SYLLABUS

291. Officers—State Nepotism Act.

The appointment of a son of the Secretary of the Fish and Game Commission violates the State Nepotism Act, even though no salary or emolument is attached to the office.

INQUIRY

CARSON CITY, January 5, 1928.

Whether or not the son of the Secretary of the State Fish and Game Commission may be legally employed by that Commission for the position of Superintendent of the State Game Farm.

There is no salary paid to any member of the State Fish and Game Commission, although a salary is to be paid to the Superintendent of the State Game Farm.

OPINION

The State Nepotism Act, as amended, Statutes 1927, p. 43, prohibits the employment within the third degree of consanguinity or affinity of any school trustee, state, township, municipal, or county official. This and similar statutes have been passed upon by this office in several instances, and it has been ruled that where the appointment is to be made by a board no person within the prohibited degree of consanguinity or affinity to any member of the board can be employed. (See Opinions of Attorney-General 1927, Opinion No. 265; Opinions of the Attorney-General 1921-1922, Opinions Nos. 120, 124, and 125.)

The fact that there is no salary or emolument affixed to the office does not make it any the less a State office. 36 Cyc. 854.

In view of the foregoing, therefore, it is the opinion of this office that the employment of the son of one of the members of the State Fish and Game Commission to act as such Superintendent would be unlawful.

Respectfully submitted for the Attorney-General,

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

By WM. J. FORMAN, *Deputy Attorney-General.*

HON. JAMES W. GEROW, *Secretary, State Fish and Game Commission, Reno, Nevada.*

SYLLABUS

292. Appropriation Act.

In case of conflict between a special statutory appropriation and items in the General Appropriation Act, the provisions of the latter control.

INQUIRY

CARSON CITY, January 13, 1928.

When the General Appropriation Act appropriates an amount which does not conform to the specific statutory appropriation, which statute takes precedence?

OPINION

The Supreme Court of Nevada, in the case of McCracken v. State, 41 Nev. 49, answers the question here submitted.

In the McCracken case the court decided that where a conflict existed between a special statutory appropriation and items in the General Appropriation Bill the provisions of the latter control, and the special statute providing for a different appropriation was superseded or suspended by the General Appropriation Act.

Respectfully submitted,

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

HON. ED. C. PETERSON, *State Controller, Carson City, Nevada.*

SYLLABUS

293. Taxation—Automobiles—Dealers' Licenses.

(1) Dealers' licenses may not be lawfully used on dealers' tow or service cars.

(2) Section 20, Stats.1925, prohibits the use of dealer plates upon motor vehicles other than those held for sale or trade and those used pursuant thereto.

INQUIRY

CARSON CITY, January 17, 1928.

1. Are dealers' licenses, as defined under section 20 of the Motor Vehicle Act, to be used on dealers' tow or service cars.
2. Are dealers' licenses to be used only on cars, new or second-hand, that are for sale.

OPINION

Section 1, Statutes of 1925, page 175, provides:

"Manufacturer" or "dealer" shall signify a person, firm, association, or corporation regularly in the business of having in his, its, or their

possession motor vehicles for sale or trade and for use and operation pursuant thereto.

A "used-car dealer" shall, for the purpose of this Act, include a person, firm, association, or corporation, regularly engaged in the business of having in his, its, or their possession, second-hand or used motor vehicles for sale or trade and operation pursuant thereto.

Section 20 of the same Act provides for issuance of dealers' plates to "dealers" and "used-car dealers" and further provides:

> Nothing in this section shall be construed to apply to a motor vehicle operated by a manufacturer, dealer, or used-care dealer for private use or for hire, which said motor vehicle shall be individually registered as provided in this Act, it being expressly understood that motor vehicles owned by a manufacturer, dealer or used-car dealer, when such motor vehicles are equipped with "dealer" plates, as herein provided, may be operated only directly and not inferentially in the conduct of the business of such manufacturer, dealer, or used-car dealer; *provided further*, that no "dealer" plates shall be used upon motor vehicles for any purpose other than the transaction of business incident to the automotive industry of such licensed manufacturer, dealer, or used-care dealer, nor upon the sales cars of a manufacturer of or wholesale dealer in accessories, and it shall be unlawful to use "dealer" plates on any used motor vehicle, unless there is also displayed conspicuously thereon the plates issued to and for said motor vehicle for the current or any prior year.

By section 20 of the Act above quoted it is manifest that the intent of the Legislature was to prohibit the use of dealer plates upon motor vehicles other than those held for sale or trade and those used pursuant thereto. No other construction can be placed upon the words "may be operated only directly and not inferentially in the business of such manufacturer, dealer, or used-car dealer."

A somewhat similar statute was construed by the Supreme Court of Maine in the case of Cobb v. Cumberland County Power Company, 104 Atl. 844, where the court said, in regard to a dealers' license:

> It was not a general and unlimited license for all purposes and uses, but for the restricted uses named,

the court holding that where the car was being operated on that particular occasion for pleasure alone it was the same as if the car had not been registered at all.

"Tow cars" and "service cars," as these terms are generally understood, are cars used to furnish mechanical service to owners of other motor vehicles. The use of such cars is an incident to the garage or automobile repair business, but it would require an unreasonable interpretation of the Act in question to rule that such cars, so used, were being operated "pursuant to the business of *selling* or *trading* in motor vehicles." See People v. Hanna, 136 N.Y.S. 162.

It is therefore the opinion of this office that such cars as those described above are not entitled to operate with dealer license plates.

The second inquiry is practically answered by the statute itself, by its provision that a dealer is one who has in his possession motor vehicles for sale or trade and for use and

operation pursuant thereto. Therefore, a dealer would be entitled to operate on dealer plates, in addition to the cars held for sale or trade, those necessarily used in *such* business, such as cars used solely for demonstration purposes.

Respectfully submitted for the Attorney-General,

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

By WM. J. FORMAN, *Deputy Attorney-General.*

HON. D.B. RENEAR, *Inspector of State Police, Carson City, Nevada.*

SYLLABUS

294. Constitution of Nevada—Legislative Exercise of Judicial Functions—Legislative Compromise of a Suit at Law—Senate Bill No. 11.

(1) The Legislature may not constitutionally sit as a court of law or equity.

(2) There is no delegation of judicial power by the Legislature to the Compromise Board under Senate Bill No. 11.

(3) Senate Bill No. 11 is a general law as distinguished from a special Act.

(4) Senate Bill No. 11 is not unconstitutional as an ex post facto law.

INQUIRY

CARSON CITY, January 30, 1928.

1. In view of the provisions of article VI, section 1, of the Constitution of the State of Nevada, in the opinion of the Attorney-General of Nevada, is there any authority "expressly directed or permitted" by the Constitution, by which the Legislature may constitutionally exercise the functions of the Judicial Department of the State, in this, namely:

(a) To sit as a court of law, as a court of equity, or as a court of law and equity, or "in all other civil cases not included in the general subdivision of law and equity?"

2. In assuming or presuming to compromise in the matter of the suit at law, entitled "The State of Nevada against the Carson Valley Bank," already in the courts, in the opinion of the Attorney-General:

(a) Would such an assumption or presumption to so sit as such a court come within the inhibitions of article VI, section 1?

(b) Would such an assumption or presumption to so sit as such a court be properly considered as discourteous to the Judicial Department of the State of Nevada?

3. In view of the provisions of article VI, sections 4 and 6, wherein such sections provide that the District Courts of the several Judicial Districts of the State shall have original jurisdiction and the Supreme Court shall have appellate jurisdiction "in all cases of equity; also in all cases of law * * * exceeds three hundred dollars," in the opinion of the Attorney-General, is or is not the Legislature of Nevada attempting to exceed its

constitutional authority in seeking to act as a court of equity or a court of law in the above-mentioned suit at law?

4. In view of article VI, section 14, wherein the Constitution of the State of Nevada provides, "There shall be but one form of civil action, and law and equity may be administered in one action," in the opinion of the Attorney-General, does Senate Bill No. 11 satisfy the requirements of said section 14?

5. Would not the operation of Senate Bill No. 11 be contrary to the provisions of article IV, section 20?

6. In view of article VIII, section 9, of the Constitution, is it the opinion of the Attorney-General that by the passage of Senate Bill No. 11, and the operation of the Adjustment Commission therein provided, acting under authority of the Legislature, would it be or would it not be an act contrary to said section 9, article VIII, should a less amount than the demand of the State be accepted by a compromise?

7. In view of article IX, section 4, of the Constitution, would or would not the Legislature act contrary to the Constitution in carrying to passage and causing to become effective Senate Bill No. 11, thus assuming a portion of a debt of a corporation?

8. Should the Legislature pass Senate Bill No. 11, is it your opinion that the Act would be unconstitutional in that it would be an ex post facto law?

OPINION

We assume from the query presented that you desire an official opinion upon the several questions presented and that you limit your inquiry accordingly.

Directing attention, therefore, to the interrogatories propounded, we desire to advise you as follows:

Question No. 1 and subdivision (a) is answered in the negative.

