

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1935

154. Motor Carrier License Fees--Public Service Commission.

A company, resident of a State other than Nevada, is entitled to use one automobile or truck of not exceeding 5,000 pounds unladen weight in the transportation of its advertising material over the highways of this State without being liable for the license fee provided for by chapter 165, 1933 Statutes of Nevada.

INQUIRY

CARSON CITY, January 5, 1935.

A company, resident of a State other than Nevada, sends men into Nevada to advertise its products. These men travel over the highways in what is known as convertible sedan automobiles, two in number, in which is also transported the advertising material. None of this material is sold, neither is there any charge made therefor. The company owns the automobiles in question and also the advertising material, the title of which remains in the company after the same has been put in place for display purposes. The automobiles each weigh approximately 2,800 pounds unladen.

Is such company liable for the license fees upon each or either of said automobiles provided by chapter 165, Statutes of Nevada 1933, known as the Motor Carrier License Act, 1933?

OPINION

The purpose of chapter 165, Statutes of Nevada 1933, is, primarily, to provide revenue for the maintenance of the highways of Nevada and thereby, through proper maintenance, protect the safety and welfare of the traveling and shipping public. Sec. 1, chap. 165. The theory upon which the collection of the license fee provided in the statute is based is that those who use the highways for the purpose of gain should pay a reasonable amount for such use in order to assist in providing the State with funds with which to repair and maintain its highways; and this theory has been sustained as a constitutional exercise of the taxing power of the State. *Continental Baking Co. v. Woodring*, 286 U. S. 352, 76 L. Ed. 1155; Ex Parte Iratacable, [55 Nev. 263](#), 30 P. (2d) 284.

The ultimate purpose of the company mentioned in the inquiry was, no doubt, the sale of its products. It hoped, through this medium, to sell its goods in new territory in Nevada and to increase its sales in territory where its products were already known. This is the basic purpose of advertising, and we think it cannot be successfully contravened that, in the final analysis, advertising is had with the one thought in mind, profit and financial gain, and the use of the

highways in the furtherance of advertising its products certainly tends to the furtherance of the business of such company and the attempt, at least, to enhance its reward.

The Legislature, however, wrote into the statute in question an exemption, reading:

None of the provisions of this act shall apply * * * to the operation of a privately owned truck in personal services as distinguished from those using the highways in a gainful occupation shall be exempted; provided, however, this exemption shall be limited to one such vehicle not exceeding an unladen weight of five thousand pounds. Sec. 3, chap. 165.

The Supreme Court of Nevada in the case of Ex Parte Thrasher, 55 Nev. 305, 31 P.(2d) 1039, held that a grocer's truck of an unladen weight of less than 5,000 pounds, used in transporting his groceries and merchandise from wholesalers to the grocer's own store over the highway was operated in "personal service" and not in gainful occupation and, therefore, came within the above-quoted exemption.

We think the operation of the company's automobiles, as indicated in the inquiry, is analogous to the operation of the grocer's truck in the Thrasher case. If the grocer's truck and the operation thereof fell within the exemption, then we think the operation of the automobiles under discussion here also falls within the exemption. We are bound by the decision of the Supreme Court in the Thrasher case on this question; however, it is to be noted that the statutory exemption only applies to one motor vehicle. The inquiry shows two such vehicles owned and operated by the same company in the transportation of the advertising material. The exemption in the law only going to one vehicle, it cannot be said that both vehicles are within the exemption.

Those who seek shelter under an exemption law must present a clear case, free from doubt, as such laws, being in derogation of the general rule, must be strictly construed against the person claiming the exemption and in favor of the public. 17 R. C. L. 522, sec. 42; 27 C. J. 237, sec. 91; *Erie Ry. Co. v. Pennsylvania*, 21 L. Ed. 595; *Railway Co. v. Philadelphia*, 101 U.S. 528; *Camas Stage Co. v. Kozer*, 209 P. 99.

We conclude that the company in question is entitled to use one automobile or truck of not exceeding 5,000 pounds unladen weight in the transportation of its advertising material over the highways of this State without being liable for the license fee provided by chapter 165, Statutes 1933, but no more than one such vehicle.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By. W. T. MATHEWS, Deputy Attorney-General.

HON. J. F. SHAUGHNESSY, Chairman, Public Service Commission of Nevada, Carson City, Nevada.

SYLLABUS

155. Bonds of Township Officers.

Township officers may elect whether they will take out their bonds under chapter 124, 1933 Statutes of Nevada, or obtain them from surety companies.

INQUIRY

CARSON CITY, January 9, 1935.

In your letter of 8th instant you ask, in effect, the opinion of this office on the following question:

Are township officers required, under the State Bonding Act of 1933 of this State, to secure their official bonds from the State, as provided for in chapter 124, 1933 Statutes of Nevada, pages 161-164, both inclusive, or may they secure their official bonds from surety companies?

OPINION

Section 3 of the last above-mentioned Act reads in part as follows:

Every state and county official required by law in his official capacity to furnish surety bond, shall apply to the state board of examiners for surety.

If it be the intention of your question to ask whether it is mandatory that township officers apply to the State Board of Examiners for their official bonds under the above-mentioned chapter, it is our unqualified opinion that the law is not mandatory as to township officers, but is mandatory as to all State and county officers. The Act expressly names State and county officials and says that everyone of them "shall apply" to the board for such surety. There is no place in the law, however, where it expressly mentions township officers or makes it mandatory that they be bonded through the State Board of Examiners under this law.

I have taken the position, however, that, when township officers apply to the State Board of Examiners for their official bonds, such board may legally execute the official bonds of township officers. This holding of mine is based solely upon the well-known principle of law that a county is simply an arm of the State, and that a township is an arm and a part of the county in which the particular township is situated.

