislative action is necessary and a method of procedure must be adopted.

Respectfully submitted,

M.A. Diskin, *Attorney-General.*

Hon. W.J. Hunting, *Superintendent of Public Instruction.*

SYLLABUS

116. Corporations—Delinquent Corporation—Publication of List by Governor—Expense, How Paid.

(1) Stats. 1923, p. 342: List of delinquent corporations and Governor's proclamation of forfeiture should be published in Carson City News and some paper outside Carson City.

(2) The advertising cost should be paid out of appropriation designated in Act.

(3) The Carson City News is not entitled to any additional compensation for this publication.

INQUIRY

CARSON CITY, February 16, 1924.

You request an official opinion concerning the following matters:

Section 4 of chapter 190, Statutes of 1923, p. 342, provides for the publication by the Governor in two daily papers of a list of delinquent corporations and a proclamation of impending forfeiture. The Carson City News, under Stats. 1917, is required to publish all advertisements for the State of Nevada, and is paid a stipulated monthly price.

Will the Statutes of 1923 be served by publishing one of these lists in the Carson City News and another in some other paper? Under these circumstances will the Carson City News be entitled to additional compensation for such publication? From what fund may the cost of these advertisements be paid?

OPINION

The provisions of law will be complied with by publishing one of the lists in the Carson City News and the other list in some paper published outside of Carson City.

The Carson City News will not be entitled to any additional compensation for such publication.

The advertising costs for the publication of this list will be paid from the appropriation designated in said Act.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

117. Schools—Term of Trustee Appointed to Fill Vacancy.

(1) Trustee appointed to fill vacancy is appointed for entire unexpired term of predecessor.

INQUIRY

CARSON CITY, February 23, 1924.

Under the provision of section 64, School Code of Nevada, where a vacancy in office of School Trustee has been filled by appointment, by the Deputy School Superintendent, how long is it contemplated that the appointee shall hold office—till the next election of School Trustees, or for the unexpired term of the former Trustee whose office is being filled by appointment?

OPINION

It is obvious that, under section 64 of the School Code, the Deputy Superintendent filling a vacancy in the office of a short-term Trustee fills it for the unexpired term, for the term expires at the time of the next school election.

The only question, then, is whether the Deputy Superintendent, in filling a vacancy in the office of a long-term Trustee, fills it for the unexpired term or until the next election.

The only provision for filling a vacancy by election is that contained in section 63 of the School Code. There is no provision for filling by election a vacancy which has already been filled by appointment—which would be, in fact, filling a vacancy which has, in fact, no existence.

Section 63 provides for "filling of a vacancy" by election, and section 64 provides for "filling of a vacancy" by appointment. The "filling of the vacancy" by election being for the unexpired term, we are of the opinion that "filling of the vacancy" by appointment must be given the same meaning—that is, for the unexpired term—in the absence of any provision, other than section 63, for filling it by election.

We are, therefore, of the opinion that a vacancy in the office of School Trustee filled by the Deputy Superintendent, under the provisions of section 64 of the School Code, is filled for the "unexpired term" and not merely until the next school election.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General.*

HON. W.J. HUNTING, *Superintendent of Public Instruction.*

SYLLABUS

118. Schools—Budget—High-School Dormitory Maintenance—Deficit.

(1) The budget of Board of Education is mandatory upon County Commissioners. They may not change it.

(2) Board of Education may charge for board and room only reasonable amount.

(3) The dormitory is part of high-school equipment. Any deficit must be paid from county high-school fund.

INQUIRY

CARSON CITY, February 26, 1924.

You request a opinion on the following questions:

1. Is the budget of the County Board of Education as submitted to the County Commissioners mandatory upon the latter, or have the Commissioners the legal right to use their discretion in accepting or revising said budget?

2. Is it the intent of the Act concerning high-school dormitories that such institutions shall be self-sustaining; that the rates charged for board and room shall

be such as to cover cost; or may the County Board of Education pay any deficit from the regular county high-school fund, disregarding capital outlay and interest on bonds?

OPINION

Answering question 1, it is our opinion that the budget of the Board of Education is mandatory upon the Board of County Commissioners, and that the Board of County Commissioners has no discretion to change or revise it, but must accept it as filed with the Auditor and Recorder.

Answering question 2, there is very little in the law with reference to dormitories from which to ascertain the intent of the Legislature, but we think it is without question that the Board of Education may charge for board and room only such sums as are fair and reasonable for such service, as the only possible purpose of providing dormitories is to save the parents and pupils from exorbitant charges for good food and comfortable rooms, and to provide such service at reasonable prices.

Section 184 of the School Code provides that dormitories shall be considered part of the regular high-school equipment and organization, and it is our opinion that any deficit arising from the operation thereof must be paid from the county high-school fund the same as for the maintenance and operation of any other part of the high-school equipment.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General.*

HON. CHAUNCEY W. SMITH, *Deputy Superintendent of Public Instruction, Ely, Nevada.*

SYLLABUS

119. Employer and Employee—Private Employment—Payment of Wages—Penalty for Delay—Use of Team.

(1) Stats. 1919, p. 121: The use of a team by an employee who is hired and is to be paid by the day does not deprive him of the benefits of the Act. He is entitled to prompt payment for services and use of team upon discharge, and penalty for delay.

(2) This rule does not apply to an independent contractor or one who is to be paid by the job.

INQUIRY

CARSON CITY, March 6, 1924.

You submit the following questions, and request an official opinion in respect thereto:

(1) Is a workman who works with and furnishes his own team and is paid a

daily rate for his combined service an employee of an employer, under chapter 71, Statutes of 1919, entitling him to penalty pay under section 2 of the said Act in the failure of the employer to pay wages or compensation promptly upon discharge?

(2) What part of the combination rate is wage or compensation and what part horse-hire for the purpose of determining the penalty rate?

(3) Or is he entitled to penalty on the combined rate, including that part undoubtedly paid for the use of his horses?

(4) In the event that employee is discharged by one employer and not paid within the thirty days during which penalty runs, but, in the interim, obtains contract or work from another employer, can such second employment wages or compensation earned be set up to reduce the running of the penalty against the first employer by showing lack of actual damages in the amount earned from the second employer within the thirty days from discharge by the first employer?

OPINION

In answer to your first interrogatory, you are advised that if an individual is employed by the day to perform work and labor and is to be paid by the day, the mere fact that in connection with his employment the workman uses his team would in no way exclude him from the benefits accruing by reason of the Statutes of 1919, chapter 71, and under these circumstances the wages or compensation of such employee, including the amount to be collected for the use of his team, would come with the provisions of said Act. It must be remembered, however, that such employee must be paid by the day and not by the job, and the element of an independent contractor must not enter into such employment. The fact that the man so employed used his horses and wagons, in performing services for which he was paid by the day, is immaterial. A carpenter or any other skilled workman employs tools to assist him in earning his wages. (See In Re Yoder, 127 Fed. 894.)

2. Interrogatory No. 2 is answered in the reply to question 3.

3. Answering Interrogatory 3, it is my opinion that, in computing the amount of penalty for failure to pay the wage, there should be considered the agreed wage per day, including the part paid for the use of horses.

4. Replying to Question 4, the mere fact that the individual who was discharged or quit work received employment from some other person would in no way affect or reduce the penalty against the first employer.

Respectfully submitted,

M.A. DISKIN, *Attorney-General,*

HON. FRANK INGRAM, *Labor Commissioner, Carson City, Nevada.*

SYLLABUS

120. Employer and Employee—Nevada Industrial Commission—Safety Rules—Evidence.

(1) Stats. 1919, p. 403; Sections 2, 3, 4, 5 require employers to make the employment and places of employment safe. Section 9 makes failure to do so a misdemeanor.

(2) Section 6 gives Industrial Commission power to prescribe rules and devices for safety.

(3) While a violation of these rules is not a misdemeanor, a failure to comply with them is prima-facie evidence of their violation. The rules are admissible in evidence.

(4) In the absence of proper proceeding to change a rule deemed unreasonable, the Court will deem it reasonable.

(5) The Commission, after proper proceedings, may make necessary rules and orders relative to unsafe employments or places of employment. If not complied with, the matter is referred to the District Attorney.

INQUIRY

CARSON CITY, March 7, 1924.

An official opinion is requested in reference to the following facts:

> Would you kindly give this commission your official opinion as to the proper means of effectively enforcing the general safety orders adopted by the Nevada Industrial Commission, by virtue of chapter 225, Statutes of 1919?

It is stated in your letter that a complaint has been filed against the White Star Plaster Company for having failed to comply with certain recommendations in reference to safeguards, in the operation of certain machinery.

OPINION

Statutes of 1919, p. 403, and section 9 thereof, make it a misdemeanor for any person to violate sections 2, 3, 4, or 5 of the Act.

Section 6 of the Act makes it the duty of the Nevada Industrial Commission to declare and prescribe what safety devices, safeguards, or other means or methods of protection are well adapted to render employment safe as required by law.

In addition to this power, certain other rights and duties are prescribed to be performed by the Nevada Industrial Commission, in respect to the protection and health of employees.

It will be noted that while the statute does not provide that a violation of the rules adopted by the Nevada Industrial Commission shall be punished as a misdemeanor, it does provide:

> In any prosecution under this section it shall be deemed prima-facie evidence of violation of any such safety provision that the accused has failed or refused to comply with any order, rule, or regulation, or requirement of the Commission relative thereto.

The rules made by the Nevada Industrial Commission under the provisions of this Act are made admissible in evidence in any prosecution under said Act. In the event an individual or corporation feels that the rule adopted is unreasonable, the corporation or individual challenging said rule must, prior to the institution of a prosecution for a violation of such rules, institute

"proceedings for a rehearing thereon, or a review thereof." In the absence of such proceeding, the rule or order shall be considered by the Court as fair, just, and reasonable.

Under subdivision 6 of section 6, whenever the Commission shall learn, or have reason to believe, that any employment or place of employment is not safe, it may, of its own motion, or upon such notice as it may prescribe, enter and serve such order as may be necessary relative thereto.

Under this provision of the statute a formal complaint reciting the charges must be made before the Commission. It then becomes the duty of the Commission to investigate the charges, and ascertain whether the same are based upon the facts, and at the conclusion of said hearing the Commission shall enter an order and serve such order upon the party offending.

In reference to making the investigation: This may be done by a member of the Commission, or some person designated as agent for the Commission. It will be necessary, however, to have a complaint filed, or, if no complaint is filed, to have the facts recited on the minutes of the Commission, tending to show that the place of employment is not safe, and then investigation must be made; thereafter the conclusions of the Commission in reference to the facts must be incorporated in the minutes, and an order made by the Commission in respect to the findings, and the order served upon the party to be affected by the order. If the order is not then complied with, the matter should be presented to the District Attorney, with a request that a complaint issue.

In any prosecutions under the provisions of this Act, the failure of the party to comply with any order or requirement of the Commission shall be deemed prima-facie evidence of a violation of any such safety provision.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. FRANK INGRAM, *Labor Commissioner, Carson City, Nevada.*

SYLLABUS

121. School of Mines—Sale of Equipment.

(1) Stats. 1919, p. 160, Rev. Laws, 3053: Equipment of School of Mines, no longer in use, may be sold by County Board of Education or Board of School Trustees.

(2) The money received from the sale shall be placed in district school fund.

INQUIRY

CARSON CITY, March 20, 1924.

We have in storage, at Goldfield and Ely, equipment that was formerly used by the Schools of Mines. The vocational education law of 1917 changed the control of these institutions from the University of Nevada to the State Board for Vocational Education, but the law does not seem to give authority for disposing of any of this equipment. We have an opportunity to sell one or both of these sets, and would appreciate your advice as to whether or not we are privileged to do

so. If we can legally dispose of the same, to what fund would the proceeds be credited?

OPINION

We have examined the statutes and find from a perusal of section 6, chapter 91, Statutes of 1919, 3 Rev. Laws, 3053, that all equipment, property, and assets of the various Schools of Mines named in your inquiry were transferred by the State Board for Vocational Education, and by the boards then having direct control of such equipment, property, and assets, to the County Boards of Education, or District Boards of School Trustees of the respective school districts in which said schools were located, for the exclusive use of said mining schools, so long as said schools might be operated. Said section 6 has never been amended or repealed, and, therefore, the equipment in question is still in the possession and under the exclusive control of said county or district boards, and not under the control of the State Board for Vocational Education. If said mining schools are no longer in operation, the question arises: "Can the County Boards of Education, or the district school boards, now dispose of the equipment which is of no further use?"

The statute is silent upon the subject, so far as any specific enactment is concerned. Section 75 of the School Code provides that County Boards of Education shall have the same general powers as School Trustees.

Section 73 of the School Code provides as follows:

> The Boards of School Trustees of the respective school districts of the State of Nevada are hereby given such reasonable and necessary powers, not conflicting with the Constitution and laws of the State of Nevada, as may be requisite to the ends for which the public schools are established, and to promote the welfare of school children.

It certainly is reasonable for the School Trustees to have the power to dispose of such equipment as may no longer be of any use in the schools, so that the money secured from the sale thereof may be used in the support and maintenance of such schools, and not be a total loss. There are no provisions of the Constitution or laws of the State prohibiting such action, and it is, therefore, not in conflict with the laws or Constitution.

We, therefore, conclude that such equipment may be sold by the County Board of Education or Board of School Trustees, as the case may be, and that the money received from such sale must be disposed of in accordance with the provisions of par. 5, sec.67, of the School Code, which provides as follows:

> To manage and control the school property within their districts, and pay all moneys collected by them, from any source whatever, for school purposes, into the county treasury, to be placed to the credit of the school fund of their district; * * *

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General.*

HON. W.J. HUNTING, *Executive Officer, Nevada State Board for Vocational Education, Carson City, Nevada.*

SYLLABUS

122. Criminal Procedure—Dismissal of Criminal Action.

Filing of statement by District Attorney of his reasons in fact and law why information should not be filed does not operate, of itself, as dismissal of case. The dismissal is made by order of court having jurisdiction.

INQUIRY

CARSON CITY, March 29, 1924.