The interrogatories embraced in question numbered 2 and subdivisions (a) and (b) thereof, question numbered 3, and question numbered 4 involve the same principles of law. These several queries are based upon the false assumption that judicial power is attempted to be delegated to the Compromise board under Senate Bill No. 11. It is our opinion that no such delegation of power is attempted, and the same is not involved under the provisions of this contemplated Act.

In answer to question numbered 5, you are advised that Senate Bill No. 11 provides in general terms for the compromise and adjustment of all claims that may be due to the State of Nevada. The Act is general in its terms, applies to all persons similarly situated, and, in our opinion, is a general law as distinguished from a special Act.

Questions numbered 6, 7, and 8 are answered in the negative.

Respectfully submitted,

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

HON. DOUG. H. TANDY, *Speaker of the Assembly, Carson City, Nevada.*

SYLLABUS

295. Constitution of Nevada—Statutes—Special Legislative Sessions—Senate Bill No. 11.

(1) A special session of the Legislature is restricted to the subjects which the Governor in his message "may deem it necessary to legislate upon," under article 5, section 9, of the Constitution of Nevada.

(2) There is no executive authority which would warrant the legislature in enacting Senate Bill No. 11 for compromising and adjusting claims in favor of the State of Nevada.

INQUIRY

CARSON CITY, January 31, 1928.

You submit Senate Bill No. 11 and request an official opinion as to its constitutionality.

OPINION

Senate Bill No. 11 is a proposed Act which provides for the compromise, adjustment, or release of indebtedness, liability, or obligation of any corporation, association, or person to the State of Nevada. Section 1 of the Act creates a board of Compromise and Adjustments. The Act authorizes corporations, associations, or persons indebted to or under liability or obligation to the State of Nevada or against whom the State claims or asserts or is about to claim or assert any indebtedness, liability, or obligation to petition the Board of Compromise and Adjustments for a release and compromise of such claim. A method of procedure is then outlined in detail, and the Board is authorized to compromise any claim for a sum not less that thirty per cent of the amount involved; or, if a settlement for an amount less than thirty per cent is made, such settlement is not final until approved by a subsequent legislative session.

We have carefully examined the several sections of this proposed Act, and the time allotted for a response to your inquiry is limited. We have endeavored, however, to carefully scrutinize these several provisions in connection with the Constitution of the State of Nevada, and you are advised that, in so far as we are able to investigate at this time, in our opinion the provisions of this proposed Act do not violate any sections or section of the Constitution of the State of Nevada, with the following exception.

Your attention is directed to article V, section 9, of the Constitution which provides as follows:

> The Governor may, on extraordinary occasions, convene the Legislature by proclamation, and shall state to both houses when organized, the purpose for which they have been convened, and the Legislature shall transact no legislative business except that for which they were especially convened, or such other legislative business as the Governor may call to the attention of the legislature while in session.

The Supreme Court of the State of Nevada, in the case of Jones v. Theall, 3 Nev. 211, in construing this section of the Constitution, ruled that the special session of the

Legislature is restricted to the subjects which the Governor in his message "may deem it necessary to legislate upon."

Having this provision of the Constitution and the decision of the Supreme Court in mind, it is manifest that this special legislative body is authorized to enact into laws only those matters which are particularly referred to it by the Governor.

Senate Bill No. 11 has for its purpose the compromising and adjusting of all claims of every kind and character that may exist in favor of the State of Nevada and owed by all persons, firms, associations, or corporations. To determine legislative authority to enact such a law, reference must be made to the document or documents which give rise to such power and authority. We are unable to discover any executive authority which would warrant the Legislature or that might constitute authority on the part of the Legislature to enact the proposed bill submitted. The Executive Proclamation deals with and submits for consideration to the Legislature a proposed compromise of certain litigation by the State of Nevada against the Carson Valley Bank and a claim the State may have against bondsmen of the former State Treasurer. Senate Bill No. 11 authorizes settlements of all or any claims due to the State and, by its provisions, embraces matters not within the Executive Proclamation. We conclude, therefore, that in this respect the proposed measure is in conflict with article V, section 9, of the Constitution.

Respectfully submitted,

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

HON. MARSHALL HAMLIN, *Member of the Assembly, Carson City, Nevada.*

SYLLABUS

296. Taxation—County License Tax on Billiard Halls—When Collectible—Overruling Opinion No. 249.

County licenses authorized by the Statutes of 1915 are collectible within incorporated cities and towns. The Acts of 1921 and 1923 merely suspend the operation of the Act of 1915 outside of incorporated cities and towns.

INQUIRY

CARSON CITY, February 7, 1928.

You call our attention to our Opinion Number 249 which rules that a county license tax on billiard halls, bowling alleys, etc., was not collectible within incorporated cities and towns, and ask that we reconsider that opinion.

OPINION

By Statutes 1915, page 236, the Sheriffs of the several counties were required to collect a county license from those operating billiard halls, bowling alleys, etc. This Act

was operative as regarding these particular licenses over the entire county, both within and without incorporated cities and towns.

By chapter 120, Statutes of 1921, page 194, and Statutes of 1923, chapter 50, page 62, those persons who conduct billiard halls, bowling alleys, etc., outside of incorporated cities and towns are required to secure a license from the County License Board.

In Opinion No. 249, this office ruled that the Acts of 1921 and 1923 superseded the Act of 1915 and that, therefore, the licenses enumerated in the Act of 1915 were not collectible even in incorporated cities and towns, In so ruling we believe we were in error, for the reason that the Acts of 1921 and 1923 do not operate over the entire county but only outside of incorporated cities and towns. Therefore, the later Acts are not entirely repugnant to the Act of 1915, but simply suspend its operation outside of incorporated cities and towns. Tilden v. Esmeralda County, 32 Nev. 321.

The statute of 1925 would then remain in effect in the territory not covered by the later Acts. Thus, county licenses enumerated therein would be collectible within incorporated cities and towns.

Respectfully submitted for the Attorney-General,

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

By WM. J. FORMAN, *Deputy Attorney-General.*

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

SYLLABUS

297. Schools—Establishment of Superintendent's Revolving Fund.

No authority in law exists for establishing such a fund. All claims against the Nevada School of Industry must be audited and allowed by the Board of Examiners.

INQUIRY

CARSON CITY, March 2, 1928.

A report is submitted wherein it is stated that the Superintendent of the Nevada School of Industry, acting under instructions of the Board of Governors, has established a "Superintendent's Revolving Fund." This fund is established in the Henderson Bank and, when articles are sold, the money received from the sale of same is placed to the credit of the institution in the Henderson Bank and checks are thereafter drawn on such fund in said bank to pay current expenses.

An opinion is requested as to the lawfulness of this transaction.

OPINION

No authority in law exists for establishing or creating the fund designated. The result of the operations set forth permits claims against the Nevada School of Industry to be

passed upon and the same paid in violation of the provision of law which requires the Board of Examiners to audit and allow all claims against the State.

Stats. 1913, chapter 187, specifically provides that the products of any State institution may be sold, and that the proceeds of such sale shall be deposited in the fund or appropriation for the support of such institution and not in the General Fund.

It is my opinion, therefore, that the Superintendent of the Nevada School of Industry has no authority under the law to deposit money in the Henderson Bank or to pay claims against the State School of Industry by checks on the said deposit, but that all moneys derived from the sale of material should be transmitted to the State Treasurer, and that under no circumstances should the Superintendent or any other officer pay claims owing by the institution except by presenting the same to the Board of Examiners for their allowance and approval.

Respectfully submitted,

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

HON. FRED B. BALZAR, *Governor of Nevada, Carson City, Nevada.*

SYLLABUS

298. Corporations—Insurance Companies—Distinction Between Mutual Insurance Companies and Insurance Companies Not Operated on Assessment Plan.

Mutual insurance companies under the Revised Laws, sec. 1817, as defined in sec. 1310, may not issue a contract of insurance upon the life of any person under 15 years of age, or after he has passed his sixty-first birthday. Every contract of mutual insurance must be accompanied by a report of a physicians.

INQUIRY

Carson City, March 2, 1928.

In the past few weeks several life insurance companies have protested my ruling on section 8, page 22, of our insurance law pamphlet, being section 1317 of the Revised Laws of Nevada of 1912.

My ruling has been that no insurance can be issued to any person in Nevada unless he shall be between the ages of fifteen and sixty-one years, and that the report of a reputable physician stating that the applicant is in good health must accompany the application.

These companies have been writing nonmedical insurance on persons between the ages of fifteen and sixty-one years, and have required a medical examination for person under fifteen years and over sixty-one years.

Your opinion as to the real meaning of this law is respectfully requested.

OPINION

I concur in your ruling, with the exception that you must differentiate between mutual insurance companies and insurance companies not operated on the assessment plan.

Revised Laws, sec. 1310, defines a mutual insurance company as follows:

> Every contract whereby a benefit may accrue to a party or parties therein named upon the death or physical disability of a person insured thereunder, or for the payment of any sums of money dependent, in any degree, upon the collection of assessments or dues from persons or owners holding similar contracts, shall be deemed a contract of mutual insurance upon the assessment plan. Such contracts must show that the liabilities of the insured thereunder are not limited to fixed premiums.