I am of the opinion, therefore, that township officers are not mandatorily required to take

out their official bonds under said chapter 124 but that, when issued by the State Board of Examiners under that chapter, the bonds are legal and enforceable. In other words, the township officers may elect whether they will take out their bonds under this chapter or obtain them from a surety company.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

HON. ERNEST S. BROWN, District Attorney, Reno, Nevada.

156. Franchise Rights.

SYLLABUS

The franchise rights of telephone and power companies are subordinate to the rights of the traveling public in the highway, and such companies are required to bear the expense of removal of their lines located on a county right of way which is abandoned, and the reinstallation of such lines on the new right of way. Such expense shall not be borne by the county or State.

STATEMENT

CARSON CITY, January 24, 1935.

A contract for the construction of a portion of the county road system from four miles south of Minden to the Nevada-California State line has been awarded by the State Highway Department. The construction is to be under the supervision of the State Highway Department and financed by funds appropriated under the National Industrial Recovery Act. The width of the original county right of way was inadequate to allow the construction of a standard-width highway, thus necessitating the acquiring of additional right of way on each side of the present county road. As this proposed construction is not on the State Highway System, it was necessary for the Douglas County Commissioners to acquire the said additional right of way in the name of the county. That they did, and the said County Commissioners secured written agreements from all property owners affected. From a road intersection on the above-mentioned section known as Scheele Corner to a point approximately 7,000 feet north, the Sierra Pacific Power Company has a power line located west of the present county road and upon the county's old right of way, and the United Farmers Telephone & Telegraph Company has a telephone line located east of the present county road and upon the county's old right of way. Each of the said companies has a written franchise from the county, duly granted by the Douglas County Board of County Commissioners, allowing them to place the said lines upon the county roads. These franchises were granted for a period of twenty-five years and have not yet expired. It is now necessary to widen that certain portion of the heretofore-mentioned county road system as a public improvement, which will necessitate the removal of the heretofore-mentioned companies' lines and the reinstallation thereof approximately fifteen feet from their present location and on the newly acquired right of way.

INQUIRY

Should the expenses of such removal and reinstallation of the lines be borne by the respective companies, or by the county of Douglas, or by the State?

OPINION

The legal question to be determined is the following: Are the intervening public rights, or, specifically, the rights of the traveling public in the highway, subordinated to the franchise rights of the companies? If so, it would naturally and necessarily follow that the State should stand the expense of the removal and reinstallation of the said telephone and power lines; if not, and the franchise rights of the respective companies are subordinated to the rights of the traveling public in the highway, the converse rule would apply and the companies would be required to bear the expense of such removal and reinstallation.

We are unable to find a decision of the Nevada Supreme Court determining this question, and feel safe in saying there is none; therefore, resort must be had to decisions from courts of other States.

In *Scranton Gas & Water Co. v. Scranton*, 214 Pa. St. 586, the city of Scranton and a railroad company had pipes under the city's streets by authority of a legislative grant. Due to the construction of the grade separation, the gas company was required to move its pipes in order to have them accessible for repair. The gas company sought to charge compensation for the expense of moving the location of the gas pipes. The court held that no liability results to the municipality for the disturbance of a gas or water company's pipes in a public street when made necessary by public consideration. It is the reasonable discretion of the municipal authorities that determines the extent of changes in the streets required to meet public necessities, and to that change, whatever it may be, short of an annulment or abrogation of the company's right to maintain its system of pipes in the public streets, the company must conform at its own cost and expense. The power to change the physical conditions of a street results from the inherent right of the municipality to the exercise of the police power, and it is the duty of the company to conform to the changes from the subordinated right of the gas company in the public streets under its original grant of privilege.

In *Belfast Water Company v. Belfast*, 92 Me. 52, 42 Atl. 235, the water company, under franchise from the city, constructed works and located water gates within the street right of way. Later, the city, in widening the street, notified the water company to move its water gates. The court held that, when the company placed its gates in the street, it did so subject to the right of the city to make such changes in the surface of the street and the alignment of the street right of way as might be necessary to render the street safe and convenient for the public travel.

In *New Orleans Gas & Light Company v. Drainage Commission (La.)*, 35 So. 929, the court held that a gas company authorized by legislative franchise to lay its pipes in a street of a city could not recover the cost of shifting its water mains to permit the installation of a system of

drains in accordance with the regulation of a drainage committee of the city, the mains themselves being unimpaired and there being no interference with their possession and the company's franchise being unimpaired. This decision was affirmed by the Supreme Court of the United States in 197 U. S. 462.

In *County Court of Wyoming v. White*, 91 S. E. 350, it is held, "It is the duty of a telegraph company occupying a highway under franchise to remove and reset its poles at its own expense when notified to do so, if they are so situated as to interfere materially with the work lawfully prosecuted of primarily improving such highway, the franchise of the company being subordinated to the rights of the traveling public in the highway."

It is held further that, "This right is not minimized by the fact that the municipality designated the exact place of laying pipes" (*Sedalia Gas & Light Company v. Mercer*, 48 Mo. Ap. 644), "neither is it affected by the Federal Post Road Law granting public service corporations the right to use Federal post roads." *Michigan Telegraph Co. v. Charlotte*, 93 Fed. 11.

The general rule, which we believe to be applicable here, is that individuals or public service corporations may be required to change the location of their property on a right of way at their own expense when the present location of such property interferes with a contemplated improvement of a public highway. *Monongahela City v. Monongahela Light & Power Co.*, 12 Pa. 529; *Ganz v. Ohio Postal Telegraph Co.*, 140 Fed. 692; *Monroe Telegraph Co. v. Ludlow*, 140 Wis. 510; *Merced Falls Gas Co. v. Turner*, 2 Cal. App. 720.