Does the filing of a statement, under section 8, Revised Laws of Nevada, vol. 3, p. 3401, operate as a dismissal of the case, and of the discharge of defendant in a criminal action?

OPINION

Section 8, supra, makes it the duty of the District Attorney to inquire into all cases of preliminary examination, and, "if the District Attorney shall determine in any such case that an information should not be filed, he shall file with the Clerk of the court having jurisdiction of such supposed offense a written statement containing his reasons, in fact and in law, for not filing any information in such case, and such statement shall be filed within ten days after the holding of such preliminary examination."

Your question assumes that the defendant has had a preliminary examination and has been bound over to the District Court for further action.

Section 11, Statutes of 1913, p. 293, makes it the duty of the magistrate, when a preliminary examination is had, and the defendant ordered held to appear before the court having jurisdiction, to file with the Clerk of said court all papers in the proceeding, together with a copy of the transcript.

The matter then becomes of record in the District Court. Section 545, Criminal Practice Act, as amended 1919, p. 436, provides that where a person has been held to answer, if an indictment be not found, or an information filed against him at the last session of the court at which he is held to answer, the Court shall order the prosecution to be dismissed, unless good cause to the contrary be shown.

Section 549, Criminal Practice Act, as amended 1919, p. 437, provides that the court may, either of its own motion, or upon application of the District Attorney, order any action, after indictment found or information filed, to be dismissed; but in such case the reasons of the dismissal shall be set forth in the order.

Section 7400, Rev. Laws, 1912 (section 550, Criminal Practice Act) provides:

> Neither the Attorney-General nor the District Attorney shall hereafter discontinue or abandon a prosecution for a public offense, except as provided in the last preceding section.

From a careful reading of the statutes, it is my opinion that the filing of a statement under sec.

8, Stats. 1913, does not of itself operate as a dismissal of the case and discharge of the defendant, but that to effect such a result an order must be made and entered by the District Court having jurisdiction.

For the forgoing reasons, therefore, your question is answered in the negative.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

123. Attorney-General—No Opinion Rendered when Subject before Court.

(1) The subject-matter of this inquiry having been submitted to court no opinion should be rendered in the premises.

INQUIRY

CARSON CITY, March 27, 1924.

You request an opinion as to the legality of the various statutes of the State of Nevada with reference to the licensing of sheep and live stock in this State.

You call my attention to an opinion rendered by this office on April 1, 1920, wherein it was held that none of the Acts relating to licensing of sheep was constitutional since the Act of 1901 (Stats. 1901, p. 64). You direct attention to the fact that said statute is an amendment of section 1 of an Act approved March 12, 1885, and that the statute of 1895 was repealed by the Act of March 22, 1915.

OPINION

I have been officially advised that an action is now pending in one of the District Courts of this State, wherein the legality of the several Acts of the Legislature with reference to the licensing of sheep and live stock has been attacked, and the questions propounded by you have been raised in this proceeding. Inasmuch as the courts of this State will have the matter involved presented to them for determination, I am of the opinion that this question should not be determined by this office.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

124. Revenue and Taxation—What Property of Nevada Industrial Commission Is Subject to Taxation.

Section 3621, Rev. Laws: Property owned and used by Commission is not subject to taxation, but portion so owned from which rental is received is taxable.

INQUIRY

CARSON CITY, March 29, 1924.

You call my attention to the fact that the County Commissioners of Ormsby County have assessed real property owned by the Nevada Industrial Commission, and you desire an official opinion as to the validity of such assessment.

OPINION

The property assessed by the Board of County Commissioners of Ormsby County consists of certain real estate which is occupied in part by the Nevada Industrial Commission, functioning as a state agency, and the other portion of the same is rented by the Commission for certain stipulated rentals.

Under section 3621, Revised Laws of 1912, as amended, it is provided that all lands owned by the State are exempt from taxation, provided "that when any of the property mentioned in this subdivision is used for any other than public purposes, and rent or valuable consideration is received for its use, the same shall be taxed."

It is my opinion that the portion of the property owned by the Nevada Industrial Commission and occupied by it is not taxable, but an assessment may be made and a tax collected on the value of that portion of the property owned by the Commission from which a rental consideration is received.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

NEVADA TAX COMMISSION, *Carson City, Nevada.*

SYLLABUS

125. Statutes—Amendment and Repeal—Livestock License.

(1) Stats. 1895, p. 53, was amended by Stats. 1901, p. 64. The amendment becomes as much a part of an Act as if it had always been included in it.

(2) Stats. 1915, p. 247, repealed Stats. 1895, and thereby repealed its amendment of 1901.

(3) There is now no law authorizing the collection of license tax on sheep.

INQUIRY

CARSON CITY, April 4, 1924.

Under date of March 27, 1924, in answer to a request for an official opinion concerning the legality of the various statutes of the State of Nevada with reference to licensing of sheep and live stock, you are advised that, inasmuch as an action was pending in one of the District Courts of this State wherein the matter submitted for an opinion was to be determined, it was ruled that the question should not be decided by this office.

An investigation discloses that the matter submitted is not a subject for court action, and I feel, therefore, that it is my duty to render an official opinion concerning the same.

Your inquiry may be stated as follows: On April 1, 1920, Attorney-General Fowler, in a written opinion, held that the several legislative actions relating to licensing of sheep were unconstitutional, and that recourse must be had to the Statutes of 1901, p. 64, for authority to impose a license tax upon sheep.

You direct my attention to the fact that the statute of 1901 is an amendment of section 1 of an Act approved March 12, 1895; that the Act of 1895 was expressly repealed by the Act of March 22, 1915. Your query is:

1. Conceding the Act of 1915 to be unconstitutional, as so declared by Attorney-General Fowler—

2. Does the repeal of the Act of 1895 leave the State without a sheep-license Act?

OPINION

Statutes of 1915, p. 247, specifically repealed the Act of 1895, supra. With this premise admitted, the question for determination is the effect of such repeal upon the amendatory Act. It is very apparent, from a review of the Statutes of 1895 and the amendatory Act that the latter is so dependent upon the former, as to become inoperative upon its repeal.

> Where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes, as if the amendment had always been there. Walsh v. State, 142 Ind. 357; Blair v. Chicago, 50 L. Ed. 801.

I am of the opinion that the provision contained in the amendment of section 1, Stats. 1895, by Stats. 1901, became engrafted upon Stats. 1895 so as to become part and parcel of it for all purposes.

Therefore the repeal of the Act of 1895 must, of necessity, carry with it the amendment of 1901.

The statute of 1901, amending section 1, would have practically no effect without sections 2, 3, 4, 5, 6, 7, and 8 of the statute of 1895.

The Supreme Court of California, in the case of Ellison v. Jackson Water Co., 12 Cal. 542, was called upon to determine whether or not the repealing of a given law would also repeal amendments made to the law. In this case it appeared that the Legislature in the year 1850 gave the mechanics' lien only upon building and wharves. In the year 1853 the Legislature extended, by amendment, the Act of 1850 to include in its provisions bridges, ditches, etc. thereafter, in the year 1855, an Act was passed repealing the Act of 1850; and the Court held that the repeal

carried with it the supplemental Act of 1853. See, also, Blake v. Brackett, 47 Me. 28; Welstead v. Jennings, 93 N.Y. Supp. 39.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

126. Animals—Railroad's Liability for Killing Live Stock on Crossing.

Stats. 1923, p. 148: Railroad company under circumstances stated is liable for value of live stock killed by its train on public crossing.

INQUIRY

CARSON CITY, April 7,1924.

You advise that the Southern Pacific Company has reported to you to killing of three animals belonging to Mrs. Margaret Ryan: that a formal claim for compensation was presented to the railroad company, and that you are in receipt, from the railroad company, of a communication wherein they deny liability upon the ground that the animals were killed while running a large on a public road-crossing.

You request an opinion as to whether or not the railroad company is liable for compensation for killing the animals in question, in view of the fact that they were killed on the public road-crossing.

OPINION

Your attention is respectfully directed to section 1, Statutes of 1923, p. 148, wherein it is provided:

> Every railroad company which negligently injures or kills any animals, * * * by running any engine * * * over or against such animals, shall be liable to the owner of such animals for the damages sustained, * * * unless it be shown on the trial of any action * * * that the owner of such animal immediately contributed to such killing * * *; *provided,* that the mere straying of such animals upon or along such railroad track or tracks concerned shall not be held upon such trial to be any evidence of contributory negligence upon the part of the owner; * * * nor shall the grazing of the same unattended by a herder be so considered; *and provided further,* that the killing or injury in such action shall be prima-facie evidence of such negligence upon the part of such railroad corporation or company.

Conceding the above rule of evidence does not offend the Constitution, I am of the opinion that the railroad company is liable and should compensate the owner for the animals in question. Further, that no good or sufficient reason that has support in law or fact is recited in the answer

of the railroad company to the demand made.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

127. Officers—Duty of County Auditor and Treasurer—Publication of Reports.

(1) Section 3746 of the Revised Laws is repealed by Stats. 1915, p. 248. It is no longer duty of Auditor to furnish statement of collections, etc.

(2) Stats. 1919, p. 331, as amended by Stats. 1923, p. 346, provides rule to be followed in reference to reports and records of County Auditor and Treasurer.

INQUIRY

CARSON CITY, April 7, 1924.

You call my attention to section 3746, Revised Laws of Nevada. Under the provisions of this section it is the duty of the County Auditor and Treasurer, at certain periods of the year, to make a joint statement to the Board of County Commissioners, showing the amount of collections from all sources paid into the county treasury, etc.

This section further makes it the duty of said officers to publish such statement in some newspaper published in the county. You direct my attention to Statutes of 1915, chap. 178, and request an opinion as to whether section 3746 has been repealed by the Statutes of 1915.

OPINION

Stats. 1915, chap. 178, p. 248, contain a specific repealing clause, and under the provisions of this repeal section 134, which is section 3746 of an Act entitled "An Act to provide revenue for the support of the government of the State of Nevada, and to repeal said Acts relating thereto," approved March 23, 1891, is repealed.

It will be noted that in volume 1, Revised Laws of 1912, p. 1042, the title of the Act approved March 23, 1891, is set forth. Some confusion arises by reason of the fact that section 3746 is set forth under the Act approved March 18, 1911 (p. 1044), which provides:

An Act to fix the state tax levy and to distribute the same in the proper funds.

Statutes of 1891, p. 135, enacted the section now known as section 3746, Rev. Laws, vol. 1, p. 1098.

I am of the opinion that section 3746, Rev. Laws 1912, has been repealed by Stats. 1915, p. 248, and that it is no longer the duty of the County Auditor to publish the statement required under said section. It will be further noted that Stats. 1919, p. 331, as amended Stats. 1923, p. 346, has adopted a rule to be followed in reference to the reports and records to be made by the County Auditor and the County Treasurer.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

128. Health—State Board—Public Funds May Be Expended.

Stats. 1917, p. 187: Whenever they are convinced of existence of any great menace to public health, beyond control of local authorities, State Board of Health, acting with Governor, may expend appropriation to combat disease.

INQUIRY

CARSON CITY, April 15, 1924.

You direct my attention to Statutes of 1917, chap. 100, and request an official opinion concerning the appropriation of $10,000 mentioned therein, and desire to be advised as to whether this money may be used in combating foot-and-mouth disease.

In your communication you state:

> I am advised that the foot-and-mouth disease is remarkably malignant and finds victims among humans as well as the lower animals, causing the characteristic lesions and other symptoms noted in neat and other cattle. I find from the information at hand that "it appears that a great menace to the public health and safety exists which is beyond the control of the county, municipal and other local authorities." I believe the State Board of Health will also make a similar finding. As to the futility of county and local control I draw my conclusion from the ineffective campaign waged by the local and county authorities in California.
>
> I would appreciate your opinion as to whether, in case such a finding shall be announced by the State Board of Health and myself, the statute in question will permit the application of the $10,000 so appropriated to the purpose here indicated, confining the same to the inspection and disinfection of human beings.

OPINION

Section 1, Statutes of 1917, p. 187, provides:

> The sum of ten thousand dollars ($10,000) is hereby appropriated, from the general fund in the treasury of the State of Nevada, not otherwise appropriated, as an emergency fund to be expended by the State Board of Health, subject to the approval of the Governor, when it appears to the State Board of Health and the Governor that a great menace to the public health and safety exists and is beyond control of the county, municipal, or other local authorities.

The Legislature has designated the Governor and the State Board of Health to be the agency in determining the ultimate facts as to whether or not "a great menace to public health and safety exists, and is beyond the control of the county, and municipal or other local authorities."

The appropriation mentioned is dependent upon, and may be expended when this determination is made.

It is my opinion that, when the designated legislative agency finds the facts in accordance with the provisions of this statute, the appropriation may be expended for the purposes designated.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

129. Officers—Compensation—Unofficial Services.

Stats. 1919, p. 177: County Clerk and Treasurer who performs road work out of the office hours is entitled to compensation therefor.

INQUIRY

CARSON CITY, April 15, 1924.

You advise that the County Clerk and Treasurer of your county has, without pay, supervised all county road work; that recently a petition signed by a majority of the taxpayers of the county has been presented to the Board of County Commissioners recommending that a nominal sum be paid for this service rendered; that the same was rendered outside of office hours, and on Sundays and holidays.

You request an official opinion, in view of the facts stated, as to whether the County Commissioners may compensate the County Clerk and Treasurer for these services, and whether or not Statutes of 1919, p. 177, would constitute a legal bar to such payment.

OPINION

Stats. 1919, p. 177, fixes the compensation of the County Clerk and Treasurer, and provides that the compensation designated shall be in full payment for his services.

The services performed by the County Clerk and Treasurer in your inquiry are not such services for which compensation is fixed by Stats. 1919, p. 177.

It appears, therefore, that the compensation to be paid is for services performed by the County Clerk and Treasurer, which were not incumbent upon him to perform by reason of his position.

I am of the opinion that the Board of County Commissioners may in its discretion, compensate for the extra services rendered.

(See Opinions of Attorney-General, No. 73, 1913-1914.)

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

130. Mothers' Pension Act—Compensation—Qualifications.

Stats. 1915, p. 151, sec. 3: The fact that mother became widow in another State would not preclude her from receiving benefits of Act if other requirements of statute were complied with.