That part of sections 8 of this Act which is important in considering the question presented reads as follows:

> No corporation doing business under this Act (except accidental [accident] or casualty corporations) shall issue a contract of insurance upon the life of any person under fifteen years of age, or after he or she has passed his or her sixty-first birthday. Every such contract of insurance shall be founded upon written application therefor, and (except when the application is for one hundred dollars life insurance or less) such applications shall be accompanied by a report of a reputable physician, containing a detailed statement of his examination of the applicant and showing the applicant to be in good health, and recommending the issuance of a contract of insurance; *provided*, that no medical examination shall be required on any application for accident or casualty insurance only.

It is plain, therefore, that a mutual insurance company, as defined, supra, may not issue a contract of insurance upon the life of any person under fifteen years of age or after he has passed his sixty-first birthday. It is also clear that every contract for mutual insurance must be accompanied by a report of a physician in reference to the insurability of the applicant.

Other insurance companies, however, operating under the provisions of sections 1267 to 1284, Revised Laws, inasmuch as they are not mutual insurance companies, would not be governed by these several sections.

Respectfully submitted,

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

HON. ED. C. PETERSON, *State Controller and ex officio Insurance Commissioner, Carson City, Nevada.*

SYLLABUS

299. Officers—Fees of Clerk of Supreme Court.

The Clerk of Supreme Court is authorized to collect a fee of twenty-five dollars which is in payment for all services in connection with cases filed in Supreme Court.

INQUIRY

CARSON CITY, March 2, 1928.

Whether or not the Clerk of the Supreme Court should exact fees in addition to those required by sec. 2006, Revised Laws, 1912, as amended, 1921, p. 111, for giving certificates and for the preparation of transcripts for filing in the Supreme Court of the United States.

OPINION

Section 2006, Revised Laws, 1912, as amended, provides a flat fee of twenty-five dollars in all cases filed in the Supreme Court. This section, as amended, gives the entire fee to be charged by the Clerk of the Supreme Court for all services.

Section 2006 is part of an Act which further provides, section 2019:

> No other fees shall be charged than those specially set forth herein, nor shall fees be charged for any other services than those mentioned in this Act.

Respectfully submitted for the Attorney-General,

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

By WM. J. FORMAN, *Deputy Attorney-General.*

MRS. EVA HATTON, *Clerk of the Supreme Court, Carson City, Nevada.*

SYLLABUS

300. Statutes—Act to Authorize Deposit of State Moneys in Banks of this State.

Under sec. 4179, of the Rev. Laws of Nevada of 1912, the Deputy State Controller is prohibited from executing State warrants and bonds. The Deputy State Treasurer is permitted under sec. 7, however, to sign such warrants for withdrawal of funds.

INQUIRY

CARSON CITY, March 5, 1928.

Please refer to the Act recently passed by the Special Session of the Legislature entitled "An Act to authorize the deposit of State moneys in banks in this State, and to repeal all Acts or parts of Acts in conflict with this Act."

Section 7 provides that withdrawals may be made upon the signatures of the State Treasurer and State Controller.

Are we to construe this to mean that the Deputy State Treasurer and the Deputy Controller are not permitted to sign such warrants?

OPINION

Unless prohibited by express provisions of law, a deputy in the office of State Controller or State Treasurer may perform any duty imposed upon the principal by reason of any statutory requirements.

Section 4179, Revised Laws of Nevada, 1912, provides:

> The Controller of State is hereby authorized to appoint a deputy, who shall have power, in the absence of the Controller, to do all acts devolving upon, and now necessary to be performed by the Controller, except the signing of State warrants and bonds.

Under the provisions of this section, the Deputy State Controller is prohibited from executing State warrants and bonds. The Deputy State Controller, therefore, is without power to execute warrants upon the State Treasurer for the payment of money. Such Deputy State Controller would, therefore, be prohibited from performing any acts required to be performed under the Act referred to by you.

In view of the fact that the law does not prohibit the Deputy State Treasurer from performing any act required by law to be performed by the State Treasurer, such deputy would be permitted to function under the provisions of section 7 of the Act referred to.

Respectfully submitted,

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

P.L. NELSON, *Assistant Cashier, Reno National Bank, Reno, Nevada.*

SYLLABUS

301. Officers—State Nepotism Act.

The appointment of a cousin of a member of the appointing board as official court reporter does not contravene the State Nepotism Act.

INQUIRY

CARSON CITY, March 12, 1928.

Whether or not the appointment of a cousin of the wife of one of the Justices of the Supreme Court as Official Court Reporter by that court would contravene the provisions of the State Nepotism Act.

OPINION

The State Nepotism Act prohibits the employment within the third degree of consanguinity or affinity of any member of the appointing board. A cousin is of the fourth degree.

The appointment, therefore, of a cousin related to any member of the appointing board does not come within the prohibition of the Act.

Respectfully submitted for the Attorney-General,

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

By WM. J. FORMAN, *Deputy Attorney-General.*

HON. BENJAMIN W. COLEMAN, *Justice of the Supreme Court of the State of Nevada, Carson City, Nevada.*

SYLLABUS

302. Highways—County—State Highway Fund—Money, How Expended.

The money in County-State Highway Fund can be withdrawn only on certificate of State Highway Engineer, and County Commissioners without authority to expend same.

INQUIRY

CARSON CITY, April 2, 1928.

On a few occasions the authority of the Department of Highways has been questioned by the County Commissioners regarding its right to use the county-state highway funds for the construction and maintenance of the Federal Aid roads. One instance in particular where the State was obligated not only to the government but to the general public to complete a section of road, County Commissioners of the county in which the road was to be constructed absolutely refused to turn over to the State the county's share.

Another county also refused to contribute money from its County-State Highway Fund to aid the State in the maintenance of the Federal Aid constructed highways within that county.

I will appreciate obtaining a decision from your office showing me just what rights and authority the Department of Highways has in regard to the handling of county-state highway funds of all the counties.

OPINION

Under section 10, State highway law (Statutes 1917, as amended), it is the duty of the State Highway Engineer to submit to the Board of County Commissioners of each county a budget setting forth the amount, character, and nature of construction work to be performed on the highways within the respective county for the ensuing year.

Section 11 of the Act makes it the mandatory duty of the County Commissioners to levy a tax for the purpose of creating the maintaining the County-State Highway Fund.

This fund can be expended only under the direction of the State Highway Engineer, and the several Boards of County Commissioners are without authority to spend any part of the money.

Your attention is called to the following specific language of section 11:

> The said fund shall be hereafter called in this Act "The County-State Highway Fund," *and shall be expended only under the direction of said State Highway Engineer,* and the moneys shall be paid, etc.

The money in this fund thus created cannot lawfully be withdrawn or used except upon certificate of yourself. If any county refuse to comply with the provisions of this Act, the court, by writ of mandamus, will compel the County Commissioners to perform the duty therein commanded.

Respectfully submitted,

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

S.C. DURKEE, *State Highway Engineer, Carson City, Nevada.*

SYLLABUS

303. Officers—Court Reporter—Payment of Compensation where County Commissioners Fail to Budget Expenses.

The law authorizes compensation payments to court stenographers either on a fee basis or monthly salary approved by County Commissioners, but, if facts warrant, District Judge has power aside from County Commissioners' action to appoint and compensate at public expense court reporter.

INQUIRY

CARSON CITY, April 11, 1928.

Should the County Auditor honor an order of the Judge of the District Court for salary of a court reporter of his court where the County Commissioners have purposely omitted the item of the reporter's salary from the current budget, and where the County Commissioners have failed to approve the reporter's salary fixed by the District Judge?

OPINION

By sections 4908-4913, inclusive, of the revised Laws of Nevada, 1912, as amended, Statutes 1921, pages 96 and 288, provision is made for the appointment of an official court reporter by the District Judge and for the fixing of the compensation therefor. It was the evident purpose of the Legislature, in enacting section 4913, as amended, that the compensation of the official reporter should be fixed by one of two methods:

1. On a fee basis, the schedule of fees being set out in the section; or
2. By a monthly salary fixed by the District Judge and approved by the board of County Commissioners.

It does not necessarily follow, however, that a Board of County Commissioners could prevent the employment of an official court reporter by failing to provide for any or sufficient compensation for such reporter in the budget.

The Supreme Court of this State has held, in the case of State v. Davis, 26 Nev. 373, that the Supreme Court possesses the inherent power to procure at the expense of the State suitable furniture for its courtroom. This ruling, as is pointed out in the opinion of the Court, is based upon the fact that the judiciary is a separate and independent branch of the government, and that courts of general jurisdiction within the State possess all the powers necessary for the free and untrammeled exercise of their functions independent of the executive and legislative branches of the State Government.

The above-mentioned case would seem to warrant a ruling that courts of general jurisdiction in this State have the inherent power to contract for, at public expense, such accommodations and assistants as are necessarily required for the court to carry out its judicial functions. If the situation is such, therefore, in any county, that a competent court reporter cannot be secured at the compensation offered by the fees listed in section 4913, as amended, and the failure to secure such reporter would prevent the District Court from carrying on its proper functions, then, it is the opinion of this office that the District Judge has the authority to contract for the services of such reporter at a reasonable compensation, at the public expense, independent of the approval of any executive board.