The County Commissioners of Douglas County obtained the power to grant the franchises to the above-mentioned companies pursuant to an Act entitled "An Act concerning the granting of franchises by board of county commissioners * * *" approved March 23, 1909, the same being found in Stats. 1909, p. 207, and also contained in sections 3183-3193, both inclusive, N. C. L. 1929. The State of California has an Act known as the "Broughton Act" which is substantially the same as our law on this subject. The Supreme Court of California in the case of *Sunset Telephone & Telegraph Company v. Pasadena*, 161 Cal. 265, at page 212, in discussing the Broughton Act, said:

It appears very clear to us that this act cannot reasonably be construed as granting any right in public highways. Its whole purpose was to prescribe the method and conditions upon which the franchises included within its terms might be granted by the legislative body authorized by law to make the grant, or, as said in *McGinnis v. Mayor, etc.*, 153 Cal. 711, "to prevent the granting thereof in any other manner than that prescribed."

Under this decision, it appears that the said "Broughton Act" does not vest in a public service corporation any absolute or indefeasible right to maintain its pole lines and to have the poles remain in the particular spot in which they were originally located for all times, this right not being superior to the right of a State to exercise the police power in the construction of public highways. This decision we believe to be particularly in point, as the said Broughton Act of

California, referred to in the opinion quoted, is an Act of the legislature setting forth the procedure by which a county may grant a franchise to a public utility corporation for rights of way for pole lines, etc., along county roads the same as the Nevada law above cited.

From the foregoing authorities, we are forced to the conclusion that, even though the above-named companies were duly granted 25-year franchises by the Douglas County Board of County Commissioners, which have not expired, the franchises so granted were nevertheless subject to the right of the county and the State to make such changes in the surface of a highway and the alignment thereof as may be necessary to render the highway safe and convenient for public travel, and that the duty of the companies to conform to the changes made naturally and necessarily flow from the rights of the public service corporations or individuals in the highway under their franchises, such rights being subordinated to those of the public.

We, therefore, hold that the expense of the removal and reinstallation of the heretofore-mentioned lines must be entirely borne by the respective companies mentioned herein and not by the county of Douglas or the State of Nevada.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

SYLLABUS

157. Fish and Game Commission.

Section 3046, Nevada Compiled Laws 1929, as amended by chapter 188, 1933 Statutes of Nevada, provides that the Nevada State Fish and Game Commission may use so much of any available funds in the Fish and Game Preservation Fund as may be necessary for the purchase of game, for the purpose of its protection and propagation in the State of Nevada, regardless of the delivery date of such game, if such date is approved by the Fish and Game Commission, and provided payment therefor is first approved by the Fish and Game Commission and by the State Board of Examiners.

INQUIRY

CARSON CITY, February 28, 1935.

Would it be legal for the Nevada State Fish and Game Commission to enter into a contract for the purchase of pheasants or other game and make payment therefor at this time; the said game to be delivered to the Commission in October 1935; the purchase thereof being for the “protection and propagation” of such game in the State of Nevada.

OPINION

That portion of section 3046, N. C. L. 1929, as amended by chapter 188, 1933 Statutes of Nevada, pages 282 and 283, section 3, which is here applicable reads as follows:

Said board of fish and game commissioners shall have full power and authority to use so much of any available funds as may be necessary for the acquisition of lands, water rights, and easements, and other property; and for the protection, maintenance, operation and repair of fish hatcheries and other means and appliances *for the protection and propagation of fish and game in the State of Nevada.*

It will here be noted that this law expressly empowers the Board of Fish and Game Commissioners to use so much of any available funds as may be necessary for the protection and propagation of fish and game in the State of Nevada. It therefore naturally and necessarily follows that the Commission may purchase the said pheasants or other game, as set forth in the inquiry, and pay for same at present out of "any funds now available for this purpose," provided, that the payment therefor is first approved by the Fish and Game Commission and by the State Board of Examiners and taken out of the "Fish and Game Preservation Fund," created and provided for by section 3047 N. C. L. 1929. The fact that the pheasants or other game are not to be delivered to the Commission until October 1935, with the consent and approval of the same Commission, is not legally material, and can in no way be construed to invalidate or interfere with the transaction.

Maintaining the views heretofore expressed we are forced to the conclusion that the inquiry should be and is hereby answered in the affirmative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

NEVADA STATE FISH AND GAME COMMISSION, Box 678, Reno, Nevada.

SYLLABUS

158. Fishing Privileges.

Chapter 188, 1933 Statutes of Nevada, provides for the purchase of fishing licenses, and any fisherman who has obtained such a license may legally and lawfully fish in the waters of that portion of Topaz Lake which lie wholly within Nevada, between the dates of March 1 and October 1, both dates inclusive, without paying any fee to any person, corporation, association or group of persons whatsoever. A request for any such fee is both illegal and unlawful.

INQUIRY

CARSON CITY, March 1, 1935.

Can any person, corporation, association or group of persons lawfully require the payment of one (\$1) dollar per day of each fisherman as a condition for the privilege of fishing in that portion of the waters of Topaz Lake which lie within the State of Nevada, or lawfully prohibit fishing therein by any or all fisherman who refuse to pay the said one (\$1) dollar per day?

OPINION

Chapter 188, 1933 Statutes of Nevada, pages 284, and 285, sections 7 and 8, provides by whom, and the procedure through which a fishing license may be procured in this State. Chapter 23, 1933 Statutes of Nevada, page 19, section 1, provides in substance, as we construe it, that it shall be lawful for any person to fish in or from the waters of Topaz Lake, District No. 11, between the dates of the first day of March and the first day of October of each year, both dates inclusive. Therefore any person who has obtained the required fishing license pursuant to the provisions of said chapter 188, 1933 Statutes of Nevada, supra, may, and has an absolute legal and lawful right to, fish in or from the waters of that portion of Topaz Lake which lie wholly within the State of Nevada without paying a fee of one (\$1) dollar per day, or any other amount, to any person, corporation, association or group of persons whatsoever, and should the said one (\$1) dollar per day be requested, such request is illegal and unlawful.