INQUIRY

CARSON CITY, April 15, 1924.

You submit the following inquiry, and request an official opinion:

A party becomes a widow in the State of Washington in 1918, moving to Smith Valley, Lyon County, Nevada, June 12, 1922, and has continuously resided therein. She is the mother of an eight-year-old son, and now makes application to the Commissioners of Lyon County for a mother's pension.

You desire to be advised as to whether, under these facts, she is entitled or qualified to receive compensation under this statute.

OPINION

In your letter to me you state: "The writer sees no inhibition in section 3 of the Mothers' Pension Act, or otherwise, that would preclude this party from receiving the benefits of the Mothers' Pension Act."

In this conclusion, I concur. The Legislature has designated, in section 3 of the Act, the qualifications necessary to enable an individual to claim the benefits of this Act. The residence qualification consists of residing in the county for a period of one year. If the person making the application has a residence in the county for one year, and the other necessary facts exist as recited in section 3, I am of the opinion that she is entitled to the benefits of this Act.

The question as to the policy which prompted the Legislature to enact this measure, and whether further restrictions should not be incorporated therein in reference to meeting the objections urged, are clearly matters for legislative consideration.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. CLARK J. GUILD, *District Attorney, Yerington, Nevada.*

SYLLABUS

131. Statutes—Repeal—Budget Law Repeals Road Fund Apportionment Act.

The "Budget Law" repeals sec. 842, Rev. Laws (Stats. 1907, p. 169, sec. 39, City of Yerington Charter) by implication. Therefore County Commissioners may not now apportion part of road fund to city.

INQUIRY

CARSON CITY, April 28, 1924.

You advise that under the charter of the city of Yerington Stats. 1907, sec. 39, p. 169), a direct provision and authorization is therein contained to the Board of County Commissioners, directing said board to apportion a portion of the road funds to the city of Yerington. You call my attention to a decision of the Supreme Court of the State of Nevada, in the case of the Trustees of Carson City v. Ormsby County (Case No. 2625), and request an opinion as to whether, under this ruling of the Supreme Court, it is no longer the duty of the Board of County Commissioners to make such apportionment.

OPINION

The Supreme Court of Nevada, in deciding the case of Trustees of Carson City v. Ormsby County, stated:

> If the idea, as above expressed, that the budget system "is a complete financial plan for a definite period," is the correct one, then it must inevitably follow that the adoption of the budget law repeals section 842 of the Revised Laws, *and all other provisions relating to the raising and expenditure of revenue by the towns and cities of this State.* Carson City v. County Commissioners, 47 Nev. 423.

It must necessarily follow that sec. 39, Stats. 1907, containing the provision directing the Board of County Commissioners of Lyon County to apportion road funds to the city of Yerington was, by reason of the budget law, repealed by implication.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. CLARK J. GUILD, *District Attorney, Yerington, Nevada.*

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SYLLABUS

132. Insurance Commissioner—Powers—Changing Term of Contract—Insurance of State Agricultural Society Property.

State Controller, acting as ex officio Insurance Commissioner, is not authorized to direct any change in insurance policy upon property of State

Agricultural Society.

INQUIRY

CARSON CITY, April 28, 1924.

Recently a fire destroyed a number of stalls at the race-track, at Reno, Nevada. This property is owned by the Nevada State Agricultural Society, which was incorporated under an Act entitled "An Act to incorporate a State Agricultural Society, and provide for the management thereof," approved March 7, 1873 (Rev. Laws, 3916). Under the authority of section 5 of the Act to provide for the management and control of the State Agricultural Society (Rev. Laws, 3925, as amended Stats. 1915) all the property of the Agricultural Society was insured with the Nevada State Life Insurance Company, the insurance being placed by the State Board of Agriculture.

After the fire it was discovered that the State Controller, as ex officio State Insurance Commissioner, pursuant to section 5 of an Act approved March 12, 1915, and subsequent to the placing of the policies of the State Board of Agriculture, had changed one of the policies, with the result that it would mean a loss of several thousand dollars to the society in the collection of the fire loss; this for the reason that he had the policy reduced on the very buildings that were destroyed.

The question now arises as to the power of the Insurance Commissioner to place a policy upon property owned by the Nevada State Agricultural Society, or to make changes in the terms, conditions, and amounts of policies placed upon said property by the State Agricultural Society.

An opinion is requested from this office by the Secretary of the Agricultural Society, through you.

In Submitting this request, you have outlined your views in respect to the question here presented, and, inasmuch as your views coincide with mine, I have concluded to embody them as my official opinion.

OPINION

It is my opinion that the power reposed in the Insurance Commissioner, under section 5, supra, does not extend to property belonging to the State Agricultural Society. The section in question reads as follows:

> SEC. 5. The State Controller, acting as ex officio Insurance Commissioner, shall place all fire insurance required by the State of Nevada *upon its property*, dealing only with companies authorized to do business in the State; and shall also have the power to inspect all state buildings and order such fire-extinguishing and safety appliances as shall be deemed necessary for the protection of property against fire; and shall have the further power to order the removal of combustibles and rubbish from said property, or order such changes in the entrances or exits of the buildings as shall insure the safety of the inmates, together with such fire escapes as he may deem necessary.

It will be noted under the above section that the State Controller is vested with the power to place "all fire insurance required by the State of Nevada upon its property." While it is true that under the provision of section 3921, Revised Laws of 1912, the State Agricultural Society is

declared to be a state institution, nevertheless, under the Act of 1873 incorporating the society, the specific power was granted it to purchase, hold, and lease land. All of the property purchased by the society is taken in its name, and not in the name of the State of Nevada.

It is reasonably clear that under the broad powers conferred upon the State Board of Agriculture under section 3925—where they are, in the language of the statute, "charged with exclusive management and control of the State Agricultural Society, as a state institution; shall have possession and care of its property, and be entrusted with the direction of its entire business and financial affairs"—that this necessarily involves the exclusive right to place insurance upon the buildings which are under their possession and care.

It therefore follows that the State Controller had no power or authority to order or direct any change in the insurance policy upon the property of the State Agricultural Society, and, if any changes were ordered, the same were without authority.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. WM. WOODBURN, *Attorney at Law, Reno, Nevada.*

SYLLABUS

133. Bonds and Undertakings—Highway Department Cannot Release Bonding Company from its Liability to Contractor's Creditors, or Substitute One Surety by Another.

Any release entered into between the Highway Department and a bonding company could in no way release the bonding company from its liability under the bond to the contractor's creditors. A contractor may not have one surety released and another substituted.

INQUIRY

CARSON CITY, May 16, 1924.

Dodge Brothers & Dudley Contracting Company, a corporation, secured a contract from the State Highway Department of the State of Nevada for the construction of a portion of the state highway described as Federal Aid Project No. 53-A.

Upon the execution of said contract, and on January 16, 1924, a surety bond in the sum of $108,769 was presented and filed, the same being executed by the Fidelity and Deposit Company of Maryland. Work under said contract commenced about March 1, 1924.

Dodge Brothers & Dudley Contracting Company desire now to have canceled the surety bond filed by the Fidelity and Deposit Company of Maryland, and in lieu thereof tender a surety bond executed by another surety company.

You request an official opinion as to the legality of such procedure.

OPINION

Upon casual consideration of the question presented, I have heretofore expressed the view that surety bonds and undertakings were similar to other contracts, and where all parties mutually agreed to a release of the obligation thereunder, from the date of such agreement the liability ceases. This principle is elementary. The Legislature of the State of Nevada has enacted a measure for the release of sureties on official bonds and undertakings. This statute was approved February 13, 1867.

Under the provisions of Stats. 1909, a surety company may be released from its liabilities upon the same terms and conditions as are by law prescribed for the release of individuals.

In answering the question propounded, we do not deem it necessary to consider the extent to which the statutes above quoted may apply in the present situation. The question here presented is more complex, as a reading of the statute and the bond itself discloses.

The bond was executed under and by virtue of the provisions of sec. 17, Stats. 1917, as amended 1919 and 1921. Section 17 provides:

> Every contractor for improvements, construction, or maintenance shall execute a bond and, in addition to the conditions heretofore provided, such bond shall provide and secure payment for all material, provisions and supplies, teams, trucks, and other means of transportation used in or upon or about or for the performance of the work contracted to be done, and for any work or labor done thereon. Any person or corporation furnishing labor or supplies, as heretofore provided herein, desiring to be protected under said bond, shall file his claim within thirty days from the completion of the contract with the Department of Highways; * * * and any such person or corporation so filing a claim may, at any time within six months thereafter, commence an action against the surety or sureties on the bond for the recovery of the amount of the claim.

The bond presented and filed by the Fidelity and Deposit company of Maryland contains two conditions: First—The faithful performance and execution of the work undertaken by the contractor; and, Second—The prompt payment by the contractor of all debts incurred by him in the prosecution of the work for labor and materials supplied by third parties.

In the case of Dewey v. State, 91 Ind. 173, the Court held, in a bond of similar import, that in—

> any breach of the second condition of the bond, by the contractor, the right of action was in the laborer, and that such right of action could not be defeated or prejudiced, by any act done, by the obligee in the bond after the bond had been taken and approved.

It was ruled that changes made in the contract by the parties thereto—to wit, the contractor and public authorities—after the bonds had been executed and accepted, did not deprive materialmen of their right to recover against the sureties on the bond.

In the case of United States v. National Surety Co., 92 Fed. 552, the Circuit Court of Appeals, in construing a bond similar to the one filed in the instant case, held:

> When the Government has executed the contract and taken and approved the bond, it ceases to be the agent of the third parties whom the contractor employs in the execution of the work, or from whom he obtains materials, and the rights of such persons under the bond are unaffected by subsequent transactions between

the Government and the contractor. If such were not the case, it would be impossible for the contractor and some officer of the United States, by making some change in the contract, to deprive laborers of all recourse against the sureties in the bond after they had supplied materials and labor of great value in reliance upon its provisions.

The Supreme Court of the United States, in the case of Equitable Surety Co. v. McMillan, 234 U.S. 458, approved the doctrine announced in United States v. National Surety Co., supra, and held:

> The surety is charged with notice that he is entering into what is in a very proper sense a public obligation, and one that will be relied upon by persons who can in no manner control the conduct of the nominal obligee, and with respect to whom the latter is a mere trustee and therefore incapable, upon general principles of equity, of bartering away for its own benefit or convenience the right of the beneficiaries. In the light of the statute the surety becomes bound for the performance of the work by the principal and for the prompt payment of the sums due to all persons supplying labor and material.

It follows, therefore, that any release entered into between the Highway Department and the bonding company could in no way affect or release the bonding company from its liability under the bond to the parties described in section 17 of the Act.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

134. Corporations—Foreign—Property of Foreign Corporation May Not Be Attached for Failure to Pay License Tax.

Stats. 1923, p. 342, sec. 4: While the Act provides for the payment of a license tax by both domestic and foreign corporations, the section makes the property of only foreign corporations subject to attachment and sale for default therein. Such discrimination being prohibited, the section is of doubtful validity.

INQUIRY

CARSON CITY, June 3, 1924.

You submit to this department for an official opinion the following communication:

> This department is desirous of obtaining from you an opinion relative to the duties and procedure of the Secretary of State in issuing his warrant and delivering the same to any Sheriff who may seize any property of a foreign corporation that has failed to pay its license tax, in accordance with the last paragraph of sec. 4, chap. 190, Stats. 1923, and what is known as the "Corporation License-Tax Law."

OPINION

That portion of section 4 which authorizes the procedure outlined by you, reads in part as follows:

> In case a foreign corporation shall make default as herein provided, the Secretary of State shall issue his warrant, stating the amount of the tax, penalty, and costs due to the State, and shall deliver such warrant to any Sheriff of any county in this State, who may seize and sell any property of a foreign corporation, as upon execution, and apply the proceeds to the payment of the tax and penalty and costs.

It will be noted from a reading of the Act that, while the license tax is to be paid by both domestic and foreign corporations, it is only the property of a foreign corporation that may be sold as authorized by section 4, supra.

It will be seen, therefore, that, in dealing with the domestic and foreign corporations a discrimination is made in respect to the property of a foreign corporation and the same procedure, or procedure of like character, is not inaugurated in respect to the property of a defaulting domestic corporation. For this reason, therefore, I entertain serious doubts as to the validity of this particular section, which authorizes you to sell the property of a foreign corporation.

In enacting laws regulating corporations, no discrimination should be made between a foreign corporation and a domestic corporation.

The law is well settled that—

> Once admitted, a foreign corporation is entitled to the equal protection of the laws, and to as favorable treatment as a domestic corporation; and any state statute violative of this provision is unconstitutional and void. Louisville R.R. Co. v. Gaston, 54 L. Ed. 542.
>
> Any attempt to substantially discriminate between domestic and foreign corporations admitted to do business in this State, prejudicial to the latter, is invalid, whether it be by unequal taxation or other substantial inequality. Herndon v. Chicago R.R. Co., 54 L. Ed. 570. (See, also, Hostetler v. Harris, 45 Nev. 43.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

137. Officers—Statute Authorizes Payment of Salary—Appropriation, Necessity for—To Pay Traveling Expenses.

Sec. 21, Chap. 191, Stats. 1919, authorizes payment of per diem to members of reclamation and settlement board, but expenses of members cannot be paid under Act.

INQUIRY

CARSON CITY, June 13, 1924.

You present the following questions, and request an official opinion:

> Under the provisions of chapter 191, Statutes of Nevada, 1919, authority was given the Governor to appoint a reclamation and settlement board of three, to act in conjunction with the Governor and State Engineer, the appointed members to receive $10 a day while actually engaged on the work of the board.

I desire your written opinion, therefore, whether appointive members of this board may be paid the per diem, excluding all other expenses, provided for in the Act of 1919.