Respectfully submitted for the Attorney-General,

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

By WM. J. FORMAN, *Deputy Attorney-General.*

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

SYLLABUS

304. Water Law—Acts Necessary to Constitute Appropriation of Waters of a Spring.

The manner of making diversion, whether by artificial means or otherwise, is not controlling. It is essential to establish the intent to appropriate by some act subjecting the water claimed to control of appropriation.

INQUIRY

CARSON CITY, April 13, 1928.

No. 1. Without the actual diversion of water at a particular place or places by means of artificial works of diversion, can a right to appropriate water for stockwatering purposes be lawfully acquired in the State of Nevada?

No. 2. Are the fundamental requisites for acquiring or establishing a right to appropriate water the same for all classes of beneficial use?

OPINION

The Supreme Court of Nevada in the case of Walsh v. Wallace, 26 Nev. 299, held that to constitute an appropriation of water of a stream system there must be an actual diversion and an application to beneficial use.

The manner of making the diversion, whether by artificial means or otherwise, is not the controlling factor. It is essential, however, that the party asserting the right establish the intent to appropriate by some open, physical demonstration, subjecting the water claimed to his control and use of the exclusion of others.

The law applicable to this question and one that must govern in determining the sufficiency of acts relied upon to sustain the appropriation is stated thusly by the Federal Court of this district in the case of Silver Peak Mines v. Valcalda:

> In appropriating the waters of a spring upon the public lands, only such acts are necessary, and such indications and evidences of appropriation required, as the nature of the case and the face of the country will admit of, and are, under the conditions and circumstances at the time, practicable to accomplish the purpose of the appropriator thereof in making a beneficial use of the water.

Answering your second inquiry, difference in beneficial use in no manner affects the essentials necessary to constitute an appropriation.

Respectfully submitted,

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

HON. GEORGE W. MALONE, *State Engineer, Carson City, Nevada.*

SYLLABUS

305. Water Law—Application of General Adjudication Statute to Appropriation of Waters of a Spring.

If waters of spring are formed from percolating water, the general adjudication statute does not apply; if formed from a natural watercourse it is applicable.

INQUIRY

CARSON CITY, April 13, 1928.

Can the determination of the relative rights to the use of water from isolated springs or water holes, not tributary to any stream or stream system, be legally determined by the adjudication procedure set forth in the present Water Law of Nevada?

INQUIRY

CARSON CITY, April 13, 1928.

Can the determination of the relative rights to the use of water from isolated springs or water holes, not tributary to any stream or stream system, be legally determined by the adjudication procedure set forth in the present Water Law of Nevada?

OPINION

If the springs in question are formed from percolating water, the general water code respecting adjudications does not apply; if, however, it appears that the waters of the spring come from a natural watercourse, subterranean in character, the general adjudication law applies.

The distinction is clearly set forth in the case of Strait v. Brown, 16 Nev. 317, where the Court stated:

> It has been conclusively established by a long line of decisions that percolating water existing in the earth is not governed by the same laws that have been established for running streams. No distinction exists in the law between waters running under the surface in defined channels and those running in distinct channels upon the surface. The distinction is made between all waters running in distinct channels, whether upon the surface or subterranean, and those oozing or percolating through the soil in varying quantities and uncertain directions. The grounds for the distinctions are clearly pointed out in the authorities.

Respectfully submitted,

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

HON. GEORGE W. MALONE, *State Engineer, Carson City, Nevada.*

SYLLABUS

306. Elections—Schools—Recall Petitions.

Procedure on recall elections concerning duty of Clerk to furnish certified list of electors. Registration of voters. Polling places. Disqualification of Trustees.

INQUIRY

CARSON CITY, May 7, 1928.

At the request of the District Attorney, the following opinion is being given to you.

In a recall election in a union school district:

1. Registration. Should the County Clerk furnish to the trustees the certified list of electors in the district on May 8, as provided in section 49 of the School Code?

May the Clerk of the Board register qualified electors whose names do not appear on the great register, on May 10, 11, and 13, and will such persons so registered be eligible to vote at such election?

2. Who are authorized to appoint officers of election at such election? Has the County Clerk such power?

3. How many polling places may be designated, it being understood that the district is one of the second-class—that is, having less than 10 regular grade teachers, as defined in section 76 of the School Code?

4. Will the fact that all five of the Trustees are in process of recall disqualify them in any way to appoint officers at the school election?

5. Is there anything in the Union School District Act of March 18, 1925, or elsewhere, which would require a district of the second-class to conduct an election at each and every schoolhouse located within the territory from which the Trustees or any of them may be elected?

6. Is there anything in the special Lyon County High School District Act of March 23, 1917, and particularly section 9 providing for the election of three District High School District here referred to, being Lyon County High School District No. 3, which would make the election a general one in the county and conflict with the election of two high school members for the Union District under the general law? Would this give the County Clerk powers not contemplated in the union district sections?

OPINION

The general school laws relating to elections apply to elections in union school districts in so far as applicable.

1. The answer to your first inquiry is "Yes" in both instances. (See sections 49 and 47 of the School Code.)

2. The Board of School trustees is authorized to appoint officers of election at such election. (See section 45, School Code.)

3. The school law, section 45, would indicate that only one polling place should be designated. In the case before us, the County Clerk calls the election and therefore should designate the polling place, which should be a place most convenient for the voters.

4. The fact that five of the Trustees are in process of recall does not disqualify them to appoint officers of the school election.

5. There is nothing in the Union School District Act of March 18, 1925, or elsewhere, which would require a district of the second-class to conduct an election at each and every schoolhouse located within the district.

6. There is nothing in the special Lyon County District Act of March 23, 1917, which would make an election a general one in the county, for the reason that the Trustees of the Lyon School District No. 2 would cease to hold office upon the unionization of the district.

Respectfully submitted for the Attorney-General,

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

By WM. J. FORMAN, *Deputy Attorney-General.*

MISS PHYLLIS HAY, *Clerk, Board of School Trustees, Smith Valley Union District, Wellington, Nevada.*

SYLLABUS

307. Taxation—Sale Personal Property Without Suit—Redemption.

Personal property over three hundred dollars in value may be sold for delinquent taxes without suit, subject to redemption.

INQUIRY

CARSON CITY, August 2, 1928.

(1) May a County Treasurer and ex officio Tax Receiver sell for delinquent taxes, without suit, personal property, which is in no way associated with real property, of an assessed value greater than three hundred dollars?

(2) If your conclusion as to the above be in the affirmative, is property so sold subject to redemption?

(3) If subject to redemption, within what period after sale may the property so sold be redeemed?

OPINION

Under the Revenue Act of this State, as amended by Statutes 1927, p. 263, this office is of the opinion that a County Treasurer and ex officio Tax Receiver may sell personal property of an assessed valuation of more than three hundred dollars for delinquent taxes without suit. Such sale, however, is subject to redemption within one year from the date of sale by the payment of taxes, penalties, costs, and interest.

Respectfully submitted for the Attorney-General.

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

By WM. J. FORMAN, *Deputy Attorney-General.*

HON. C.C. WARD, *District Attorney, Mineral County, Hawthorne, Nevada.*

SYLLABUS

308. Officers—Act Providing for Election of County Road Supervisors Has Not Been Repealed—Act Applied Only in Those Counties Adopting Its Provisions by an Election.

(1) Statutes 1913, page 390, providing for election of County Road Supervisor has not been repealed.

(2) County Road Supervisors are elected in only those counties adopting the provisions of Statutes 1913, page 390, by an election.

INQUIRY

CARSON CITY, August 4, 1928.

(a) Your opinion will be appreciated advising whether Statutes 1918, page 390, have ever been repealed.

(b) If not, is it mandatory, under article 3, section 1, to elect road supervisors or road commissioners in the several counties of this State?

OPINION

(a) Statutes 1913, page 390, have not been repealed.

(b) This office has heretofore passed upon this statute and, by Opinion No. 79, held that in those counties where the matter of calling a special election to authorize the issuing of bonds under this Act has not been held the provisions of this Act did not apply in such counties.

It was further held by this opinion that the Act was in the nature of "a local option Act," requiring for its adoption by the particular county the issuing of bonds at an election to be held as provided in such Act.

It would necessarily follow from this construction that in those counties where no such election was had that no authority would exist for appointing road supervisors or road commissioners, and no such officers would be elected. In those counties where the provisions of the Act apply and where, by special election, a majority of the voters of the county have authorized the issuing of bonds under this Act, it is not mandatory to elect road supervisors or road commissioners, as, under the terms of the Act, it is discretionary with the Board of County Commissioners in appointing road supervisors or road commissioners. The Board of County Commissioners, in their discretion, may appoint a road supervisor for the county, or they may appoint road commissioners for each district, in those counties where the provisions of the Act apply. If road commissioners are appointed, they are elected in the same manner as other township officers.

It is our opinion, therefore, that, under the provisions oft his Act, where road commissioners are appointed and the provisions of the Act apply, it is mandatory that road commissioners be elected as provided in the Act.