Maintaining the views heretofore set forth we are forced to the conclusion that the inquiry should be and the same is hereby answered in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

NEVADA STATE FISH AND GAME COMMISSION, Box 678, Reno, Nevada.

SYLLABUS

159. Licenses to Hoisting Engineers.

Sections 4258 and 4265, Nevada Compiled Laws 1929, provide that any person desiring to obtain a license to operate any steam, electric, gas, air, or other hoisting machinery in this State, who fulfills the requirements provided by law and successfully passes the examination lawfully required therefor, is legally entitled to such license, regardless of the class of property upon which the said hoisting machinery is, or is intended to be, operated.

INQUIRY

CARSON CITY, March 15, 1935.

Is it within the purview of the powers of the licensing board under the "Hoisting Engineers Licensing Act" to issue licenses to hoisting engineers to operate steam, electric, gas, air, or other hoisting machinery in this State, where the applicant for the license desires to procure the same for the purpose of operating hoisting machinery in no way connected with the mining industry and not to be used on mining property?

OPINION

This Act is entitled "An Act providing for the issuance of licenses to hoisting engineers; providing a fee for such licenses; creating district boards of examiners; providing for revocation of licenses; creating the hoisting engineers license fund in the state treasury; making a temporary appropriation for carrying out the purpose of this act, and providing a penalty for violation of any of the provisions hereof," and is embodied in sections 4258 to 4294, both inclusive, N. C. L. 1929.

After a careful perusal of this entire Act we find that there is nothing therein, either in the title thereof or in the body of the Act, limiting the operation of same to applicants for hoisting engineer's licenses who intend to operate on mine property only. To the contrary, we believe it to have been the intention of the Legislature, as gleaned from sections 1 and 9 of this Act, same being sections 4258 and 4265, respectively, N. C. L. 1929, that any person desiring to obtain licenses to operate any steam, electric, gas, air, or other hoisting machinery in this State, who fulfills the requirements provided by law and successfully passes the examination lawfully required therefor, is legally entitled to such license, regardless of the class of property upon which the said hoisting machinery is, or is intended to be, operated.

Maintaining the views heretofore set forth the inquiry is answered in the affirmative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

HON. MATT MURPHY, State Inspector of Mines, Carson City, Nevada.

SYLLABUS

160. Automobile License Fees, Etc.

A nonresident salesman temporarily in this State uses his automobile for the purpose of soliciting orders for the firm which he represents. The automobile is duly registered and taxed in

the foreign State, which is the domicile of the owner, and bears license plates of said State. The salesman does not keep said automobile in any county in this State long enough to allow same to acquire a permanent situs in Nevada.

1. The salesman is “engaged in trade or business” within the meaning of the term as the same is used in section 4375, Nevada Compiled Laws 1929.

2. The portion of section 4375, Nevada Compiled Laws 1929, which refers to registration of motor vehicles brought into this State for the purpose of “engaging to trade or business of any kind,” is repealed, amended or superseded by chapter 202, 1931 Statutes of Nevada, as amended by chapter 177, 1933 Statutes of Nevada, page 250, section 17, paragraph (a), to the extent that, if such nonresident strictly complies with the five-day proviso of paragraph (a), section 17, of said 1933 statute, he is exempt from the payment of any fees to this State. This exemption refers only to State licensing or registration fees and does not refer to personal property or other State taxes on the property in question.

3. The owner of said automobile cannot be lawfully required to pay the Nevada State registration or license fee, provided the nonresident salesman, or any other nonresident person or persons, strictly complies with the five-day proviso of chapter 177, 1933 Statutes of Nevada, section 17, paragraph (a).

4. The Assessor cannot lawfully assess a personal property tax against such an automobile and require the owner thereof to pay the same.

5. Under the provisions of section 6505, Nevada Compiled Laws 1929, a poll tax cannot be lawfully assessed and collected from the owner of such an automobile.

STATEMENT

CARSON CITY, April 11, 1935.

A salesman who is a nonresident of this State uses his automobile while in this State temporarily for the purpose of soliciting orders herein for the firm which he represents. Said automobile is duly registered and taxed or taxable in a foreign State which is the domicile of the owner and bears license plates of said State. After completing his business of soliciting orders in this State, said salesman drives the automobile from this State, to another State, where he continues to carry on the same business, not keeping said automobile in any county in this State long enough to allow same to acquire a permanent situs in Nevada.

INQUIRY

1. Is the salesman referred to in the foregoing statement “engaged in trade or business of any kind,” within the meaning of this term as the same is used in section 4375 N. C. L. 1929?

2. Is the portion of section 4375, N. C. L. 1929, which refers to registration of motor

vehicles brought into this State for the purpose of “engaging in trade or business of any kind,” repealed, amended or superseded by chapter 202, 1931 Statutes of Nevada, as amended by chapter 177, 1933 Statutes of Nevada, page 250, section 17?

3. Can the owner of this automobile be lawfully required to pay the Nevada State registration or license fee?
4. Can the Assessor lawfully assess a personal property tax against this automobile and require the owner thereof to pay the same?
5. Can a poll tax be lawfully assessed and collected from the owner of said automobile?

OPINION

1. The word “business” as the same is used in “An Act supplemental to the General Revenue Act and to provide for a State license upon the business of disposing at retail or wholesale of spirituous, malt or vinous liquors in this State, and providing penalties for violation hereof,” approved March 15, 1905, is defined by the court as follows:

The term “*business*,” as used in these statutes, clearly, we think, means business in the trade or commission sense, as held by the courts construing similar statutes. State v. University Club, 35 Nev. 475, at 484, 130 P. 468.

It is here pointed out that the court construes the word “*business*” as synonymous with the word “*trade*”. In 101 U.S., page 231, the word “*trade*” is construed in its broader sense, as equivalent to any occupation, employment, craft or *business*. We therefore hold that the words “*business*” or “*trade*,” as used in said section 4375 N. C. L. 1929, are synonymous.