OPINION

You are advised that in the opinion of this office, under the provisions of sec. 21, chap. 191, Stats. 1919, you have the authority to appoint three members of the reclamation and settlement board, as provided for therein, and that such members may lawfully be paid the sum of $10 per day while "Actually engaged in the work of the board," the same as other state officers are paid, but, because of vagueness and uncertainty and the impossibility of ascertaining the amount which might be claimed as "necessary expenses" of the members of the board, that part of section 2 providing for the payment of such "necessary expenses" would not be sufficient to constitute an appropriation, and expenses could not be paid thereunder.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General.*

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

SYLLABUS

138. Officers—City Officers Elected Every Two Years.

> The provisions of Statutes of 1921, p. 96, in reference to terms of office apply only to county officers. City officers must be elected every two years.

INQUIRY

CARSON CITY, June 23, 1924.

You advise that the city officers of the city of Lovelock were elected last spring to serve, as they supposed, for a term of two years.

There now seems to be some question in the minds of some of the council, as to whether, under the new law, they were elected to serve four years instead of two.

OPINION

Statutes of 1921, p. 96, provide:

> SEC. 17. County Clerks, Sheriffs, County Assessors, County Treasurers, District Attorneys, County Surveyors, County Recorders, and Public Administrators shall be chosen by the electors of their respective counties at the general election in the year 1922, and at the general election every four years thereafter, and shall enter upon the duties of their respective offices on the first Monday of January subsequent to their election.

This provision applies to county officers only, and has no application to city officers.

You are advised, therefore, that city officers do not come within the provisions of said Act.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. C.H. JONES, *City Clerk, Lovelock, Nevada.*

SYLLABUS

139. Officers—Appointment—Tenure and Term under Appointment—Special and General Election—Next General Election Defined.

(1) Where a vacancy occurs in a county office the County Commissioners may fill such vacancy until the next general election.

(2) The next general election means the next election at which the particular office is to be filled under the law, and not the next election in point of time.

(Opinion affirmed by Supreme Court in case of State ex rel, Bridges v. Jepson, as County Clerk, 48 Nev. .....)

INQUIRY

CARSON CITY, June 27, 1924.

You advise that heretofore you were appointed Public Administrator of Clark County to fill the vacancy caused by the removal from the State of Mr. I.C. Johnson, who was duly elected for the term of four years at the election in 1926, or whether your successor should be elected at the next general election in November, 1924.

OPINION

Prior to the amendment of section 2781, Revised Laws of 1912, fixing the term of all county officers for a period of two years, there would be no difficulty in determining the present question. Stats. 1921, p. 96, amends section 2781, and by reason of said amendment the term of all county officers was fixed at four years, beginning with the election of 1922.

Inasmuch as Mr. Johnson was elected at the November election of 1922 for a four-year term, and you have been appointed to fill the vacancy caused by his removal from the State, the

question to be decided is whether your successor is to be elected at the next general election in November, 1924, or the next general election for the office in which the vacancy has occurred, or in November, 1926.

Section 2813, Revised Laws of 1912, provides:

> When any vacancy shall exist or occur in the office of County Clerk or any other county or township office, except the office of District Judge, the Board of County Commissioners shall appoint some suitable person to fill such vacancy until the next general election.

The matter herein presented must be determined upon the construction to be given the words "until the next general election" as used in the statute, supra.

Stats. 1917, p. 358, provide:

> A general election shall be held in the several election precincts in this State on the Tuesday next after the first Monday of November, 1918, and every two years thereafter, at which there shall be chosen all of such officers as are by law to be elected in such year, unless otherwise provided for.

It will be noted from a reading of this statute that a "general election" is to be held every two years, and at such general election "there shall be chosen all such officers as are by law to be elected in such year."

Section 2781 of the Revised Laws, as amended Stats. 1921, p. 96, provides that the county officers therein enumerated—

> Shall be chosen by the electors of the respective counties at the general election in the year 1922 and at the general election every four years thereafter.

In reference to the election of county officers, this statute, supra, is the authority in law which designates and fixes the time when the general election for county officers must be held.

If we assume that, by the words "next general election," as used in Rev. Laws 2813, it is meant, in the present instance, the general election in the year 1924, we find that there is no authority in law for holding an election for the purpose of selecting a Public Administrator in the year 1924.

It is imperative that the statute authorize and fix a time and place when public offices shall be filled by an election. Voting for and selecting an individual to fill a public office at any other time than that authorized by law would be invalid, and the people have no inherent right to assemble and elect a public officer unless such election has been authorized by legislative Act. The Supreme Court of Nevada, in the case of Sawyer v. Haydon, 1 Nev. 79, announces the following statement of law in support of this doctrine:

> But when a people live under a government which is regulated by written law, in which the powers, duties, and responsibilities of the different officers of the government and of the body of the people are clearly defined, and in which the law attempts to point out how and when citizens may exercise the election franchise, and for what officers they may vote, we cannot conceive of a case in which the people could be entitled to vote for any officer without some provision of law, either express or clearly implied, authorizing such vote to be cast.

In construing the words "until the next general election," as used in section 2813. I am of the opinion that in enacting said section the Legislature intended the words "until the next general election" to mean the next general election when candidates were selected to fill the office in

which the vacancy occurred.

Admitting that a general election is to be held in November, 1924, it is a general election only for electing officers who are by law authorized to be elected at that time, and the same would be a special election, considered from the standpoint of filling vacancies in offices, when the statute does not authorize or fix that particular time as the time when the election or selection of said officers are to be made.

> It is not necessarily the time or manner of holding an election to fill a vacancy that makes it a special election, but the fact that it is held at a time other than the time fixed by law to elect an officer for the regular or defined term. State v. Howell, 110 Pac. 386.

It is my opinion, therefore, that, under your appointment, you will hold office until December 31, 1926. Under section 2813, when the Legislature used the words "next general election," it meant the next general election for the particular office, and it did not mean the next general election in point of time.

Authorities examined:

Daggett v. Collins, 2 Nev. 351.
People v. Call, 132 Cal. 334.
People v. Hardy, 9 Utah, 68.
State v. Howell, 110 Pac. 386.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. C.D. BREEZE, *Public Administrator, Las Vegas, Nevada.*

SYLLABUS

140. Officers—Mortgages—Sheriff Not Entitled to Commission on Foreclosure Sale to Mortgagee.

Stats. 1919, p. 170: A sheriff is not entitled to commission on foreclosure sale to mortgagee for amount of judgment, etc., where no money passes.

INQUIRY

CARSON CITY, June 30, 1924.

You request an official opinion in reference to the following facts:

> Under a decree of foreclosure and order of sale, the Sheriff is commanded to sell certain mortgaged premises to cover the amount of judgment entered, with interest and costs of suit: upon the sale the property is purchased by the mortgage, but no money passes through the hands of the Sheriff.
>
> Query: Under the provisions of section 4, page 170, Stats. 1919, is said Sheriff entitled to and compelled to collect commissions upon the amount of said judgment?

OPINION

Under the statement of facts recited you are advised that the Sheriff is not entitled to collect a commission. This point was decided by the Supreme Court of Nevada in the case of Clover Valley Company v. Lamb, 43 Nev. 375.

The question would be answered in the affirmative if the sale, under the fact stated, was made under a judgment and execution. Roberts v. Ingalls, 36 Nev. 325.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

141. Revenue and Taxation—Delinquency—Amount of Payment Necessary to Redeem Property.

(1) Rev. Laws, 3654: Where the delinquent tax, costs, and penalties are less than $300, taxpayer may redeem property prior to sale by paying entire tax.

Rev. Laws, 3645: Or, taxpayer may pay on least subdivision assessed, without paying on whole.

Rev. Laws, 3651: If property goes to sale, taxpayer loses this right and entire tax must be paid by sale of smallest quantity sufficient to pay amount due.

(2) Where delinquent tax is over $300, Sheriff cannot sell any parcel for less than entire amount due.

(3) Rev. Laws, 3651, 3666: "Smallest quantity" means all interest of taxpayer in smallest designated portion, viz., quarter-section, town lot, or specified article of personal property, that will sell for enough to pay entire amount due.

INQUIRY

CARSON CITY, July 11, 1924.

(1) Where property has been duly and regularly assessed, and has become delinquent, can the Tax Receiver (where the amount due, exclusive of penalties and costs is under $300), at the date of sale, accept taxes upon, or sell, any specific part of such delinquent property, less than the entire amount found to be due as delinquent taxes, penalties and costs? In other words, if any person desires to redeem any part of delinquent property is it not required that the Tax Receiver collect the entire amount of the delinquency, plus the penalties and costs?

OPINION

Where property, on which the tax, exclusive of penalties and costs is less than $300, becomes

delinquent, the taxpayer may at any tie prior to sale, under the provisions of Sec. 3654, Revised Laws of Nevada, pay the entire tax, penalties, and costs and redeem the property; but, under the provisions of Sec. 3645, Revised Laws of Nevada, he is entitled at any time prior to sale, to pay the taxes, together with the penalties and costs if there be any, upon the least subdivision thereof that is entered upon the assessment roll, without paying the taxes on the whole.

If the property goes to sale the taxpayer loses this right and the Tax Receiver must then collect the entire amount of the taxes, penalties and costs by selling "the smallest quantity of the property that will pay the taxes, penalties and costs." (Sec. 3651, as amended.)

INQUIRY

(2) Where property has been duly and regularly assessed and has become delinquent (where the amount of the tax is over $300), can the Sheriff at the execution sale, sell any specific part or parcel of the property for less than the entire amount of the judgment, which includes penalties and costs?

OPINION

After judgment, upon execution sale, the Sheriff cannot lawfully sell any part or parcel of the property for less than the entire amount of the judgment, which includes penalties and costs.

INQUIRY

(3) In the sale of delinquent property, do you construe the language of Sec. 366 (Rev. Laws, vol. 3, p.2989) "provided that the officer in selling such property shall sell only the smallest quantity that will pay the judgment and all costs" to mean that a *specified quantity* shall be sold, or merely an undivided interest in the whole, viz: one-half, or one-third, or one-tenth, etc.?

By *specified quantity*, I mean a designated part or portion of the property assessed, viz: SE1/4 of NE1/4 of a certain section and township, or a designated lot of ground, or a designated lot of personal property.

OPINION

The words "smallest quantity" as used in sections 3651 and 3666 Revised Laws of Nevada, contemplate the absolute sale of *all the interest of the taxpayer* in and to the smallest quantity that will sell for enough to pay the taxes, penalties and costs, and not the sale of the smallest undivided interest in and to the whole property. For instance, if a purchaser at the sale for taxes of a quarter-section of land, bids for forty acres of such land for the amount of the taxes, penalties and costs, and there is no bid for a smaller quantity, the purchaser takes absolute title, subject to the redemption of the forty acres bid for, and the taxpayer retains undisturbed his title to the remaining one hundred and twenty acres.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General.*

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

SYLLABUS

142. Nevada Industrial Commission—Leasers of Mining Property are Employees and Entitled to Compensation for Injuries—Burden Not on Commission to Collect Premiums—Act Should Be Liberally Construed.

Nevada Industrial Insurance Act Stats. 1919, c. 176), Sec. 7(d); Subd. g, section 1: Member of leasing partnership, injured while working on property of mining company which has accepted benefits of Insurance Act is entitled to benefit, even though, through misconception of the law, leasers were not included in pay-roll list furnished Commission, there being no evidence that injured leaser rejected benefits of Act.

The burden is not on Commission to collect premiums due.

The Act should be liberally construed.

INQUIRY

CARSON CITY, July 11, 1924.

The following statement of facts is submitted:

The Seven Troughs Reorganized Mines Company during the time mentioned herein has substantially complied with the requirements of the Nevada Industrial Insurance Act.

On June 22, 1922, the company leased to W.B. Nixon and G.W. Warmoth a portion of its property and, on August 3, 1922, notified the Commission that the partnership of Warmoth and Nixon desired to insure their employees, and enclosed a check from the partnership as an advance premium payment. It appears that Earl L. Laughton was a member of this partnership. On April 6, 1922, the Commission, assuming that premiums should be paid by the partnership, directed a letter to the company requesting a pay-roll list of the lessees. In reply to this inquiry, the company stated that they had nothing to do with the matter but would advise the lessees of the Commission's demands.

Thereafter the lessees directed a letter to the Commission stating "that they did not employ any men and it is not our intention to carry insurance on the partners."

On November 15, 1923, the lease was canceled and a new lease executed to Warmoth and Laughton. The Commission had no knowledge of the execution of the new lease until January 23,1924.

Mr. Earl L. Laughton, one of the partners, while operating under said lease and in the performance of his duties in connection therewith, was injured on or about December 28, 1923.

An opinion is requested as to whether or not the Nevada Industrial Commission, under the facts recited should compensate Mr. Laughton under the provisions of the Act for injuries sustained by reason of an accident occurring while working on the leased premises.

OPINION

A review of the above facts establish and, for the purpose of this opinion, we assume that the lessor, Seven Troughs Reorganized Mines Company, had accepted the benefits of the Nevada Industrial Insurance Act and had paid the premium required under the law, except, that said company, due to a misconception of the law, did not include or pay premiums for the leasers on said property, which would include Earl L. Laughton, the party injured.

It is my opinion that the Nevada Industrial Commission is liable and should compensate Mr. Laughton for the injuries received, providing, of course, that no facts exist other than those stated which might militate against his claim for compensation.

Section 7 1/2 (d) of the Nevada Industrial Insurance Act provides:

> Workmen commonly called "leaser," engaged individually or in association with other workmen in performing manual labor upon the mining property of another in the expectation of finding, developing, or extracting ore or mineral of value under an agreement, oral or written, to share in whole or in part the value of the ore or minerals found, developed or extracted with the lessor, shall be deemed employees of such lessor, and for the purpose of this Act shall be deemed to be employed at the average wage paid to regularly employed miners in the locality. (Added, Stats. 1919, c. 176.)

By virtue of this section, workmen who operate by virtue of a lease, and perform manual labor upon the mining property of another, under the circumstances stated in said section, are clearly employees of the lessor.

This section definitely and without ambiguity fixes the status of what are termed "leasers," and, under the facts of this case, Mr. Laughton comes within this definition.

It appears that at the time Mr. Laughton was injured he was performing work upon the mining property of the Seven Troughs Reorganized Mines Company under and by virtue of the lease executed November 15, 1923.