Respectfully submitted,

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

HON. FRED. B. BALZAR, *Governor of Nevada, Carson City, Nevada.*

SYLLABUS

309. State Free Employment Service Fund.

Statute appropriating money for State Free Employment Service limits expenditures to be made from appropriation and does not include expenditures for attending conferences of State and Government employment officials.

INQUIRY

CARSON CITY, August 13, 1928.

In your opinion, can any money appropriated for the support of the State Free Employment Service be used to defray the expenses of attending a conference with Government officials and other State employment officials, in discussing employment conditions of interest to the service, where a conference is held in some other State?

OPINION

The State Free Employment Service was established and authorized by Statutes 1923, chapter 121.

Under the provisions of this statute, a certain amount of money is appropriated to carry out the provisions of the Act. The Act specifically recites and limits the expenditures to be made under the appropriation. The expenditures designated by you, to wit, the expenses incurred in attending a conference with government and other State employment officials not being designated in the Act as an item for which the money may be used, the expenditures above referred to may not be incurred.

Respectfully submitted,

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

HON. WILLIAM ROYLE, *Labor Commissioner, Carson City, Nevada.*

SYLLABUS

310. Eight Hour Law—Time Consumed in Eating Lunch in Underground Mines Applies on Eight Hours.

Where men employed in underground mines are required to remain underground to eat lunch, the time so occupied applies on the eight hours underground, as defined by Rev. Laws, 1912, sec. 6554, as amended.

INQUIRY

CARSON CITY, August 13, 1928.

Where men are employed in underground workings and are required to remain underground to eat lunch, would that time apply on the eight hours underground, as prescribed in the Revised Laws of 1912, section 6554, as amended, chapter 105, Statutes 1927?

OPINION

Section 289 of an Act concerning crimes and punishments was amended by Statutes 1927, chapter 105.

The Act, as amended, provides:

> The period of employment for all persons who are employed, occupied, or engaged in work or labor of any kind or nature in underground mines or underground workings * * * shall not exceed eight hours within any twenty-four hours, and the said eight hours shall include the time employed, occupied, or consumed from the time of reaching the point of employment or place of work in any underground mine, and in returning to the surface from said point or place of work, and that it is the intent and purpose of this Act that the period of time between arriving at the point or place of work, in any underground working, and returning to the surface from such point of work shall not exceed eight hours within any twenty-four hours * * *.

I am of the opinion, therefore, that, under your inquiry, if men employed in underground mines are required to remain underground to eat lunch, the time so occupied would apply on the eight hours underground as defined by the above and foregoing section.

Respectfully submitted,

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

HON. WILLIAM ROYLE, *Labor Commissioner, Carson City, Nevada.*

SYLLABUS

311. Nevada National Guard—Certain Sections of Statutes 1864, Chapter Regarding National Guard, Repealed—Revised Laws 1912, Section 4038, Not Directly Repealed—State of Nevada Adopted National Defense Act by Statute.

(1) Sections 50, 51, 52, Statutes of 1864, page 203, were repealed by Statutes 1899, page 37.

(2) Section 4038, R. L. 1912, has not been directly repealed.

(3) By Statutes 1913, page 37, State of Nevada accepted the provisions of the National Defense Ace of 1916.

INQUIRY

CARSON CITY, August 13, 1928.

Your opinion is respectfully requested on the following queries:

(1) Have sections 50, 51, and 52, Statutes 1864, chapter 67, page 203, ever been repealed, or, if not, have they been in any manner superseded or become obsolete?

(2) Has section 4038, R. L. Nev. 1912, volume 1, been repealed?

(3) Does the Act of 1913, page 37, bind the State of Nevada to acceptance of the provisions of the National Defense Act of 1916 and amendments thereto, or does the

national Act have the effect of superseding all Acts passed by the Legislature of Nevada relating to the national guard, in so far as the provisions thereof conflict therewith?

OPINION

(1) Section 50, Statutes 1864, page 203, chapter 67, was repealed by Statutes 1899, p. 37.

Sections 51 and 52 of the above statute, inasmuch as they are so connected with section 50, are also repealed by the provisions of the 1899 Act.

(2) Section 4038, Revised Laws, 1912, volume 1, has not been directly repealed and, if the same is not in conflict with any provision of the regulations adopted by the United States, would be in force and effect.

(3) The Act of 1913, page 37, constitutes an adoption by the State of Nevada, through the Legislature, and acceptance of the provisions of the National Defense Act of 1916, and has the effect of superseding all Acts passed by the Nevada Legislature relating to the national guard, in so far as the provisions thereof conflict therewith.

Respectfully submitted,

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

HON. J. H. WHITE, *Adjutant General, Carson City, Nevada.*

SYLLABUS

312. Schools—Law Requires Segregation of Accounts of Several Deputy Superintendents of Public Instruction—Deputy Superintendent's Expenses Limited—Office Deputy's Traveling Expenses Include Travel, Subsistence, and Office Expense.

(1) The law requires a segregation of the accounts of the several Deputy Superintendents of Public Instruction.

(2) No Deputy Superintendent may expend more than fourteen hundred dollars per annum, and the Office Deputy is limited to five hundred dollars.

(3) Office Deputy's traveling expenses include travel, subsistence, and office expenses.

INQUIRY

CARSON CITY, August 20, 1928.

(1) Is there anything in the law which requires the State Controller or the Superintendent of Public Instruction to keep segregated accounts with each of the Deputy Superintendents, including the Office Deputy?

(2) If there is a requirement for such segregation, to what extent must it be carried?

(3) May the Office Deputy's expense account include the same classes of items as the expense accounts of other Deputy Superintendents, to wit, travel, subsistence, and office expense?

OPINION

(1) While Statutes 1927, chapter 97, section 41, appropriates a lump sum of fifteen thousand dollars for traveling and office expenses of Deputy Superintendents, section 13, Statutes 1911, as amended 1920, chapter 156, limits the amount to be spent by each Deputy to the sum of nine hundred dollars, and the Office Deputy to five hundred dollars per annum. Compliance with this section requires a segregation of the sum of fifteen thousand dollars among the several Deputies so that each field Deputy will receive not to exceed fourteen hundred dollars per annum and the Office Deputy five hundred dollars per annum.

(2) No deputy may expend more than fourteen hundred dollars per annum, and the Office Deputy is limited to five hundred dollars per annum.

(3) Traveling expenses for Office Deputy, as defined by the Act as amended, Statutes 1920, chapter 156, section 13, includes: "cost of transportation, cost of living * * *, together with necessary office expenses."

Respectfully submitted,

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

HON. WALTER W. ANDERSON, *Superintendent of Public Instruction, Carson City, Nevada.*

SYLLABUS

313. Vocational Education Fund—Combined State and County Expenditures May Exceed that of Federal Government.

Law does not limit the expenditure by State and local communities for vocational education to a sum equal to that expended by Federal Government.

INQUIRY

CARSON CITY, August 21, 1928.

Reference is made to section 9, Statutes 1919, chapter 86, with a request for an opinion on the following state of facts:

If the total of funds expended by local communities and by the State for vocational education is in excess of the amount expended by the Federal Government within the State of Nevada for this purpose, is the State expenditure legal, according to the provisions of section 9, chapter 86, Statutes 1917?

OPINION

Statutes 1919, section 9, chapter 86, authorizes an appropriation as a vocational education fund in the sum of thirty-five thousand dollars, with the amounts required of local communities * * *, being equal to the amount of money to be received by the State of Nevada from the Federal Government."

This latter expression cannot be considered as limiting the amount of the appropriation in the sum of thirty-five thousand dollars to be expended, but it is rather a declaration by the Legislature that in making the appropriation the amount designated is sufficient to comply with the Act of Congress.

The General Appropriation Act, Statutes 1926-1927, fixes the sum of thirty-five thousand dollars as the appropriation for the year 1927-1928 as a vocational education fund. This amount may be legally expended. The fact that this amount plus sums spent by local communities exceeds the amount expended by the Federal Government, would not make such expenditure unlawful. The existence of such facts, however, might cause the Legislature to reduce the appropriation for this item, if called to their attention at the next session.

Respectfully submitted,

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

HON. TRUE VENCILL, *State Auditor, Carson City, Nevada.*

SYLLABUS

314. Corporations—Amended Articles of Incorporation Become Original Articles When Filed—Date of Original Articles Controls in Issuing Certificate.

(1) When amended articles of incorporation are filed, they take the place of the original.

(2) Certificates issued by Secretary of State should treat amended articles of incorporation as original.

(3) Where original name of corporation is amended, certificate should give new name and original date.

INQUIRY

CARSON CITY, August 21, 1928.

Assuming that an amended certificate to articles of incorporation is tendered for filing, changing the name of a corporation, and facts are alleged in the amended certificate complying with section 6, Statutes 1925, chapter 177, please advise in what manner this office should handle said amendment in the following particulars:

(1) The proper caption for the paper substituted for the original article;

(2) The proper certificate for certified copy of same;

(3) The proper wording of charter, if any should be issued.