In 50 Alabama 130, and 23 New York 244, “*business*” is defined as “that which occupies the time, attention and the labor of man for the purpose of livelihood or profit.”

The salesman heretofore mentioned, who is in this State solely for the purpose of engaging in the business of soliciting orders for his firm, which occupies his time, attention and labor for the purpose of livelihood or profit is most certainly engaged in *trade* or *business* within the purview of said section 4375, N. C. L. 1929, and is therefore bound by the terms thereof so far as the same are applicable to him. Query No. 1 is, for the reasons hereinbefore given, answered in the affirmative.

2. Section 4375, N. C. L. 1929, provides, so far as here material, that where a motor vehicle is brought into this State for the purpose of engaging in “*trade*” or “*business*” of any kind, same shall be registered within five days after such motor vehicle enters the State in compliance with the State Motor Vehicle Laws. This provision of the statutes would make it mandatory that said salesman register his automobile and pay the required fee therefor, unless the same is repealed, amended or otherwise superseded by a legislative Act, or other valid law enacted subsequent thereto. Said section 4375, N. C. L. 1929, is section 2 of the “Motor Vehicle

Licensing and Registration Act,” approved March 19, 1925. All parts of said 1925 Act inconsistent with the provisions of chapter 202 of the 1931 Statutes of Nevada, page 322, as amended by chapter 177, 1933 Statutes of Nevada, page 249, are superseded by said 1931 Act and the Act amendatory thereto, because of the fundamental doctrine that a subsequent valid legislative Act superseded all prior Acts of the Legislature inconsistent therewith.

This brings us to a determination of the main question, viz: Is section 2 of the above-cited 1925 Act inconsistent with the said 1931 Act, as amended by chapter 177, Statutes of 1933, page 250, section 17, paragraph (a), which reads as follows:

A nonresident owner, except as otherwise provided in this section, owning any foreign vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in this state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner, may operate or permit the operation of such vehicle within this state without the payment of any fees to the state; *provided*, that the nonresident owner of such vehicle shall, within five days after commencing to operate or causing or permitting it to be operated within this state, apply to the department, or a duly appointed assistant, for the registration thereof on an appropriate official form, stating therein the name and home address of the owner and the temporary address, if any, of the owner while within this state, the registration number of said vehicle assigned thereto in the state or country in which the owner is a resident, together with such description of the motor vehicle as may be called for in form, and such other declaration of facts as may be required by the department.

Section 2 of said 1925 statute, same being section 4375, N. C. L. 1929, is clearly inconsistent with section 17 of the 1933 statute, above quoted, in that the latter expressly exempts a nonresident owner of a motor vehicle, or a foreign vehicle, duly registered in a foreign State or country, in which the owner is a resident, from the payment of any *fees* to this State, provided that such owner strictly complies with the 5-day proviso of said paragraph (a), section 17, of said 1933 statute. Where said nonresident owner fails to comply with the said 5-day proviso of said section 17 then, and only then, section 4375 N. C. L. applies. Section 2 of the 1925 Act contains no such exemption, but instead of exempting such nonresident owner it requires him to pay the State registration fee provided he brings the car into the State for the purpose of *engaging in trade or business of any kind*. This renders said 1925 law and the 1931 law, as amended in 1933, clearly and irreconcilably inconsistent *quoad hoc*. We wish to make it clear that this exemption of State “fees” refers only to State *licensing or registration* fees and has nothing whatever to do with personal property or other State taxes on the property in question.

For the reasons heretofore set forth query No. 2 is answered in the affirmative to the extent above indicated.

3. Query No. 3 is answered in the negative provided the nonresident salesman, or any other nonresident person or persons, strictly complies with the 5-day proviso of chapter 177,

1933 Statutes of Nevada, page 250, section 17, paragraph (a), as explained herein by the answer to query No. 2.

4. Section 6421, N. C. L. 1929, reads as follows:

Between the first day of January and the second Monday of July in each year, the county assessor, except when otherwise required by special enactment, shall ascertain, by diligent inquiry and examination, all property in his county, real and personal, subject to taxation, and also the names of all persons, corporations, associations, companies, or firms, owning the same; and he shall then determine the true cash value of all such property, and he shall then list and assess the same to the person, firm, corporation, association, or company owning it. In arriving at the value of all public utilities the intangible or franchise element shall be considered as an addition to the physical value and a portion of the true cash value. For the purpose of enabling the assessor to make such assessments, he shall demand from each person or firm, and from the president, cashier, treasurer, or managing agent of each corporation, association, or company, including all banking institutions, associations or firms within his county, a statement under oath or affirmation, of all the real estate and personal property within the county, owned or claimed by such persons, firm, corporation, association, or company. If any person, officer, or agent shall neglect, or refuse on demand of the assessor or his deputy to give, under oath or affirmation, the statement required by this section, or shall give a false name, or shall refuse to give his or her name, or shall refuse to swear or affirm, he or she shall be guilty of a misdemeanor, and shall be arrested upon complaint of the assessor, or his deputy, and upon conviction before a judge of the peace of the county, he or she shall be punished by a fine of not less than ten dollars nor more than five hundred dollars, or by imprisonment in the county jail for a term of not less than ten days nor more than three months, or by both such fine and imprisonment, at the discretion of the court. If the owners of any property not listed by another person shall be absent or unknown, or fail to make the statement under oath or affirmation, as provided herein, within five days after demand is made therefor, the assessor shall make an estimate of the value of such property and assess the same accordingly. If the name of such absent owner is known to the assessor the property shall be assessed in his or her name; if unknown to the assessor the property shall be assessed to unknown owners. But no mistake heretofore or hereafter made in the name of the owner or supposed owner of real property shall render the assessment or any sale of such property for taxes invalid. It is hereby made the duty of the assessor, at the end of each month, to report to the district attorney of the county the names of all persons neglecting or refusing to give the statement as required by this section of this act, and it is hereby made the duty of such district attorney to prosecute all persons so offending.