No rejection of the benefits of the Act was made by him. It is true, that one of the partners to the original lease, signified an intention "to not carry insurance on the partners," this expression was made, however, under a mistaken conception of the law. Such declaration made by one of the parties would have no force of effect as to the status of his associates. A rejection of the Act by one employee could not be considered as binding upon a coemployee. In any event, at the time Mr. Laughton received his injuries he was operating under a new lease and there is no evidence of any declaration made by Laughton that would be consistent with the conclusion that he desired to reject the benefits of this law.

That the Commission had no knowledge of the execution of the new lease is immaterial; to hold otherwise would be to sustain the contention, that, before the Commission is liable, where an injury occurs, this liability must be predicated upon actual knowledge of every individual employed by a contributor.

From the facts stated it appears that all parties interested acted upon the theory that the "leasers" were not employees of the lessor, and, that if they desired to come within the provisions of the Act, contributions to the Industrial Commission by the way of premiums should have been made. Due to this misapprehension, the lessor although contributing to the Nevada Industrial Commission based upon what is termed regular pay-roll employees, did not include the leasers

therein, and because of this condition, some doubt is expressed concerning the duty of the Commission in compensating Mr. Laughton for the injuries received.

Section 7 1/2 (d) determines the status of lessors and establishes the relationship of employer and employee, as existing between the lessor and lessee, and under the circumstances enumerated herein. Mr. Laughton, being a leaser, was an employee of the lessor.

Assuming in the given case that an employer by mistake, and without fraud, does not include in his premium payment, all individuals employed by him, could it be successfully maintained that the man for whom no premium is paid would not be entitled to be compensated in the event an injury was received? Such a construction cannot be indulged in, because, it would violate the spirit and intent of the law and work a hardship and an injustice on the workingman.

I am not unmindful, of subdivision (g), sec. 1, which provides that: "failure on the part of any such employer to pay the premiums as by the provisions of this Act required shall operate as a rejection to the terms of the Act."

In the instant case the facts admit that the lessor has paid the premiums and there is no provision in the Nevada Industrial Insurance Act which warrants the conclusion, that an employer has rejected the terms of the Act because he fails to include in the premium payments all of the men upon his pay-roll. On the other hand, however, a reading of the sections quoted above shows that the Legislature realized it might be impossible to include all the individuals working for the mining company in the report of the pay-roll and the premiums due thereon. This for the reason that it provides for an estimate of the monthly pay-roll.

Nothing stated herein is to be construed as placing the burden upon the Commission to collect the premiums due from those participating in the Act. This onus is clearly upon the party desiring to accept the provisions of this law.

This Act is to receive a fair and liberal construction for the protection of the employees and, under the circumstances recited, it would require a narrow and technical interpretation of the provisions of this law to sustain the theory that Mr. Laughton should not be compensated for the injury received.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

NEVADA INDUSTRIAL COMMISSION, *Carson City, Nevada.*

SYLLABUS

143. Officers—Sheriff Has No Authority to Appoint Deputy at Expense of County.

Stats. 1917, p. 298, makes no provisions for compensating Deputy Sheriff at expense of county of Lander, even though County Commissioners consented to appointment made by Sheriff.

INQUIRY

CARSON CITY, July 11, 1924.

An opinion is requested in reference to the following facts: Statutes of Nevada, 1917, page 298, provide for the salaries of the various officers of Lander County. Under the authority of this Act, the Sheriff received a salary of $2,400 per annum. He is authorized to appoint a jailor at a salary of $100 per month. An opinion is requested as to whether the Sheriff, with the consent of Board of County Commissioners, may appoint a Deputy Sheriff to serve in Austin, at a salary of $150 per month.

OPINION

Statutes of Nevada, 1917, page 298, authorizes the Sheriff to employ a jailor, and the Act fixes the compensation of this office. No provision is contained in this Act authorizing the Sheriff to appoint a deputy.

While under the general law the Sheriff may appoint a deputy, the county would not be obligated to pay such deputy any compensation. The Legislature, by statutes 1917, supra, having made no provision for compensating the Deputy Sheriffs, the Sheriff would have no authority, even with the consent of the Board of County Commissioners, to appoint a Deputy Sheriff at the expense of the county.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

144. Fish and Game—Sage Chicken—Prairie Chicken—Closed Season—County Commissioners Power to Change.

Stats. 1923, p. 349, sections 5 and 20: Within prescribed limits, County Commissioners may change open or closed seasons for any desired period, upon petition of not less than fifty resident electors.

INQUIRY

CARSON CITY, July 15, 1924.

An opinion is requested concerning the following facts:

Statutes of Nevada, 1923, page 349, provides for the protection and preservation of game. Section 5 of said Act, provides as follows:

> It shall be unlawful for any person to take any sagehen or sagecock, or prairie chicken, except between the 16th of August, and the 31st of August, both dates included, in each and every year.

Section 20 of said Act, delegates to the Board of County Commissioners, the privilege of changing certain seasons within certain limits.

An opinion is requested as to the authority of the Board of County Commissioners under

section 20, to change the sagehen season to any period other than between August 16 and August 31.

OPINION

Under section 20, the Board of County Commissioners is authorized "to lengthen the time of the closed season or fix the dates of the open season within the limits hereinbefore prescribed, for any species of game mentioned in this Act."

This authority is given to the Board of County commissioners upon petition of not less than fifty resident electors of said county. The Act specifically recites that the Board of County Commissioners must adopt an ordinance, and publish the same when it is desired to exercise authority under said section. It will be noted that the power and authority thus given to the Board of County Commissioners is limited in this respect:

> That in no event shall the County Commissioners of any county * * * extend the open season or shorten the closed season for any species of game whatsoever.

It is my opinion that the Board of County Commissioners, under the provisions of section 20, may change the sagehen season to any period which it may desire, upon petition, but in making said change it must comply with that portion of the provision of section 20, which limits the right to extend the open season or shorten the closed season.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

145. Election—Election Precincts Created and Abolished—Mailing Precincts.

Stats. 1923, c. 207: Precincts containing not over twenty electors registered at last preceding election are automatically abolished.

Same, sections 1 and 6: Mailing precincts may be established by County Commissioners where there are not more than twenty votes registered for the last preceding general election, without petition. Where there are not more than twenty qualified electors, the showing is made by petition. The only limitation prescribed is "not more than twenty."

INQUIRY

CARSON CITY, July 16, 1924.

You submit the following questions and request an official opinion:

(1) Is an election precinct where there were not at least ten qualified electors at the preceding election automatically abolished by Statutes 1923, chapter 207?

(2) If so, for the reestablishment of that precinct even for a mailing precinct,

would it not be necessary to present another petition signed by ten or more qualified electors, permanently residing in said precinct?

(3) How many qualified electors are necessary for the creation or establishment of a mailing precinct under section 6, chapter 207, Statutes 1923?

An opinion is requested, first, as to whether or not under the above provisions of law, election precincts, where there were not at least ten qualified electors at the preceding election, are automatically abolished. Second, if so, for the establishment of a mailing precinct, will it not be necessary to present another petition signed by ten or more qualified electors permanently residing in said precinct. Third, how many qualified electors are necessary for the creation or establishment of a mailing precinct, under section 6, chapter 207, Statutes 1923?

OPINION

Replying to your first interrogatory you are advised that under Statutes of 1923, supra, election precincts for voting purposes containing not more than twenty qualified electors at the last preceding election, are automatically abolished.

Under section 6, Statutes 1923, p. 373, it is the "duty of the Board of County Commissioners." at their regular meeting in the month preceding any election, to establish mailing precincts in accordance with this Act, and forthwith mail notification to the registration agent in each precinct so designated.

The mailing precincts that may be established by the Board of County Commissioners under the provisions of section 1 of said Act are defined as follows:

An election precinct where there were not more than twenty votes registered for the last preceding general election.

Under this classification, the Board of County Commissioners may establish a mailing precinct at such point without the presentation of a petition.

Section 1 defines the other mailing precinct to be "where it shall appear to the satisfaction of the Board of County Commissioners that there are not more than twenty qualified electors."

This showing may be made by petition.

Replying to your third interrogatory, you are advised that section 6, chapter 207, Statutes 1923, leaves the matter of establishing mailing precincts to the discretion of the board of County Commissioners. No statement is contained in the Act as to how many voters must be in the precinct thus established. The only provision is that the precinct shall contain not more than twenty votes.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

146. Nevada Industrial Commission—Lump-Sum Payments, When Allowed.

(1) Industrial Insurance Act, Section 31 (Stats. 1913, p. 137): The Commission may, in its discretion, allow conversion of compensation into lump-sum payment not exceeding $5,000, under such rules as may be devised for obtaining present value of compensation.

If suit is brought, the proceedings are trial de novo. Court hears entire matter. The power of Commission ceases. Court may direct lump-sum payment under proper pleading and proof.

(2) Same Act, section 25, subdivision 10: No lump-sum settlement is allowed in action by beneficiary to recover death benefits.

INQUIRY

CARSON CITY, July 16, 1924.

(1) Where an employee institutes an action in the District Court against the Nevada Industrial Commission, and the plaintiff prevails in such action, may judgment be entered directing the amount thereof be paid in a lump sum, or must judgment so entered be paid in monthly payments in accordance with the disability established?

(2) Where such action is instituted by the beneficiary under said Act to recover death benefits, what is the rule as to the power of the Court to enter a judgment directing the payment of a lump-sum?

An official opinion is requested in reference to these two inquiries.

OPINION

The statute in determining and fixing compensation for injured employees, provides that the same shall be paid upon the percentage of disability suffered, and rated and payable monthly in an amount based upon the disability as provided by law.

The principle involved in the compensation Act is that the benefits received are a substitute for the wages of the injured employee, and with this theory in mind, the Legislature has provided for periodical payments. The purpose of this method of payment is to preclude any possibility of an imprudent employee or dependent wasting the means provided for his support and thereby becoming a burden upon society. The practice of commuting payments to a lump sum, if unrestricted, would result in great abuse and injustice. The disabled workman, in the hope of obtaining a large amount of money at one time, would be inclined to sacrifice his right to additional benefits to which he might be entitled, in order to obtain a lump-sum settlement.

If the Nevada Industrial Insurance Act contained no provision authorizing lump-sum settlements, clearly the Court would have no authority in entering a judgment in this class of cases, to direct lump-sum payments.

Section 31, of the Nevada Industrial Insurance Act provides:

> The Nevada Industrial Commission may, in its discretion allow the conversion of the compensation herein provided for, into a lump-sum payment, not to exceed the sum of $5,000, under such rules and regulations, and system of compensation as may be devised for obtaining the present value of such compensation.

The Commission would have no authority, however, in all cases where monthly payments are

to be made, to commute these periodical payments into a lump-sum settlement. In each case where commutation is made by the Commission, facts must exist which warrant the Commission in exercising this discretion.

When a case is presented to the Court by an employee against the Commission, under the Nevada Industrial Insurance Act, the proceedings in court are considered a trial de novo, and it becomes the duty of the Court to hear the entire case, and to pass upon all questions involved or presented. The Commission has no further power in the premises. It could perform no function in the matter after the suit is brought and every question involved is subject to examination and disposition of the District Court. The District Court has the same power to award a lump-sum settlement in each case as the Commission. The provisions of section 25, supra, become equally applicable in the proceedings before the District Court.

Where a lump-sum award is made by the Court, facts must appear in the complaint which justify such award and in the absence of such allegations and proof, the award in lump sum cannot be made.

It is my opinion, therefore, in answer to the first question, that the District Court may, when the proper showing is made, in entering judgment, direct that the judgment be paid in a lump sum, conditioned, however, that the complaint recite facts and the proof establish matters which will warrant the Court in exercising its discretion and allowing a lump sum.

(2) In reference to the second question presented, the provisions of subdivision 10, section 25 of the Nevada Industrial Insurance Act, the allowance of a lump-sum settlement in death-benefit cases, is prohibited. Subdivision 10 of section 25 provides:

> In such cases where compensation is awarded to the widow, dependent children or persons wholly dependent, no lump-sum settlement shall be allowed.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

NEVADA INDUSTRIAL COMMISSION, *Carson City, Nevada.*

SYLLABUS

147. Elections—Primary Elections—Instructions on Ballot as to Number To Be Voted for Governed by Number To Be Elected.

Primary Election Laws, section 12, subdivision (e), as amended Stats. 1921, c. 248: Names of candidates on ballot are grouped according to office sought. Each group is preceded by instruction as to how many to vote for, depending on number to be nominated, as fixed by statute.

Stats. 1923, p. 51: Section 22 amends above provision so that number to be voted for depends, not upon the number to be nominated, but upon number to be elected. Thus, in case of office of Justice of the Peace where only one is to be elected, instruction should be "Vote for one."

INQUIRY

CARSON CITY, July 25, 1924.

In preparing the Official Ballots for Nonpartisan Candidates for Justice of the Peace, are the words "Vote for one" or "Vote for two" to be inserted. After reading section 22, page 51, Stats. 1923, I am somewhat puzzled which would be correct.

OPINION

The above question is answered by subdivision (e) of section 12 of the primary law, as amended by chapter 43, Stats. 1923, and not by section 22 of said law, as amended.

Subdivision (e) of section 12 of the Primary Law of 1917, as amended by chapter 248, Stats. 1921, reads in part, as follows:

> The names of the candidates to be grouped according to the office for which they are candidates and the names in each group shall be placed with the surname first, arranged alphabetically, and each group shall be preceded by the designation of the office for which the candidate seeks nomination, and the words "Vote for one," or "Vote for two," or more, according to the number to be nominated.