OPINION

Section 6, Statutes 1925, chapter 177, provides:

> It shall be lawful for the incorporators of any corporation, before the payment of any part of its capital, to file with the clerk of the county in which copy of certificate of incorporation was filed, and file with the secretary of state, an amended certificate duly signed by the incorporators named in the original certificate of incorporation, and duly acknowledged, or proved as required for certificates of incorporation under this act, modifying, changing, or altering its original certificate of incorporation, in whole or in part, which amended certificate shall take the place of the original certificate of incorporation, and shall be deemed to have been filed on the date of filing of the original certificate; *provided, however*, that nothing herein shall permit the insertion of any matter not in conformity with this act; *and provided, however*, that this act shall not in any manner affect any proceedings pending in any court, and for filing said amended certificate of incorporation, the secretary of state shall charge such fee as shall be allowed by law.

With these provisions in mind, we submit to you the following answers:

(1) While the certificate of amendment tendered is designated an amendment to original articles, when such amendment is filed it becomes the original article. Concerning said amendment and the effect thereof, the statute provides, "* * * which amendment certificate shall take the place of the original certificate."

(2) When a certified copy is issued by you of such corporation, you must consider and treat the amendment not as an amendment but as the original article.

(3) Where an amendment is made as aforesaid, changing the name of the corporation, a new certificate should be issued by your office under section 5. Such certificate should bear the date of the issuance of the first certificate or the date of the filing of the original articles under section 5, and designate therein the new name of the corporation.

Authority for this procedure is found in the language of section 6, which provides, "which amended certificate shall take the place of the original certificate of incorporation, and shall be deemed to have been filed on the date of filing of the original certificate."

Respectfully submitted,

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

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

SYLLABUS

315. Revenue—Federal Agencies Can Claim Exemption from Gasoline Tax—Statute Must Be Followed to Secure Refunds.

(1) The Supreme Court of the United States has held federal agencies to be exempt from payment of gasoline tax.

(2) Legislature has provided means for those entitled to exemption to secure refunds. This statute must be followed.

INQUIRY

CARSON CITY, August 21, 1928.

Referring to a decision of the Supreme Court of the United States, dated May 14, 1928, in the case of Panhandle Oil Company v. State of Mississippi, in which it was held that the States could not demand payment of tax on sale of gasoline made to the various branches of the United States Government, we are asking for a decision of the following:

(1) Does this apply in Nevada to motor-driven vehicles owned by the Federal Government and having attached thereto the United States license plate?

(2) Does this also apply in Nevada to motor-driven vehicles privately owned by officials and employees of the Federal Government having a State license plate attached thereto and presumably used in performing their duties for the Federal Government?

(3) Referring to section 4 of the gasoline tax law of Nevada granting refund of this tax and how the same may be procured, can the enforcement department, having to do with the collection of this tax, issue a certificate of exemption, to be signed by government officers or employees who purchase gasoline from time to time and pay cash, enabling them to get such gasoline exempt from the State tax at the time of purchase, and such coupons to be returned to the State by the dealer?

OPINION

(1, 2) As stated by you, the Supreme Court of the United States in the case of Panhandle Oil Company versus the State of Mississippi ruled that, under a statute similar to the Nevada Act, sales of gasoline made to Government agencies were exempt from tax payments. It was further decided that, while the Act in terms provided that the dealer or seller under the statute was required to pay the tax, a sale or purchase constituted a transaction by which the tax is measured and on which the burden rests, and that the operation of the Act directly retarded, impeded, and burdened the United States of its constitutional powers.

It must be concluded, therefore, that the Nevada Gasoline Tax Act does not apply to sales made to Government agencies.

(3) The Legislature of this State, under the provisions of section 4 of the Gasoline Tax Act, has provided a method by virtue of which those who are entitled to exemptions on gasoline sales may have the money so paid refunded. The Legislature has designated the Nevada Tax Commission as the agent before whom the proper affidavits must be filed, reciting the facts necessary to warrant the exemption.

To issue certificates of exemption indiscriminately to Government officers or employees would be violating the provisions of our law and setting up a method contrary to law in the matter of granting exemptions.

It will be necessary, therefore, for those engaged in Government service and who are acting as agents for the United States to pay the tax in the first instance and submit to the Nevada Tax Commission, in support of their exemption claim, an affidavit reciting facts

establishing that the gasoline so purchased was used by them for and on behalf of the United States.

Respectfully submitted,

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

NEVADA TAX COMMISSION, *Carson City, Nevada.*

SYLLABUS

316. Elections—Election Precinct May Be on Indian Reservation—Government Employees Cannot Be Election Officers—Government Employees Right to Vote Depends upon Residence—Illiterate Voters Cannot Be Assisted in Voting.

(1) An election precinct may be established on an Indian Reservation.

(2) Persons holding lucrative offices with the Government cannot act as State election officers.

(3) Whether Government employees of an Indian Reservation can vote thereon depends upon matter of residence.

(4) Illiterate voters may not be assisted in marking their ballots.

INQUIRY

CARSON CITY, September 1, 1928.

(1) Is it legal to hold the polls of a given precinct within the established boundaries of a Government Reservation?

(2) Can government employees or officials act as election officers?

(3) Can such Government employees legally register and vote at State and county elections?

(4) In view of the provisions of section 45, Statutes of Nevada 1917, page 358, can illiterate voters receive assistance in marking their ballots by claiming to be physically disabled?

OPINION

Within the State of Nevada there have been established by Executive Order several Indian Reservations. In considering the first question, I assume that election precincts have been established upon Indian Reservations by the several Boards of County Commissioners in accordance with the provisions of section 2 of the General Election Laws, and that your question is directed to the legality of such action because it authorizes polling places within the boundaries of Indian Reservations.

By Opinion No. 247, we ruled that an Indian residing upon the Pyramid Lake Indian Reservation for the required period of time, with the intent to make such place his permanent domicile, was entitled to vote. This opinion was grounded upon the theory that

the land within the confines of this reservation was Nevada territory and that residence thereon for the required time was a residence within the State of Nevada.

A correct answer to your first question requires, therefore, a determination of the legal status of Indian Reservations in this State and whether the State of Nevada has the power to include them within the political subdivisions of this State for governmental purposes.

The Legislature of the State of Nevada, in authorizing the establishment of election precincts within the State of Nevada, excludes no part or portion of the territory embraced within the boundaries of the State as established by the Constitution. Section 2 of the General Election Law authorizes the Board of County Commissioners of the several counties to establish precincts and define the boundaries thereof. The several Indian Reservations located in this State are situated in the several counties of the State.

By an Act of Congress organizing the Territory of Nevada, all land between certain boundaries was included within the Territory of Nevada, "excepting such land as may be embraced within treaties existing between the Government and the several Indian tribes," and such land was excluded. That no treaties existed with any Indian tribes that would work an exclusion of any of the territory within the boundaries of Nevada is disclosed by the fact that neither the Enabling Act nor the Constitution of Nevada contained any provision excluding from the operation of the State government any area within the boundaries as defined. When the State was, therefore, admitted to the Union, Congress did not, by any declaration, reserve Indian lands to its exclusive jurisdiction.

The Supreme Court of the United States, passing upon the status of Indian Reservations and the right of the State to exercise jurisdiction, said:

> Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian Reservation or the sole and exclusive jurisdiction over that reservation, it has done so by express words.

In Opinion No. 208, Opinions of the Attorney-General, 1925-1926, we held that:

> The criminal jurisdiction of the State and all criminal laws or laws applicable to crime extend over both Indians and white persons, whether within or without an Indian Reservation with one exception, that is, for an offense committed on an Indian Reservation by one Indian against the person or property of another Indian.

citing sec. 6270, Revised Laws, 1912; State v. Johnny, 29 Nev. 203; State v. Buckaroo Jack, 30 Nev. 326; State v. Crosby, 38 Nev. 389.

It must logically follow, therefore, that the territory upon which Indian Reservations are located constitutes a part of the State of Nevada, and the State has the right to extend to its citizens, lawfully upon such Indian lands, all the privileges and immunities arising by reason of the laws of this State where the same in no manner conflict with the reserved jurisdiction of the United States.

The Supreme Court of Nebraska passed upon the right of the State to establish polling places on Indian Reservations and, in the case of State v. Norris, 55 N.W. p. 1087, said:

> Are the votes cast by these Indians to be rejected because the polling places at which they were cast were located on their reservations? Relator insists that neither the State of Nebraska nor the county of Thurston had any jurisdiction over these reservations; that the establishing of election precincts, and holding elections thereon, were illegal, and the votes cast

> thereat should be thrown out. In Painter v. Ives, 4 Neb. 128, it was said by Chief Justice Lake: "It would seem clear that, at the date of the State's admission into the Union, every portion of the territory within the prescribed boundaries thereof, the Indian Reservations inclusive, became subject to its laws." We think this is correct. The county of Thurston, in which these reservations lie, is one of the duly organized political subdivisions of the State. The county authorities were invested by law with the duty of establishing voting places therein, and of holding elections. The fact that one or more of the places of voting happened to be on an Indian Reservation in the county should not disfranchise the voters. That the title to these reservations is in the United States, and the lands are occupied by the Indians, sometimes denominated "wards of the Nation," does not give the United States exclusive jurisdiction of the territory. The jurisdiction of the Nation over the Indian, in his tribal relation, is supreme and exclusive; but when an Indian becomes a citizen of the United States, within the provisions of the Acts of Congress, he becomes subject to the laws of the State of which he is a resident, and entitled to the benefits of the laws of such State. The State also has jurisdiction over all the territory within its boundaries, for the government and protection of its citizens and their property, and the enforcement of its laws.