Section 6472, N. C. L. 1929, reads as follows:

The county assessor in the several counties in this state, when he assesses the property of any person or persons, company or corporation liable to taxation, who do not own real estate within the county of sufficient value, in the assessor's judgment,

to pay the taxes on both his or their real and personal property, shall proceed immediately to collect the taxes on the personal property so assessed; but the party paying such taxes shall not be thereby deprived of his right to have such assessment equalized, and if, upon such equalization, the value be reduced, the taxes paid shall be refunded to such party from the county treasury, upon the order of the board of county commissioners, in proportion to the reduction of the value made.

These statutes are a part of the general revenue laws of this State, and the moneys derived thereunder are paid into the general State and county funds, for the upkeep of the general State and county governments. Therefore the question of whether a personal property tax may be lawfully levied against said automobile and collected from the owner thereof, must be governed by the laws and decisions of the courts construing such general revenue laws. It is here pointed out that section 6421, N. C. L. 1929, states that the Assessor shall do certain things with relation to all property within the county, real and personal, *subject to taxation, etc.*, section 6472, N. C. L. 1929, fixes the time at which the Assessor shall collect the taxes on personal property within the county *liable to taxation*. Hence it is made clear that the Assessor shall not levy and collect taxes on any personal property, within the county, not *subject or liable to taxation*, which of course is the fundamental law of the land and found in the laws of all of the States.

We now arrive at the determination of the main question which is specifically as follows:

Can an automobile owned by a nonresident and duly registered in a foreign State, which foreign State is the domicile of the owner, legally taxable therein, and brought into this State by such owner, to remain here temporarily only, and used by said owner as a means of transportation, which transportation is necessary and incidental to the successful transaction of his business, be lawfully taxed pursuant to the above-quoted revenue laws of Nevada?

Our attention is called to volume 61, Corpus Juris, page 221, paragraph 204, as authority to support the right of this State to tax such property. This paragraph reads as follows:

It is perfectly competent for the state to lay a tax on tangible personal property found within its borders, notwithstanding the fact that the owner, a nonresident, is also liable to taxation on the same property in the state of his domicile, and the fact that the property may have escaped taxation in the foreign state of domicile has no bearing on its taxability in the state of the forum.

This encyclopedic statement cites, under note 71, decisions from the States of Connecticut, Kansas, Massachusetts, New Hampshire, Washington, and Oklahoma. A perusal of these cases clearly shows that they deal with the taxing of tangible personal property of nonresidents within their respective borders which has acquired a "*situs*" therein, holding that such property is taxable in such State, regardless of the domicile of the owner. This is also the law of Nevada and we are heartily in accord with the reasoning and conclusions arrived at by the various courts in these decisions, but they are not in point of the question here under consideration as the personal property involved, as shown in the statement to this opinion, never

acquired a legal “*situs*” in Nevada.

The rule governing the taxation of property, which needs no citation of authority to support, is that real property is taxed by the “*lex loci rei situ*,” or law of the situs of such property, regardless of the domicile of the owner. The general rule which governs the taxation of tangible personal property is the “*lex loci domicilii*,” or the law of the domicile of the owner. The exception to this latter rule being that where tangible personal property acquires a “*situs*” in a State other than the domicile of the owner, such property, by reason of this fact, then and there becomes taxable according to the “*lex situs*,” or law of the State where the situs is acquired.

A taxable situs of tangible personal property is not acquired in a county of this State merely because it is physically within its borders. If such property belonging to a nonresident is here temporarily only, either for business or pleasure purposes it does not acquire such situs.

In the case of Robinson v. Longley, [18 Nev. 71](#), the plaintiff was a resident of Hamilton County, Ohio, where his tangible personal property was legally taxable. Said property consisting of a circus and menagerie. In July, 1882, he was traveling and exhibiting his circus and menagerie throughout the State of Nevada as a business and for profit. While the property was being exhibited in Washoe County, Nevada, the Assessor thereof assessed said circus and menagerie for general State and county purposes. To prevent seizure and sale of his property the plaintiff paid said tax under protest and thereafter brought action for recovery of the amount of money so paid. The court held said tax to be illegal and void, and a recovery of the said taxes so paid was held proper; the court saying on page 73:

The property was not assessable in this State. In the sense of the statute for the purposes of taxation, it was not within the State. It was passing through the State at the time of the assessment. It was here temporarily in the ordinary course of business. When he came here, plaintiff intended to remain in the State but a few days--just long enough to fill the engagements advertised and then to continue his journey to other places in a neighboring State. He intended to take away all the property he brought with him. He was actually “on the wing,” passing from one State to another. As well might this property have been taxed as for the purpose of rest or health, plaintiff had stopped a few days in Washoe County. As well might a resident of another State be taxed on his money and team, if he comes on a visit to the State, to remain a week.

The court cites as authority for its decision: Barnes v. Woodbury, [17 Nev. 383](#), Conley v. Chedic, [7 Nev. 341](#); State v. Engle, 34 New Jersey Law, 427; Hoyt v. Commission, 23 N. Y. 240, at 245.

To the same effect is: People v. Niles, 35 Cal. 282; Rosasco v. Tuolumne County (Cal.), 77 P. 148, all of which cases deal with the same principle here being considered and arrive at the same conclusion, the only difference being that these cases deal with tax disputes between counties instead of such disputes between States.

Robinson v. Longley, supra, has never been overruled, modified or in anyway criticized by our Supreme Court, but has been cited as authority and with approval on various different occasions by divers appellate courts of the Union, and particularly by the Supreme Court of California. It definitely settles the law of Nevada on the subject with which it deals, and we believe it decisive of the point here in question.