The right to "Vote for one" or "Vote for two," as the case may be, is conferred and limited by the statue, and, under the language of the statute above quoted, the Supreme Court, in State v. Jepsen, 46 Nev. 193, at pp. 195-196, uses this language:

> Subdivision (e) of section 12 of the Act as amended, which is substantially the same as it was when the Act was originally adopted, states what instructions shall be placed on the primary ballot whether the candidate be partisan or nonpartisan. So far as it is applicable to the point at issue, it provides that the names of the candidates shall be grouped on the primary ballots according to the office for which they are candidates, and the names in each group shall be preceded by the designation of the office for which the candidate seeks nomination "and the words 'Vote for one' or 'Vote for two,' or more, according to the number to be nominated." The statute provides no different instructions for a nonpartisan office; consequently "the words 'Vote for one' or 'Vote for two,' or more, according to the number to be nominated," apply alike both to partisan and nonpartisan candidates, and the statute means that each group of names of candidates on the primary ballots shall be preceded by the words "Vote for one," or "Vote for two," or more, according to the number to be nominated by the political party or body nominating candidates for the office or position to be filled. If the candidates are partisan, and but one person can be elected to that office at the general election, then each political party can nominate but one candidate for that office; but if the candidates are nonpartisan—that is if they are seeking the nomination for a nonpartisan office, and but one person can be elected to that office at the general election—the law clearly provides that two persons may be nominated for that office by the electors as a whole, who vote at the primary election. Since there were three candidates for the nomination for each of the nonpartisan offices to be filled, mentioned in the amended petition, and since two candidates were to be nominated for each of those offices, under the expressed language of the

Legislature, it follows that the words "Vote for two" should precede the names of each group of candidates mentioned in the amended petition.

But the Legislature of 1923 amended this provision of the law, and made the right to "Vote for one" or "Vote for two" to depend, not upon the number to be nominated for the office, but upon the number to be elected to that office, so that if there are two candidates to be elected to an office, as two members of the Board of Education, or two Regents of the University, or two members of the Assembly, the instructions should be "Vote for two" or more, according to the number to be elected; but, in all cases where there is but one to be elected to an office, the instruction should be "Vote for one."

In the specific instance mentioned, as there is, under the present statute, but one Justice of the Peace to be elected, in each township, the instruction should be "Vote for one."

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General.*

HON. L.E. GLASS, *County Clerk, Tonopah, Nevada.*

SYLLABUS

148. Elections—Primary Election—Independent Candidate Should be Registered as Independent.

The spirit and purpose of primary law is that each political party may have opportunity to nominate its candidate. If a person who runs independently presents himself for registration, he should be registered "Independent" or without party designation, otherwise he might be challenged on ground that "he (the voter) does not belong to the political party designated upon the register."

INQUIRY

CARSON CITY, July 25, 1924.

I find no provision in the statutes as to how a person running independent should be registered. If he is running independent for Constable should he be registered as an independent or can he be registered as a Republican or Democrat and vote at the primary election? Although the names of the independent candidates do not appear on any ballots at the primary election.

OPINION

While there is no specific provision of the statute prohibiting one who files for an independent nomination for an office, from participating in a primary election, it would plainly be a violation of the purpose and spirit of the primary law to permit him to do so. The purpose of the primary law is to permit and confer the right upon all persons who belong to a political party, and presumably who expect and desire to support its candidate after the nomination, to take part

in such nominations, and to prevent all other persons from doing so. And to permit one who does not expect to do this, but to oppose and contest with one of such candidates for an office at the general election, would clearly be a violation of that purpose.

Further, it is provided in section 16, of the primary law, that a cause for challenge to vote at a primary election may be made upon the ground that "he (the voter) does not belong to the political party designated upon the register.

We can think of no stronger evidence that one does not belong to a political party than the fact that he is actually running as a candidate against a nominee of such party for an office, at the general election, and we are sure that any Court to which the matter might be presented for determination, would hold such evidence to be conclusive.

In respect to your specific question, if one who is running for an office independently presents himself for registration, he should be registered "Independent," or without party designation. Whereas, if he has already been registered and given a party designation on the register, he may be challenged as above stated, if he attempts to vote a party ticket at a primary election.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General.*

HON. L.E. GLASS, *County Clerk, Tonopah, Nevada.*

SYLLABUS

149. Election—Registration—Absent Voters.

All voters who voted absent-voter ballots at last general election must reregister if they desire to vote at ensuing election.

Under the provisions of sec. 2, Stats. 1917, p. 425, persons engaged or employed in the military, national or civil service of the United States or the State of Nevada do not come within the provision of this statute, neither do persons who are kept at an alms house or asylum. Students at seminary or other institution of learning are also exempted.

INQUIRY

CARSON CITY, July 25, 1924.

You advise that many names are now on the registration list of those who voted absent voter's ballots at the election of 1922. Are such persons entitled, under the law, to apply for absent voter's ballots at the election of 1924 without reregistering?

OPINION

This question is answered by the provisions contained in section 15, Stats. 1921, p. 153, as

amended Stats. 1923, p. 197. The latter portion of said section reads as follows:

> The County Clerk is hereby directed to cancel all registration cards of persons who voted by absent voter's ballot in the manner provided by section 16, of said Act, approved March 27, 1917.

The only exception to this statute, are those persons described in section 2, Stats. 1917, p. 425, which reads:

> No person shall be deemed to have gained or lost such residence by reason of his presence or absence employed in the military, national or civil service of the United States, or the State of Nevada; nor while engaged in the navigation of the waters of the United States, or of the high seas; nor while a student at any seminary or other institution of learning, nor while kept at an alms house, or other asylum at public expense.

The conclusion therefore, must necessarily follow, that all persons who voted an absent voter's ballot in the election of 1922, except those enumerated in section 2, Stats. 1917, p. 425, must reregister in order to vote at the election of 1924.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. L.E. GLASS, *District Attorney, Tonopah, Nevada.*

SYLLABUS

150. Election—Primary Election—Nonpartisan Candidates.

(1) Where no contest in nonpartisan office at primary, name of candidate not to be printed on official ballot.

(2) Where there are two candidates for nomination for nonpartisan office both names go upon official primary ballot with instructions to "Vote for one."

(3) Names of nonpartisan candidates appear on Democratic, Republican, and Nonpartisan ballot.

(4) Where one candidate for nonpartisan office receives a majority of all votes cast at a primary election, his name only goes on the ballot at general election.

INQUIRY

CARSON CITY, July 29, 1924.

Will you please advise me concerning the nomination of candidates for a nonpartisan office? In this county we expect to have candidates for the office of Justice of the Peace, for Eureka Township. In case the two candidates file, would it not become the duty of the County Clerk to place the two names on the primary election ballot and, in case there names are placed on the ballot at the primary election, will one of the candidates be eliminated, or will both names appear again on the general election ballot?

OPINION

Your first inquiry is answered by the provisions of subdivision "J," section 12, of the primary election law, which provides:

> In addition to the party ballots provided for in this section, the County Clerk shall prepare and have printed a "nonpartisan primary ballot; *provided,* that the names of all party candidates shall be omitted therefrom."

Section 22, of the election law provides:

> The party candidate who receives the highest vote at the primary shall be declared to be the nominee of his party for the November election. In the case of an office to which two or more candidates are to be elected at the November election, those party candidates equal in number to positions to be filled who receive the highest number of votes at the primary shall be declared the nominees of their party.
>
> In the case of a nonpartisan office, the candidates equal in number to twice the number to be elected to such office, or less, if so there be, who receive the highest number of votes shall be the candidates for such office at the ensuing election, and their names as such candidates shall be placed on the official ballot voted at the ensuing election; *provided, however,* that in case there is but one person to be elected at the November election to a nonpartisan office, any candidate who receives at the September primary election a majority of the total number of votes cast for all the candidates for such office, shall be the only candidate for such office at the ensuing election. *As amended Stats. 1923, p. 51.*

Under the law therefore, the names of the candidates for the office of Justice of the Peace must be placed upon the nonpartisan primary ballot.

As to whether the names of both candidates shall, after the primary election, be placed on the ballot for the general election, the provision of the statute is clear and free from ambiguity. There is to be but one person elected to the office of Justice of the Peace. If at the primary election one of the candidates for the office receives the majority of the total number of votes cast at the primary election for all candidates, the one receiving such vote shall be the only candidate at the ensuring election.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

151. Fish and Game—Recreation Grounds, Game Refuges—Governor May Designate—No Persons Permitted to take Game Therefrom.

(1) Stats. 1923, c. 78, section 1: Governor is authorized by proclamation, to set aside not to exceed twenty-five recreation grounds and game refuges on public

domain. Privately owned lands are excluded therefrom. All persons including those whose lands are surrounded by or contiguous to such refuges are prohibited from taking or attempting to take game therefrom.

(2) Stats. 1923, c. 195, prohibits all persons from killing game during closed season, even on their own lands.

(3) Stats. 1917, c. 214, permits person to hunt or fish on his own land during open season, but not during closed season, without license.

INQUIRY

CARSON CITY, July 31, 1924.

On June 30, 1923, the Governor set aside by proclamation eleven State Recreation Grounds and Game Refuges under the provisions of chapter 78, Statutes 1923, and on December 15, 1923, another proclamation was issued further describing and setting aside such refuges and also additional ones.

Under the statute reference has been made to lands within the "public domain."

Inquiry has now been made whether in the case of lands held in private ownership such as homesteads surrounded by the "public domain" or contiguous thereto, owners of such lands have the right to take and kill game and birds otherwise prohibited by such proclamations. The question also involves the right of owners of private lands to hung and kill game and birds during the open season and during the closed season as fixed by the general game laws of Nevada.

OPINION

Section 1 of chapter 78, Statutes of 1923, authorize and direct the Governor to designate and set aside by proclamation "suitable areas described by metes and bounds of the public domain of Nevada, not exceeding twenty-five in number, such areas to be known as State recreation grounds and game refuges."

The above language limits the power of the Governor, in creating and setting aside game refuges, to such areas of the "public domain" as he shall deem advisable, and excludes from such areas and from the operation of chap. 78, Stats. 1923, all lands which are privately owned or shall have been withdrawn from the "public domain," whether they be surrounded by public lands set aside as a game refuge or otherwise. The terms "public domain" and "public lands" are synonymous, and are used to designate such lands of the United States, or other States, as are subject to sale or disposal under general laws. Barker v. Harvey, 181 U.S. 481.

The statute prohibits all persons, whether or not they reside on privately owned lands contiguous to or surrounded by a game refuge, from taking or attempting to take any game bird or animal from such game refuge.

Chapter 195, Statutes of 1923, prohibits all persons (which includes persons hunting on their own lands) from killing or attempting to kill any game bird or animal, excepting during the open season and in the manner, and subject to the conditions therein provided. The only preference given to a person hunting on his own land is contained in section 68, chap. 214, States. 1917, which permits a person to hunt or fish on his own lands during the open, but not the closed

season, without a license.

By order of the Attorney-General:

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General.*

HON. JAMES G. SCRUGHAM, *Governor, Carson City, Nevada.*

SYLLABUS

152. Officers—Pershing County Treasurer—Deposit of County Funds in Local Banks—Liability of Treasurer and Banks—Constitutionality of Act.

(1) Stats. 1919, c. 62, section 18: County Treasurer and funds in his possession do not come within provisions of Act requiring "officials" of that county to deposit certain funds in local banks, but under

(2) Revised Laws, section 1687, such deposit may be made if Treasurer's bondsmen agree, but Treasurer and bondsmen are not relieved from responsibility by such deposit.

(3) The constitutionality of the Act need not be passed upon in view of the foregoing answers.

INQUIRY

CARSON CITY, August 6, 1924.

You submit the following questions that have heretofore been presented to you by the County Treasurer of Pershing County with the request for an official opinion. The questions so presented read as follows:

(1) Is section 18, chapter 62, Statutes of Nevada, 1919, constitutional?

(2) Assuming this question to be answered in the affirmative, does the law make it mandatory upon the County Treasurer to deposit county funds in local banks without condition?

(3) At just what point does the County Treasurer's responsibility cease and the bank's responsibility begin?

OPINION

Replying to the first interrogatory, I am of the opinion that the several questions here presented may be decided without passing upon the constitutionality of section 18, Stats. 1919, chap. 62.

The section referred to reads as follows:

> The officials of Pershing County shall deposit all funds of said county appropriate for bank deposits equally, in the several banks located and transacting business in the city of Lovelock, dividing said funds equally, or as near equally as

may be practicable, among said banks in the city of Lovelock * * *.

As I view the provisions of this section, the office of County Treasurer is not to be included in the words, "officials of Pershing County." and the money in the hands of the County Treasurer cannot be considered as "funds of said county appropriate for bank deposits."

Section 1687 Revised Laws of Nevada, 1912, provides that:

> The County Treasurers of the several counties of this State may, when a private or incorporated bank is located at the county-seat, deposit, with unanimous consent of their bondsmen, county funds in such bank or banks upon open account * * *.

The funds in the possession of the County Treasurer cannot be said to be "funds of said county appropriate for bank deposit" until the provisions of section 1687 have been complied with, and consent of the bondsmen first had and obtained.

The Supreme Court, in the case of State v. Nevin, 19 Nev. p. 162, clearly defined and sets forth the duty and responsibility of County Treasurers in respect to funds coming into their possession. In this case the Court held that in an action brought against the County Treasurer it was no defense to plead that the shortage was caused by robbery.

I conclude, therefore, that:

(1) The question here presented can be determined without passing upon the constitutionality of the law.

(2) That the County Treasurer of Pershing County and the funds in his possession are not to be considered as coming within the provisions of section 18, Stats. 1919, and therefore it is not the duty of the County Treasurer to deposit such funds in local banks, but such deposit may be made when the provisions of section 1687, supra, are complied with.

(3) The county Treasurer and his bondsmen are always liable for county funds, and the deposit of such funds in banks in no way relieves the liability created under the Nevada statute.

Authorities examined:

State v. Commissioners of Washoe County, 22 Nev. 203.
Yarnell v. City of Los Angeles, 25 Pac. 767.
Rothschild v. Bantel, 91 Pac. 803.
People v. Wilson, 49 Pac. 135.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

153. Elections—Primary Election—Party and Nonpartisan Ballots—Voter To be Given Only Such Ballot as His Registration Indicates.

Stats. 1923, p. 50, section 12: Separate ballots shall be printed for each party and for nonpartisan candidates.

Same, subdivision (i) determines size, shape, etc. of ballots.

Same, subdivision (j) provided for nonpartisan ballot which shall omit names of party candidates.

Those who fail to designate party affiliations shall receive and vote nonpartisan ballot only.

INQUIRY

CARSON CITY, August 8, 1924.