If therefore, by reason of existing facts, the establishment of an election precinct under section 2, General Election Law, is warranted, the further fact that the designated location of such precinct is on an Indian Reservation presents no legal or lawful objection.

(2) Section 9 of article IV of the Constitution of the State of Nevada declares, in substance, that no person holding any lucrative office under the Government of the United States shall be eligible to any civil office or board in this State.

If the Government employees or officers mentioned in your inquiry hold lucrative offices with the Government of the United States, I am inclined to the view that they cannot legally act as election officers.

(3) By the words "such Government employees" used in question No. 3, I apprehend that you refer to Government employees residing upon Indian Reservations and that their residence upon the reservation for the statutory period is relied upon to qualify them for registration and voting purposes.

That a residence, as defined in the Constitution, may be established upon an Indian Reservation is implied by the answer to question 1. It is only necessary, therefore, to determine if there exists any legal objection to the acquisition of a residence on a reservation by Government officers.

If Government officers, prior to employment, were residents of this State and registered voters in a precinct and county, the induction into office and residing at places of employment, under section 9, article IV of the Constitution, by the fact alone of such residence would not work a forfeiture of the right to vote at the former domicile. Where Government officials or employees assert the right to register and vote, based upon residence acquired by residing upon Government Reservations, a different question is presented.

The Constitution of the State of Nevada, section 2 of article II, provides:

> For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of the United States or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse or other asylum, at public expense; nor while confined at any public prison.

The same provision is contained in the Constitution of the several States of the Union. The courts of last resort of these States are not uniform in their decisions in construing the meaning and effect of this section. The Supreme Courts of Idaho, Michigan, Kansas, and New York have ruled that, under this section, persons in almshouses or other asylums are, by reason of this section of the Constitution, prohibited from establishing a residence at the places where the asylums are located and could only vote at their places of residence before becoming such inmates. The Supreme Court of Kansas at a later date reversed its former ruling, and the courts of Kansas, Oregon, and California hold that, under this section of the Constitution, inmates of asylums may acquire a residence at the asylum where that is their intention.

The Idaho case made no distinction in the several classifications referred to in the Constitution but held that:

> When it declares that no one, by reason of presence or absence in certain service, or at certain institutions, shall be regarded or deemed to have gained or lost a residence for the "purpose of voting," it is only meant that whoever enters such service or such institution, if he votes while in such service or institution, must do so at the place where he was entitled to vote at the time he entered such service or institution. Any other interpretation of the language of the Constitution would do violence to the words used, and would palpably defeat the meaning and intent of the provision under consideration.

The decisions to the contrary are based upon the theory that, under the Constitution, those in the employment of the United States or a State or in institutions of learning or asylums are not thereby prevented from becoming voters in the places where their work requires them or in places where the schools or asylums are situated. They further hold that the right to vote is not gained by a mere presence at such places, but, if it exists, it must be established by acts distinct from such residence.

The Supreme Court of the State of Nevada has not construed this section of the Constitution. I feel, however, that the decisions of the courts of California, Oregon, and Kansas present the better view, and that this section of the Constitution is not to be construed as a prohibition depriving the parties indicated of establishing a residence at their new place of endeavor.

In reference to Government employees and officers on Indian Reservations and their right to establish a residence thereon, it is important to determine if any facts exist by reason of their employment or the particular place of employment that may be inconsistent with the establishment of a residence as defined by our law.

The Supreme Court of Colorado has ruled in a recent case that a Government employee cannot successfully establish a residence at a United States Government

Hospital for voting purposes, because the residence of such person therein cannot be permanent in character for the reason that the employment period and, hence, the residence period is at the will and whim of the employer.

If the Colorado decision is accepted as declaring the correct rule in the matter of establishing residence for Government employees, it would follow that they cannot establish a residence upon Indian Reservations, for, no matter what the intent may be to claim permanency of residence thereon, the uncertainty of their tenure of office makes such intent impossible of fulfillment.

I am of opinion that the mere fact of residence upon a reservation for the statutory period is not, in itself, to be considered as sufficient to constitute a residence to authorize registration and voting, but that such residence must concur with and be manifested by the resultant acts which are dependent of the presence on the reservation.

Where an individual, whether an officer in Government service or a student in a seminary or an inmate of an asylum, by acts and declarations makes manifest his intention of claiming a residence at a particular place and, to that end, complies fully with the requirements of law, the theory which is advanced to deprive the right of such an individual to vote, because of intervening eventualities over which he has no control, seems to me to be too finely spun. If this theory were forced to its logical conclusion, then permanency of residence as affecting all individuals is impossible of attainment, because of the uncertainty of conditions surrounding ones domicile as evidenced by the happening of conditions causing change in domicile over which the individual has no control, and, finally, by the uncertainty of life itself.

I conclude, therefore, that there exists no legal reason which would prohibit an officer or employee of the Government from establishing a residence upon a Government Reservation.

(4) The provisions of the statute, Stats. 1927, chapter 61, specifically provide that inability to read or write shall not be considered as physical disability. The words of the statute, therefore, answer the question.

Respectfully submitted,

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

HON. FRED B. BALZAR, *Governor of Nevada, Carson City, Nevada.*

SYLLABUS

317. Corporations, Foreign.

It is not necessary for a foreign corporation to maintain a principal office in this State?

INQUIRY

CARSON CITY, September 17, 1928.

Is it necessary for a foreign corporation to maintain a principal office in this State?

OPINION

After a careful examination of the Statutes of this State respecting foreign corporations, I am of the opinion that no requirement exists making it mandatory for a foreign corporation to maintain a principal office in this State.

It is necessary, however, for such corporation to appoint a resident agent.

Respectfully submitted,

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

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

SYLLABUS

318. Fish and Game—County Commissioners May Limit Duck Shooting to Three Days a Week.

The Board of County Commissioners of any county may, by special ordinance, limit duck shooting to three days a week during open season.

INQUIRY

Carson City, September 22, 1928.

Whether an ordinance of Churchill County made by the County Commissioners limiting the hunting season for ducks to three days a week during the open season is valid, where the State law makes no restriction of the number of days during the week that ducks and other wild fowl may be hunted.

OPINION

Chapter 195, Statutes 1923, page 349, section 20, provides:

> Should it be deemed advisable by the Board of County Commissioners for any county in this State to lengthen the time of the closed season, or fix the dates of the open season within limits hereinbefore prescribed, for any species of game mentioned in this Act, the said Board of County Commissioners, acting for its respective county, may, upon petition of not less than fifty resident electors of said county, lengthen the time of said closed season by special ordinance spread upon its minutes and published at least two times in some newspaper of general circulation in said county.

Under the provisions of the section above quoted, it is the opinion of this office that an ordinance limiting the shooting of ducks to three days a week during the open season complies with this section; provided such ordinance was enacted in the manner prescribed by said section. The fixing of the open season at three days a week instead of seven is lengthening the time of the closed season and fixing the dates of the open season within

the limits prescribed in accordance with said section 20, above quoted. Therefore, said ordinance is valid if it was enacted according to the provisions of said section 20.

Respectfully submitted,

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

By WM. J. FORMAN, *Deputy Attorney-General.*

R.J. VANNOY, *Churchill County Game Warden, Fallon, Nevada.*

SYLLABUS

319. Health, Public.

(1) Statute distinguishes osteopathic physician and surgeon and osteopathic physician.

(2) Health board should not issue license to practice as osteopathic physician and surgeon upon a certificate of foreign State authorizing holder to practice as osteopathic physician.

INQUIRY

CARSON CITY, October 4, 1928.

Under Statutes 1925, chapter 118, may the Board of Osteopathy of this State issue a license to practice osteopathy as a physician and surgeon to a practitioner who presents a California license authorizing such person to practice osteopathy as a physician in the State of California.

OPINION

Statutes 1925, supra, defines osteopathy and regulates the practice thereof. This law makes it unlawful: (a) To practice medicine as an osteopathic physician or (b) to practice medicine as an osteopathic physician and surgeon, without obtaining a license.

Section 12 of the Act differentiates in respect to the rights and privileges of osteopathic physicians and osteopathic physicians and surgeons. It provides:

> Osteopathic physicians and surgeons licensed hereunder shall have the same rights as physicians and surgeons of other schools of medicine. Osteopathic physicians licensed hereunder shall have the same rights as physicians and surgeons of other schools of medicine, with respect to the treatment of cases or the holding of offices in public institutions.

It will be noted, therefore, that osteopathic physicians are not treated in the same manner, under the provisions of this Act, and a distinction is definitely made as between osteopathic physicians and osteopathic physicians and surgeons.