The automobile of a nonresident salesman, duly registered in the State in which such nonresident salesman is domiciled, temporarily in use in this State, soliciting orders for his firm as a business, is closely analogous to the "circus and menagerie" which was the subject of the controversy in Robinson v. Longley, supra.

This portion of this opinion is also supported by analogy in the very recent Nevada Supreme Court case entitled State ex rel. United States Lines Company, a corporation, v. Second Judicial District Court, etc., filed with the Clerk of said court on the 5th day of April, 1935, and not at the date of this opinion reported in the advance sheets, wherein the question of the proper situs of tangible personal property for taxation purposes is exhaustively treated.

Maintaining the views hereinabove set forth, the query is answered in the negative.

5. In answering query No. 5 we need go no farther than to consider section 6505, N. C. L. 1929, which is the only law on this subject in the State, except a constitutional provision which is without application here. Said section reads as follows:

Each male resident of this state, over twenty-one and under sixty years of age (uncivilized American Indians excepted), and not by law exempt, shall pay an annual poll tax, for the use of the state and county, of three dollars; and for the purposes of this act, any person shall be deemed to be a resident of this state, who shall reside in this state, who shall reside in this state, or who shall be employed therein upon any public or private works, for a period exceeding ten days; *provided*, that any person who has paid a poll tax in any other state or territory and has in his possession a receipt therefor, shall not be required to pay a poll tax in this state for the year represented by such polltax receipt issuing in another state or territory.

The owner of said automobile is a nonresident of this State, here only for temporary purposes with no fixed abode within this State for any period whatever, as has been heretofore pointed out in this opinion, and it is transparently clear to us from the express language of said section 6505, N. C. L. 1929, that such person cannot be thereunder lawfully assessed a poll tax in this State. The query is therefore answered in the negative.

Respectfully submitted,
GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

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

SYLLABUS

161. Fish and Game Laws.

1. Question No. 2 on the official ballot at the general election held November 6, 1934, being a referendum question relative to the Fish and Game Law of Nevada, section 3125, Nevada Compiled Laws 1929, did not receive a sufficient number of votes in approval to establish the same so as to prevent any change of said section being made except by direct vote of the people, as provided in section 2, article XIX, Constitution of Nevada.

2. Section 3125, Nevada Compiled Laws 1929, now occupies the same status in the law that it occupied prior to the referendum hereon and is subject to such action as the Legislature may deem necessary hereafter; and said section, as amended by chapter 188, 1933 Statutes of Nevada, is still the law on the subject of said section.

INQUIRY

CARSON CITY, May 1, 1935.

Question No. 2 on the official ballot at the general election held on November 6, 1934, the same being a referendum question on section 91 of the Fish and Game Law of Nevada, i.e., section 3125, N. C. L. 1929, received 20,277 votes in approval and 6,998 votes in disapproval thereof. The highest total vote for a State office at said election being 42,806 votes cast for the three candidates for Governor.

1. Did said question No. 2 receive a sufficient number of votes in approval thereof, as to establish said section 91 in the law of this State so as to prevent any change of said section being made except by the direct vote of the people, as provided in section 2, article XIX, Constitution of Nevada?

2. If said question No. 2 did not receive a sufficient number of votes to so approve said section 91, what is the status of such section?

OPINION

The inquiry presents a question dealing with the referendum provisions of the Constitution, *i.e.*, sections 1 and 2, article XIX thereof. Section 1 provides for the machinery whereby the referendum power is set in motion by means of a petition signed by ten per centum of the voters of the State. Section 2 provides the measuring stick whereby the will of the electorate of the State is measured with respect to the important matter of approving or disapproving legislative enactments. The referendum power is an important and vital power. Pursuant to said section 2, this power, when exercised and the vote cast pursuant thereto is in

sufficient number, either establishes the legislative enactment voted on in the law of the State in such a manner as to prevent any change of such law except by the direct vote of the people, or declares such enactment absolutely void and of no effect. Said section 2 reads:

When the majority of the electors voting at a state election shall by their votes signify approval of a law or resolution, such law or resolution shall stand as the law of the state, and shall not be overruled, annulled, set aside, suspended, or in any way made inoperative except by the direct vote of the people. When such majority shall so signify disapproval the law or resolution so disapproved shall be void and of no effect.

The language of this section is clear. It means that, before a law or resolution shall stand as the law of the State subject to change only by the direct vote of the people, such approval must be given by a majority of the electors voting at the State election wherein said law or resolution is also voted on and not by such electors who voted on the approval or disapproval of such law or resolution. And the disapproval thereof must be shown in the same manner. *People v. Town of Berkeley*, 36 P. 591; *In re Deny*, 59 N. E. 359; *State v. Powell*, 27 So. 927; *Bryan v. City of Lincoln*, 70 N. W. 252, 9 R. C. L. 1117, sec. 118; Opinion No. 389, 1929-1930 Opinions Attorney-General of Nevada.

In the opinion of the Attorney-General, above cited, the question was presented whether the "Rabies Law" had been disapproved by the direct vote of the people at the November, 1930, election--the number of votes for disapproval being 11,586, and the number for approval being 11,567. The total number of votes cast for Governor being 34,634. It appeared that a majority of the number of the electors voting on the Rabies Law question favored disapproval, but it also appeared that this majority was less than a majority voting for Governor. The Attorney-General held, and properly so, that inasmuch as a majority of the electors voting at the election had not signified their disapproval of the law that such law was not disapproved and was still in force and effect, even though, of the number who voted on the question, a majority expressed their disapproval thereof. We concur in this former opinion. We think the people of the State have most wisely circumscribed the referendum power. To put a legislative enactment beyond the power of the Legislature to change should undoubtedly receive the earnest consideration of the entire electorate of the State and the exercise of that power be had by the greatest number thereof as is possible under our Constitution. Likewise the disapproval and rejection of a law should be measured by the same measuring stick. This is just what section 2 of article XIX accomplishes and prevents minority control of the will of the people in this respect.