Owing to the fact that this office has received many inquiries concerning questions relating to the primary election, printing of ballots, nonpartisan candidates, "Vote for one," "Vote for two," it has been deemed advisable to prepare an opinion and mail the same to all officers upon whom the law places the duty of having prepared for printing the official primary ballots.

OPINION

Printing of Ballots: Section 12, Election Law, as amended 1923, provides in part:

> * * * and separate official ballot for each party and for nonpartisan voters shall be printed and provided for use in each precinct, but such ballots must be alike in the designation of nonpartisan candidates.

Subdivision (i), section 12, provides:

> The County Clerk shall determine the size and shape of the ballot in such a way as to conform to the provisions of this Act * * *. Party ballots shall have an extra heavy black vertical line between the column or columns on the left in which the names of candidates for party offices shall be placed and a column on the right in which the names of candidates for nonpartisan offices shall be printed.

Subdivision (j), section 12, provides:

> In addition to the party ballots provided for in this section the County Clerk shall prepare and have printed a "Nonpartisan Primary Ballot" which shall be the same, except as to size thereof, as the other official primary ballots; *provided,* that the names of all party candidates shall be omitted therefrom.

The County Clerk shall, therefore, have printed, irrespective of the fact as to whether or not a contest exists in the Democratic or Republican party, a ballot for the respective parties for the primary election, containing, first, if there is a contest in the party, the names of the respective candidates for the several positions, together with the names of the nonpartisan candidates. If no contest exists in the Republican or Democratic parties, an official primary ballot shall be printed for the Republican and Democratic parties, and such ballot shall only contain the names of the nonpartisan candidates.

In addition to the Democratic and Republican primary ballot, there shall be printed "a nonpartisan primary ballot, which shall be the same, except as to size thereof, as the other official primary ballots; provided, that the names of all party candidates shall be omitted therefrom."

Under the law, therefore, it is necessary that there be printed an official Democratic primary ballot and an official Republican primary ballot and a nonpartisan primary ballot. In the event a contest exists in the Democratic party, there shall be printed upon such Democratic ballot the names of the candidates for the respective positions, together with the names of the candidates

for the respective positions, together with the names of the nonpartisan candidates. In the event no contest exists in the party for the respective positions, then there shall appear on the Democratic ballot the names only of the nonpartisan candidates.

There shall be printed a Republican primary ballot containing the names of the party candidates for the respective positions in the vent there is a contest, together with the names of the nonpartisan candidates. If no contest exists in the Republican party, for the respective positions, there shall be printed a ballot containing the names only of the nonpartisan candidates. A nonpartisan ballot shall be printed containing the names of the nonpartisan candidates.

Upon the nonpartisan ballot the words "Vote for one" shall appear thereon, if there is to be but one candidate to be elected to such office at the ensuing general election.

Those who fail to designate their party affiliations when registering are entitled to receive and vote a nonpartisan ballot only.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

To County Clerks and Election Officials.

SYLLABUS

154. Election—Registry Card—Duty of County Clerk to Accept though Irregularly Marked by Applicant Who Cannot Write.

Election Laws 1924, sec. 12; Rev. Laws, 6294(7), 3913: It is the duty of the County Clerk to accept registry card of applicant which bears his name, and, in place of usual cross or (x), his thumb print and words "his mark," and signature of witness is sufficient.

INQUIRY

CARSON CITY, August 15, 1924.

You request an opinion upon the following facts:

"Has the County Clerk the right to decline to place upon the registry list of the county, the name of an applicant for registration whose registry card is not signed but which bears a thumb print or finger print in lieu of the signature required by law?"

OPINION

The card of the individual in question has been submitted with this request and it appears that the name of the individual is signed to the card and to the right of this signature appears a thumb print in ink, and over and below said thumb print, are written the words "his mark," Witness, and the names of the witness is signed to said card.

Section 12, Election Laws 1924, as compiled by the Secretary of State, provides:

Any elector residing within the County, may register by appearing before the County Clerk or deputy registrar, and making satisfactory answers to all questions propounded by the County Clerk touching items of information called for by such registry card and by signing and verifying the affidavit or affidavits on such card."

Section 6294(7) defines the word "signature" as follows:

The word signature shall include any memorandum, mark or sign made with intent to authenticate any instrument or writing, or the subscription of any person thereto.

Section 3913, Rev. Laws, provides:

The signature of a party, when required to a written instrument, shall be equally valid if the party cannot write, provided the person makes his mark, the name of the person making the mark being written near it, the mark being witnessed by a person who writes his own name as a witness.

It appears that the person in this inquiry whose registration card is questioned complied with section 3913. It is true that in making his mark he did not make a cross or "X," but he did make a mark, and by making this mark he did so with intent to authenticate his registration card.

I am of the opinion therefore, that the law has been complied with by the registrant, and that the registry card should be accepted.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

155. Election—Registration—Chinese—Foreign-Born Chinese Whose Father Was American-Born Is Entitled to Registration and Citizenship Without Naturalization—Challenging Vote of Such Person—Statute Liberally Construed.

(1) A Chinese who was born in China but whose father was American-born is American citizen, and entitled to right of suffrage without naturalization.

(2) General Election Laws, section 23, provides for challenge.

(3) Statutes prescribing duties of registration officers should be liberally construed, so that constitutional right of suffrage be not denied.

INQUIRY

CARSON CITY, August 16, 1924.

The following inquiry has been submitted for an official opinion, to-wit:

Has the County Clerk the right to reject an application for registration in the event that answers given to questions propounded to the applicant are unsatisfactory, or it appears from the statements made that such applicant is not

entitled to register?

With this request for an opinion there is submitted the original registration card containing the signature of the party desiring to be registered, together with the answers to questions set forth on the card.

OPINION

It appears to me that the question involved in this case, and to be decided, will not rest upon the query presented.

The registration card discloses that the party desiring to be registered is a Chinese. It is stated on the card that his father was born in America and that he was born in China. It further recites that he was naturalized in 1913. The question to be decided is whether, under these facts, the registrar should register the individual.

It appears that the father of this man was born in America. This being the case, and this fact admitted, the father was a citizen of the United States.

In the case of In Re Look Tin Sing, 21 Fed. 905, the Court decided that:

> A child born of Chinese parents within the dominion and jurisdiction of the United States is a citizen of the United States.

I am not unmindful of the provisions of the Act of Congress which prohibits the naturalization of Chinese persons. The Supreme Court of the United States, however, in the case of United States v. Wong Kim Ark, 42 L. Ed., p. 890, decided that:

> The refusal of Congress to permit the naturalization of Chinese persons cannot exclude Chinese persons born in this country from the operation of the constitutional declaration that all persons born in the United States subject to the jurisdiction thereof, are citizens of the United States.

It having been stated, and admitted that the father of the appellant was born in America, and therefore is a citizen of the United States, the fact that the appellant was born in China would in no way affect his status as an American citizen.

> The foreign-born children of a citizen are themselves citizens. In the application of this rule it is wholly immaterial whether the parents are citizens by birth or naturalization. Ex Parte Wong Fu, 230 Fed. 534.

While its is true that the appellant states he was naturalized in the year 1913, and no naturalization papers were exhibited, yet, under the facts stated by him, there was no necessity for his being naturalized, and his citizenship rests upon the fact that his father was born in America. I am, therefore, of the opinion, that the registration card should be accepted and if any person desires to challenge his right to vote, section 23, General Election Laws, provides a remedy.

We must remember in this and other cases, dealing with the right of an individual to vote, no technical or strict construction should be placed upon the law, if in doing so, the constitutional right of suffrage is to be defeated.

It is a general rule that statutes prescribing the power and duties of registration officers should not be so construed as to make the right to vote by registered voters, dependent upon a strict observance of such officers, of minute direction of the statute, thereby rendering the constitutional right of suffrage liable to be denied through fraud, caprice, ignorance or negligence

of the registrar. 20 C.J. sec. 66.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

SYLLABUS

156. Nevada Industrial Insurance—Men Working on Mining Property for Leaser are Employees of Lessor—Lessor Required to Report and Pay Premium—Statute Liberally Construed.

(1) Nevada Industrial Insurance Act, section 7 1/2 (a), (d): Men working for leasers on mining property are in employment of lessor, whose duty it is to report to Commission and pay premiums on men so employed.

(2) The statute is remedial and should be liberally construed.

INQUIRY

CARSON CITY, August 19, 1924.

Reference is made to Opinion No. 142. In this opinion it was held that under Section 7 1/2 (d) "leasers" were employees of the lessor.

The present inquiry seeks to have determined the status of those employed at a given or stipulated wage by the "leasers." Are such workmen considered employees of the leasers or lessor, under the provisions of the Nevada Industrial Insurance Act?

OPINION

Section 7 1/2 (a) defines the term "employee" to mean "every person, firm, etc., * * * which has any person in service under an appointment or contract for hire * * *." An employee is defined to mean "every person in the employment of an employer as defined in subdivision (a) of this section, under any appointment or contract for hire * * *."

It must be remembered that the Nevada Industrial Insurance Act is a remedial statute, adopted for the purpose of giving protection to men employed in various capacities, and is, therefore, to receive a liberal construction.

The Legislature, by enacting section 7 1/2 (d) brings within the purview of the Act, leasers who work on the mining property of the lessor. The same liberal spirit which prompted the Legislature to enact this measure would support the construction that men employed by the leasers were employees of the lessor.

In any event it would be paradoxical to so construe the Act and hold that the leasers were employees of the lessor, and the men working for the leasers were not.

Giving to the provisions of this Act a liberal construction, I am of the opinion that men working for the leasers are to be considered, for all purposes of the Nevada Industrial

Commission, in the employment of the lessor, and it is therefore the duty of the lessor to report to the Nevada Industrial Commission and pay premiums on the men so employed.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

NEVADA INDUSTRIAL COMMISSION, *Carson City, Nevada.*

SYLLABUS

157. Taxation—Revenue—When Personal Property without State May Be Assessed.

Stats. 1921, as amended, Stats. 1923, p. 359, provides that between first day of January and second Monday of July of each year the Assessor shall ascertain all property subject to taxation and shall, within time stated, determine value, list, and assess such property. Property coming into State after latter date cannot be assessed for current year.

INQUIRY

CARSON CITY, September 12, 1924.

You direct to me the following inquiry and request an official opinion:

> The State Board of Equalization, in session at the present time, requests the opinion of the Attorney-General as to the right of the various County Assessors to assess and collect taxes on personal property unsecured by real estate, after the second Monday in July of any current year; and whether or not the date limit for the assessment and collection of taxes on said property extends beyond the date mentioned. In discussion before said State Board it was brought out that a great deal of such property comes into the State after the second Monday in July.

OPINION

Statutes of 1923, page 359, amends section 8 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."

Section 8 of this Act provides:

> Between the first day of January and the second Monday of July in each year, the County Assessors, except when otherwise required by special enactment, shall ascertain by diligent inquiry and examination, all property in his county, real and personal, subject to taxation, and also the names of all persons, corporations, associations, companies, or firms owning the same; and *he shall then determine* the true cash value of all such property, *and he shall then* list, and assess the same to the person, firm, corporation, association or company owning it.

In 37 Cyc., p. 989, the following doctrine is announced in reference to the time and date of

assessment:

> The revenue laws commonly provide that the assessment shall be made or shall be completed on a certain day or within a certain time. * * * But the assessment must always be made as of the statutory date, or with reference to conditions as then existing; and hence a delay beyond that time will not enable the assessor *to include in his list, persons or property not within the state or not in existence or not subject to taxation on that date.*

I am of the opinion, therefore, that personal property not within the State of Nevada on the second Monday in July of any current year cannot thereafter be listed or assessed for the current year. If, however, the property is within the State of Nevada, and through inadvertence is overlooked by the Assessor, the same may be thereafter assessed, even beyond the date stated in the statute. I am of the opinion, however, that property not in existence or within the State on the second Monday in July, of any current year, but which comes in existence or into the State thereafter, cannot be assessed for the current year.

See State of Nevada v. Easterbrook, 3 Nev. 173; State of Nevada v. Earl, 4 Nev. 394; State v. C. & C. Railroad Co., 29 Nev. 487.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. STATE BOARD OF EQUALIZATION, *Carson City, Nevada.*

SYLLABUS

158. Taxation—Revenue—Real Estate of Bank Outside State is Exempt from Taxation.

> Rev. Laws, 3820, as amended, Stats. 1915, 174: In fixing value of shares of stock of bank, real estate of bank without State is allowed as exemption and deducted from value of such shares.

INQUIRY

CARSON CITY, September 13, 1924.

An opinion is requested calling for a construction of Section 3820, Revised Laws Nevada, as amended Stats. 1915, p. 174.

The question to be decided is whether the value of real property owned by banks and situated without the State of Nevada may be deducted from the case value of the shares of stock of banks in arriving at the value of same for taxation purposes.

OPINION

Section 3820, Revised Laws, reads in part as follows:

> * * * all such shares shall be assessed at their full cash value on the first day of May, first deducting therefrom the proportionate value of the real estate belonging

to the bank. * * *.

The Supreme Court of Connecticut has construed a similar statute, and ruled that to deny to the bank an exemption consisting of the value of property situated without the State, would require the Court to read into the statute after the words "real estate," the words "in this State," which the Court had no power to do.

I am of the opinion that the bank is entitled to the exemption precisely as the Legislature has written it, and that in fixing the value of the shares of stock of banks the value of the real estate belonging to the bank and located outside of the State of Nevada should be allowed as an exemption, and deducted from the value of such shares.

Authorities cited: Batterson v. Town of Hartford, 50 Conn. 558.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. LESTER D. SUMMERFIELD, *District Attorney, Reno, Nevada.*

SYLLABUS

159. Taxation—Revenue—Railroad Property Assessment, When Changed.

Tax Commission Law (Stats. 1923, c. 172), sections 4, 5 and 7: Tax Commission shall meet on second Monday in January of each year at regular session, and establish valuation of all interstate and intercounty railroads. Duration of meeting is not limited except that on or before first Monday in June assessed valuation of such property shall be transmitted to County Assessors. Special sessions are provided for. As Board of Assessors, Commission has no power to change original valuation. When sitting later as Board of Equalization, Board may equalize its original assessment, and include value of betterments between date of original assessment and second Monday in July.