Section 7 provides the qualifications necessary to practice as an osteopathic physician and surgeon. The Act is silent, however, as to the qualifications necessary to practice medicine as an osteopathic physician.

Section 10 gives the board discretionary power to recognize and issue a license without examination to the practitioner who has been licensed in another State, where the requirements of such State are deemed equivalent to the requirements of this State at the date of such license.

In the instant case, the board could not issue a license, under the circumstances, as an osteopathic physician and surgeon because the California license authorizes the applicant to practice as an osteopathic physician. The board could, however, issue a license to practice as an osteopathic physician if, in its discretion, the requirements of the State of California at the time the license was issued are equivalent to those of the State of Nevada.

‘ Respectfully submitted,

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

DR. EMORY M. LORD, *State Board of Osteopathy, Reno, Nevada.*

SYLLABUS

320. Corporation—Fee for Issuing Reincorporation Charter.

Where corporation is reincorporated under sec. 82 of Statutes 1925, Corporation Law, a fee of five dollars must be charged for issuing charter.

INQUIRY

CARSON CITY, October 8, 1928.

A company organized under the Corporation Act of 1903 desires to come under the 1925 Act as provided in section 82, chapter 177, Statutes 1925, and a new charter is issued. Shall any fee be charged for the new charter?

OPINION

The new charter mentioned in the inquiry is in the form of a certificate.

Section 77, chapter 177, Statutes 1925, providing for the fees to be charged under said Act, provides in part as follows:

For all certificates not hereby provided for, five dollars.

It is the opinion of this office, therefore, that, although a new charter is not specifically mentioned in section 77, a fee of five dollars must be charged therefor.

Respectfully submitted,

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

By WM. J. FORMAN, *Deputy Attorney-General.*

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

SYLLABUS

321. University of Nevada—Resident of State—Tuition Charge.

If at the time a person matriculates at the University he is not a resident of Nevada, a residence thereafter established would not entitle such student to free tuition unless the family of such student is a bona fide resident of the State.

INQUIRY

CARSON CITY, October 23, 1928.

A matriculated at the University of Nevada at a time when he was not a resident of the State. Thereafter A resided within the State of Nevada a sufficient length of time to establish a residence, but, during all of the time, his family did not reside within the State.

Is A entitled to receive free tuition at the University of Nevada under section 4648, Revised Laws of Nevada, as amended?

OPINION

Section 4648 provides:

> The Board of Regents of the University of Nevada shall have the power to fix a tuition charge for students at that University; *provided, however*, that tuition shall be free (a) to all students whose families are bona fide residents of the State of Nevada, and (b) to all students whose families reside outside of the State of Nevada, providing such students have themselves been bona fide residents of the State of Nevada for at least six months prior to their matriculation at the University.

Under this section, free tuition may be obtained at the University by those who, by reason of the facts existing, are entitled to be classified under the exemptions of subdivision (a) or subdivision (b).

In the question submitted, A, the student, was not a resident of this State for a period of six months prior to the time of his entrance in the University of Nevada. The statute plainly indicates the intention, in cases where parents of the student reside outside of the State, to charge a tuition fee unless, at the time of matriculation, the student is a bona fide resident of the State of Nevada and has resided therein for a period of six months. Under the law, this qualification must exist at the time of matriculating to warrant an exemption from tuition fees under subdivision (b). The fact that A, after he entered the University, became a bona fide resident and citizen of this State, would not exempt him from the payment of tuition fees unless the facts are such as would entitle A to be classified under subdivision (a) of the statute.

The query submitted calls for a construction of the law, and the opinion is limited to the scope of the inquiry.

Respectfully submitted,

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

DR. WALTER E. CLARK, *President, University of Nevada, Reno, Nevada.*

SYLLABUS

322. Revenue—Time for Certification of Assessment Book Directory.

The failure to deliver assessment book certified to County Auditor within statutory time would not invalidate assessment.

INQUIRY

CARSON CITY, November 21, 1928.

Will an assessment levied by an irrigation district be rendered invalid by reason of the failure of the Secretary of the Board of Directors of such district to certify the assessment book to the County Auditor, prior to October 15, as required by section 29 of the Irrigation District Act, as amended, Statutes 1927, chapter 182, page 18.

OPINION

The statute in question provides:

> An assessment book shall be made up for the lands in each county in which the district is situated, and the Secretary of the Board of Directors shall forthwith certify the same not later than October 15 of each year to the County Auditor or County Auditors, as the case may be, who shall enter such assessments in the tax rolls of such county or counties.

In considering a similar question in the case of State v. Northern Belle M. Co., 15 Nev. 385, the Supreme Court of this State held:

> The provision as to time for completing the assessment roll is merely directory, and any irregularity in this respect is a defense in an action for the taxes, only to the extent that the taxpayer has been injured thereby,

and in the case of State v. Western Union Tel. Co., 4 Nev. 338 held:

> The time prescribed by the revenue law within which the assessor is to complete his assessment roll is only for the convenience of other officers; his dilatoriness furnishes no matter of which a taxpayer can complain, or on account of which he can defeat the tax.

In view of these decisions it is the opinion of this office that the fact that the assessment book mentioned in the inquiry was not certified to the County Auditor until after October 15 would not invalidate the assessment.

Respectfully submitted,

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

By WM. J. FORMAN, *Deputy Attorney-General.*

HON. J.A. JURGENSON, *District Attorney, Lovelock, Nevada.*

SYLLABUS

323. Public Service Commission—No Authority to Review Assessment Made by Irrigation Districts.

INQUIRY

CARSON CITY, December 10, 1928.

Has the Public Service Commission of Nevada jurisdiction to review assessments and charges made for water by the Walker River Irrigation District?

OPINION

Section 7 of the Public Service Commission Act defines public utilities and grants to the Public Service Commission the power to supervise, regulate, and control such utilities.

The Walker River Irrigation District was organized under Statutes 1919, chapter 64 (In Re. Walker River Irrigation District, 44 Nev. 321).

This statute authorizes the formation of a district upon petition of a majority of holders of title of the land situated within the proposed district. A complete and comprehensive plan of procedure is outlined in the Act, including the authority lodged in the Board of Directors to fix the rate and levy an assessment upon lands in the district sufficient to raise the annual interest on outstanding bonds or any contractual obligation. The law further defines the several funds that may be created, and includes in the general fund the cost of operation, maintenance, and management.

Briefly stated, the purpose of the Act is to permit landowners with water rights to pool their interests and pledge their property for raising funds, so that greater benefits may accrue to all. The agency authorized by the legislature may be defined as a mutual, cooperative corporation, organized not for profit, engaged in distributing water to its members for use upon lands within this district. It is also defined as a special State organization for State purposes, with limited power to perform certain work which the policy of the State requires.

The Supreme Court of California, in the case of McFadden v. The Board of Supervisors of Los Angeles County, 16 Pac, 397, ruled that, the provisions of law authorizing the Board of Supervisors to fix rates on water to be sold did not apply to a corporation distributing water not for profit and where the distribution was made to stockholders of such corporation only. The Court stated:

> In this case it is clearly apparent that the waters under the control of the corporation were acquired to be held and employed for the use of the stockholders only. An individual can certainly acquire water to be used on his own land. With such use a Board of Supervisors would have nothing to do. We know of no reason why individuals cannot associate themselves, take on a corporate form, and acquire water to be used on their own lands.

When this is done, we are of opinion that a Board of Supervisors can have no more power over the rates to be paid by the stockholders than in the case of individuals.

So long, therefore, as an irrigation district confines its efforts to supplying water to those within the district, it is not functioning as a public utility within the provisions of section 7 of the Public Service Commission Act, and the latter would have no authority to supervise or control charges and assessments.

Authorities examined in rendering opinion:

Nampa v. Meridian Irrigation District, 147 Pac. 75;

Central Oregon Irrigation District v. Public Service Commission, 196 Pac. 832;

Allen v. Railroad Commission, 176 Pac. 466.

Respectfully submitted,

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

HON. JOHN F. SHAUGHNESSY, *Chairman, Nevada Public Service Commission, Carson City, Nevada.*

SYLLABUS

324. Corporations—Foreign and Domestic—Charges to be made by Secretary of State.

(1) Where a foreign corporation changes its resident agent in this State and files certificate reciting the change, it is not necessary for resident agent appointed to file an acceptance with the Secretary of State.

(2) No fee is collectible by the Secretary of State for filing such paper for either a domestic or foreign corporation.

INQUIRY

CARSON CITY, December 15, 1928.

When a foreign corporation changes its resident agent in this State and files a certificate reciting the change in compliance with section 5024, Revised Laws, 1912, is it necessary for the new agent to file an acceptance of appointment in the office of the Secretary of State, and copy of such acceptance, certified by the Secretary of State, and copy of such acceptance, certified by the Secretary of State, in the office of the County Clerk of the county in which the foreign corporation has its principal place of business?

When appointment is made in accordance with the above-named section by foreign corporation, is there any fee for filing same?

Also, is there any fee for filing appointment of resident agent by domestic corporations other than filing list of officers designating resident agent?

OPINION

You are advised that, after an examination of the law, your several questions are answered in the negative.

Respectfully submitted,

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

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