INQUIRY

CARSON CITY, September 22, 1924.

Has the Nevada Tax Commission the power and authority, after having established the valuation for assessment purposes of all interstate and intercounty railroads at its regular January meeting, and turned such valuations over to the County Assessors of the various counties involved, on or before the first Monday in June, to reopen the assessment, set aside the valuations originally fixed, and establish a different valuation for assessment purposes of the property of any such railroad at special meetings of the Commission, held in September or October of the current year?

OPINION

Section 4 of the Tax Commission Law provides for certain meetings of the Tax Commission,

regular and special. Section 5 provides that, at the regular session of the Commission held on the second Monday in January of each year, the Commission shall establish the valuation for assessment purposes of all interstate and intercounty railroads. The statute does not directly limit the duration of this regular January meeting, but says it shall continue from day to day until the business of the meeting is completed. The statute does, however, provide in section 5:

> On or before the first Monday in June it shall be the duty of the said Commission to transmit to the several Assessors, the assessed valuation found by it on such classes of property as are enumerated in this section, together with the apportionment of each county of such assessment. The several County Assessors shall enter on the roll all such assessments transmitted to them by the Nevada Tax Commission.
>
> In case of the omission by said Commission, to establish a valuation for assessment purposes upon any property mentioned in this section, it shall be the duty of the Assessors of any counties wherein such property is situated to assess the same.

So there appears to be a definite limit as of the first Monday in June, when the regular January session must end, and with it, the jurisdiction of the Tax Commission to make an original assessment of the property named in section 5, including railroad property, for, if it has not then been done, it becomes the duty and is within the jurisdiction of the various County Assessors to make the original assessments of such railroad property. There is no provision for concurrent jurisdiction of the Commission and the County Assessors to make the assessment of railroad property, but the law does provide for the original and exclusive jurisdiction of the one or the other, according to the circumstances.

In the case under consideration, we are bound to assume that the Commission did make the original assessment of all the property named in section 5 of the Tax Commission Act, and transmit the same to the various County Assessors on or before the first Monday in June, and that such Assessors did thereafter, and on or before the second Monday in July, make such assessments and enter the same on the assessment rolls of the various counties involved, and turned the same over to the Clerks of the Boards of County Commissioners, on or before the fourth Monday in July. (See chap. 172, Stats. 1923.).

We believe it is well settled that when an original assessment has once been made and entered upon an assessment roll and such assessment roll has passed from the hands of the assessing officers, all powers of original assessment are exhausted, and the only power to change it lies in the various Boards of Equalization, excepting where it is otherwise authorized by law. State v. Manhattan Silver Mining Co., 4 Nev. 318.

For the above reasons we do not believe that the Tax Commission, at this time sitting as a board of original assessment, has any power to change the original assessment valuation of the property of any interstate or intercounty railroad, as the same appears on the various assessment rolls.

We do believe, however, that under the provisions of section 7 of the Tax Commission Law, the Commission may, as an equalizing body, equalize its original assessment of any railroad property, and also place upon the assessment rolls of the various counties the value of such improvements, additions and betterments as were made by any such interstate or intercounty railroad, between the date of the original assessment of its property and the second Monday in

July, 1924. See State v. C. & C. Railway Co., 29 Nev. 487.

Respectfully submitted,

THOMAS E. POWELL, *Deputy Attorney-General.*

TAX COMMISSION OF THE STATE OF NEVADA, *Carson City, Nevada.*

SYLLABUS

160. Statutes—No Authority for Expending Funds of Nevada Historical Society in Purchase Copies Nevada's Golden Star.

INQUIRY

CARSON CITY, December 9,1924.

You request an official opinion as to whether the Nevada Historical Society can use any of the money appropriated in chapter 136, Statutes 1919, for the purpose of purchasing a number of copies of a book entitled, "Nevada's Golden Stars," at actual cost.

OPINION

You are respectfully referred to section 2, of an Act entitled "An Act providing for the publication of Nevada's Golden Star Book," which reads as follows:

> Copies of the book shall be furnished free of charge to the following: * * * To the Nevada Historical Society, * * *.

Under this section, therefore, the Legislature has provided that the Society shall receive copies of the book free of charge, and it would be contrary to this provision to make any charge for copies furnished to this Society.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. MAURICE J. SULLIVAN, *Lieutenant-Governor, Carson City, Nevada.*

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161. Schools—Increase of School Census Children—Time for Filing Report with Superintendent Public Instruction—Law Not Mandatory.

(1) Section 131, as amended Stats. 1921, p. 198, construed as directory and not mandatory.

(2) If school board can present sufficient facts establishing just cause for failure to submit report of increase of census children, and failure to file report in time limited by law will not work hardship or interfere with any rights that may then exist, provisions of Act in reference to time limit should be waived.

INQUIRY

CARSON CITY, December 16, 1924.

You advise that the School Trustees of the Tonopah School District made application for relief under Statutes 1921, p. 198.

It appears from your inquiry that the data required to be filed under section 131a of the above-entitled Act, with the Superintendent of Public Instruction, was not submitted until December 5.

In view of the provision of section 131a, supra, requiring such statement to be submitted on or before December 1, may the same be considered and acted upon and filed after that date?

OPINION

Section 131a, as amended, Stats. 1921, p. 198, provides:

> If any board of school trustees 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, they may cause a census of such increase to be taken in the same manner as is prescribed for the regular school census; *provided*, that the cost of such census shall be a legal charge against the said district and shall be paid as other school expenditures are paid.
>
> Whenever a correct report of such increase shall be presented to the superintendent of public instruction on or before June 1 or December 1 of any year, with a showing that there is a necessity for the employment of one or more additional teachers because of such increased school census, he shall include such increase in the school census of the district and shall take the revised school census report as the basis of the next semiannual apportionment or apportionments.

From a reading of the above section, it is to be noted that the information must be submitted to the Superintendent of Public Instruction by December 1, of any year. The purpose of this statute in fixing a definite time when such information must be in the possession of the Superintendent of Public Instruction, is to enable him to perform the acts required under this section of the law and not embarrass him in the administration thereof by failure to file within the time stated.

It has been held by many courts that the provisions of the statute where a time limit is fixed similar to the one in the instant case, is to be construed as directory and not mandatory.

I am of the opinion that if the Tonopah School Board, in the instant case, can present sufficient facts establishing a just cause or reason for their failure to submit this statement in time, and this, coupled with the further fact that their failure to file the same in time, will not work a hardship or interfere with any rights that may now exist, that the provisions of the Act in reference to the time limit should be waived.

The duty of the Superintendent of Public Instruction in connection with this matter, is one of administration and the authority to the exercised is discretionary. In all cases of this character, the failure of the Superintendent of Public Instruction to act, or his refusal to act, would, in no

manner establish a precedent for future guidance, but in deciding questions of this kind, he is to be guided solely by the facts in each particular case.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

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

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162. Revenue—Mining Claims, Patented—Exemption from Taxes—Failure to Comply with Statutes Waives Exemption.

(1) To entitle owner of patented mining claim to exemption from payment of taxes he must either perform $100 worth of labor thereon or must by affidavit declare his intention of performing such labor before expiration of current calendar year, as provided by Stats. 1915, p. 316.

(2) If owner, therefore, of patented mining claim, fails to comply with provisions of the statute, at time stated therein, he waives his exemption, and performance of work after time provided by law for filing affidavit of work performed or of intention to perform work constitute waiver and performance of work thereafter would not entitle him to a refund of taxes.

INQUIRY

CARSON CITY, December 30, 1924.

You submit to me the following facts and request an official opinion.

Several mining companies presented to you during the month of December, 1924, affidavits disclosing that $100 work of labor had been performed for the year ending 1924, on each of the several mining claims owned by the corporation.

This proof is now submitted and a request is made by the applicant and bills presented for a refund of the taxes paid to the State by said mining companies under Stats. 1923, p. 151.

The question to be determined is whether or not, under the facts stated, a refund should be allowed.

OPINION

That portion of sec. 1, Stats. 1923, p. 151, that is applicable to the point in question reads as follows:

> This Act shall apply in making applications for refund of moneys which have been paid into the State Treasury or into the treasuries of the respective counties of the State where it appears * * *; also, to cases where a remission of the assessed valuation on patented mining claims has been ordered by a board having jurisdiction of the matter on account of annual assessment work having been performed thereon, and such remission has not been made by the proper county officers, and taxes on the full valuation have been paid thereon by the owner of

such patented mining claims under protest.

It will be noted that the mining companies seeking a refund in the instant case have not presented any order authorizing such refund from the board having jurisdiction under the provisions of the 1923 statutes, supra.

Section 1 of article 10 of the Constitution provides:

> The Legislature shall provide by law for uniform and equal rate of assessment and taxation and shall prescribe such regulations as shall secure a just valuation of taxation of all property, real, personal, and possessory, except mines and mining claims when not patented * * * and when patented, each patented mine shall be assessed for not less than $500 except when $100 in labor has been actually performed on such patented mine during the year.

In 1913 the Legislature enacted a law, by the provisions of which patented mining claims were to be assessed unless "$100 in labor had been performed thereon." The Act further provided that the owner of such patented mine might appear before the County Board of Equalization and, upon presenting an affidavit that $100 in labor had been expended on each patented mining claims, the Board of Equalization was authorized to strike from the roll the assessment of such patented claim or claims. Stats. 1913, p. 106.

It is quite obvious that the provisions of this Act were not consistent with the constitutional enactment in that, under the statute, the owner of a patented claim would have to perform the work at least within a period of nine months in each year and under the Constitution a claim might be exempted if the work was performed any time during the entire year.

This statute was amended in 1915, Stats. 1915, p. 316. Under section 5 of the amendment it was provided that "the owner of patented mines on which $100 in labor has not been performed at the time of the meeting of the County Board, or any duly authorized State Board, may declare, by properly executed affidavit to either of such boards, his intention of performing such labor before the expiration of the then current calendar year." It is further provided that where such declaration of intention was filed together with a bond, the board was authorized to strike such assessment from the roll. This statute corrected the evil of the statute of 1913 and gave the owner an opportunity, by filing a declaration of intention, to perform the work any time during the calendar year.

The proper officer, under the law, is compelled to assess patented mining claims, and he cannot indulge in the presumption that the owner of such claim will perform the annual work and thereby be entitled to an exemption. The duty rests upon the owner of such claim to do one of two things, viz: (1) to either perform the work on such claim and present his affidavit to the County Board within the time designated in the statute; or, (2) to file his declaration before the County Board at the time indicated in the statute, and, in addition, to file the bond as provided by law, and in either event the board is authorized to strike assessment of such claim from the assessment roll.

I am of the opinion that these statutory regulations are not inconsistent with the provisions of sec. 1, art. 10, of the Constitution, but that they are proper statutory enactments and give the owner of patented claims all the rights and privileges which flow from the constitutional provision.

If the owner, therefore, of patented mining claims, fails to comply with the provisions of the statute, and do those things requires by the statute, at the time stated therein, he waives his

exemption, and the failure to file a declaration of intention to perform the work, or, a failure to file the affidavit showing the expenditure of $100 upon each patented mining claim at the time and before the board recited in the statute would constitute a waiver, and the performance of the work after that time would nit entitle him to a refund.

The several acts must be performed before the assessment rolls are turned over to the tax collector.

In view of the fact that no showing is made by the applicant for refund that an affidavit is filed with the County Board of Equalization or any duly authorized State Board, in compliance with secs. 4 and 5, Stats. 1915, p. 316, and that no order was made by said board directing a refund, I am of the opinion, that the application for refund and the bills presented in support thereof should be disallowed.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. THOMAS F. O'BRIEN, *Secretary of Board of Examiners, Carson City, Nevada.*

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163. Portrait of Governor—Frame Must Be Furnished with Portrait.

Stats. 1923, p. 42, providing for procuring portrait of ex-Governor Emmet D. Boyle authorizes Board of Examiners to pay $500 for frame and portrait and unframed portrait could not be paid for under the law.

INQUIRY

CARSON CITY, December 30, 1924.

You submitted to me the following inquiry and requested an official opinion:

Under the provisions of chap. 36, Stats. 1923, the Board of Examiners commissioned Mrs. Rosemary Mundy to paint the portrait of Hon. Emmet D. Boyle, ex-Governor of Nevada.

Although the appropriation was made for procuring a "framed portrait," section 2 of the Act requires the Controller to issue his warrant in the sum of $500 in favor of the artist, "upon delivery of the *portrait* to the Secretary of State, and its acceptance by the Board of Examiners."

I request your opinion in writing as to whether the Secretary of State should accept the portrait without the frame and whether there is any source provided for the payment of the cost of the frame and framing other than the $500 appropriated by the chapter mentioned.

OPINION

Statutes 1923, p. 42, referred to, provides in part as follows:

Section 1. The sum of five hundred dollars is hereby appropriated * * * for the procuring of a framed portrait of Emmet D. Boyle, ex-Governor of the State of Nevada.

Answering your second inquiry first, I am of the opinion, that, under the provisions of this Act, the Board of Examiners is limited to an expenditure of the sum of five hundred dollars for the frame and portrait.

Section 2 of the same Act provides:

> Upon delivery of *said portrait* to the Secretary of State, and its acceptance by the Board of Examiners, the State Controller is hereby directed to draw his warrant in *favor of the artist* employed for *the sum of five hundred dollars* and the State Treasurer is hereby directed to pay the same.

In using the words "said portrait" in sec. 2, reference is made thereby to the framed portrait described in sec. 1.

It will be observed from the reading of the Act that the sum of five hundred dollars is the total amount appropriated for procuring frame and portrait and further that said sum in toto is to be paid to the artist. It must follow that for the said sum of five hundred dollars there must be delivered by the artist a frame and portrait.

The Board of Examiners would have no authority, under the Act, to expend five hundred dollars except for the frame and portrait as described in said Act.

Respectfully submitted,

M.A. DISKIN, *Attorney-General.*

HON. JAMES G. SCRUGHAM, *Governor of the State of Nevada, Carson City, Nevada.*