The official returns of the 1934 election show that the approval of section 92 of the Fish and Game Law received 20,227 votes, its disapproval 6,998. If this vote represented the entire number of votes cast at such election then, of course, there would be no question presented. Section 91 would stand approved, but such returns show that the total vote for Governor was 42,806 (this being the highest vote for State office), a majority of this vote is 21,404 votes, thus section 91 received 1,177 votes less than a majority of the votes of the electors voting at the State election, such majority vote was and is not sufficient in number to comply with the constitutional requirement, and consequently did not receive the constitutional majority necessary to establish such section 91 in the law of the State beyond the power of the Legislature to thereafter repeal or

amend.

But, was such section 91 disapproved at such election? We think not. The constitutional provision requires the same majority to disapprove a legislative measure as it does to approve it. It is clear in this case that no such majority was had. The mere fact that section 91 was not approved by the constitutional majority does not signify that it then and there was disapproved. In order to have been disapproved the disapproval must have been shown by a majority of the electors voting at the State election in the same manner as the approval must be shown.

We therefore conclude that said question No. 2 did not receive the constitutional majority necessary and required by section 2, article XIX, Constitution, as to stand approved within the meaning of that section; that such question was not thereby disapproved so that said section 91 of the Fish and Game Law would be void and of no effect; and that said section 91 now occupies the same status in the law it occupied prior to the referendum thereon and is subject to such action as the Legislature may deem necessary hereafter, and that said section 91, as amended by 1933 Statutes, chapter 188, is still the law on the subject of said section.

We note section 91, as voted on at the November, 1934, election, is now chapter 1 of the 1935 Statutes (advance sheets). It should be stricken therefrom.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

HON. L. C. BRANSON, Senator, White Pine County, Ely, Nevada.

SYLLABUS

162. Taxes.

Where an irrigation project is owned by the Federal Government and the water contracted for with it by divers private land owners, it is not lawful for the Assessor, by reason of such contract, to deduct the amount owed by such private land owners and water users of the Federal Government on the water contract from the valuation of the land when making his assessment.

STATEMENT

CARSON CITY, May 2, 1935.

We have no copy of the contracts between the private land owners and water users and the Federal Government, and therefore the recitation of various contractual provisions will be taken from your letter of the 29th ultimo, in which you request an opinion, and for the purposes

of this opinion such recitation and statements in said letter will be assumed to be correct.

You state that in Churchill County there is an irrigation project owned by the Federal Government. The water from said project was contracted for between divers private land owners and the Department of the Interior, in an amount necessary to supply their respective needs, same to be paid by said land owners in installments at a stipulated sum per acre. Under the terms of said contract and pursuant to the powers vested in the Department of the Interior under title 43, section 479, U. S. C. A., the penalty which attaches to a private land owner and user of said water for default in the payment of said installments, is that if such owner and user shall default and remain in arrears for more than one calendar year his supply of water shall be shut off and no more water from said project delivered to him. Title 43, section 480, U. S. C. A., provides for cancellation of such user's water right in the event of such default. The pertinent part of title 43, section 431, U. S. C. A., provides, in substance, that the said water user shall have a permanent and vested water right upon the completion and fulfillment of the said contract, including the payment of said installments as agreed.

The contract with the Department of the Interior for water does not give said Department a lien, mortgage or other security upon the land, but is legally a lien upon the water right and is subject to cancelation, dependent upon the contingency set forth above.

In the past, the Assessor has on several occasions, by reason of such contracts, deducted the amount owed by the private land owners and water users to the Federal Government on the water contract from the valuation of the land when making his assessment, in many instances exempting said land from taxation entirely.

INQUIRY

Is such deduction lawful?

OPINION

Section 6418, N. C. L., reads in part, as follows:

All property of every kind and nature whatsoever, within this state, shall be subject to taxation except: first--all lands and other property owned by the state, or by any county, incorporated farm bureau, municipal corporation, irrigation, drainage or reclamation district, town or village in this state, and all public schoolhouses, with lots appurtenant thereto, owned by any legally created school district within the state.
* * *

It is pointed out that the property tax here under consideration is not a tax levied against the property of the irrigation project, owned in part by the Federal Government and being purchased by title retaining or conditional sales contracts, or otherwise exempted by this section, or any other law of this State; but is privately owned land, which, due to a contract between its owner and the Federal Government, happens to be receiving certain water benefits according to

the terms thereof. Said property is, therefore, not entitled to any of the exemptions set forth in this section, or any other law of the State.

Article 10, section 1, of the State Constitution, provides, in part:

The legislature shall provide by law for a uniform and equal rate of assessment and taxation and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory. * * *

The Legislature in giving effect to this constitutional provision, provided by section 6420, N. C. L., which is a part of the general revenue law of the State, that:

* * * All property must be taxed at its full cash value.

The said contract between the land owners and water users and the Federal Government is immaterial and has no force or effect, so far as the question here under consideration is concerned, and does not alter the property owner's tax obligation to the State in anyway whatsoever, and said property should therefore be assessed and taxed at its "full cash value" as other property is assessed and taxed, independent of, and without making any deductions on account of the said water contract. In other words, such property should be assessed and taxed according to its just valuation to the same extent that it would be if said contract did not exist.

Section 6416 N. C. L. provides, inter alia, that every tax levied under the provisions of the revenue law shall be a perpetual lien against the property assessed until the taxes are paid, and this law applies to the property concerned in this opinion.

According to the statements made herein the Federal Government has no mortgage, lien or other security against the land itself, but even if said Government did have such mortgage, lien or security, this fact would not in anyway interfere with the State's rights to tax the property to the owner at its "full cash value," or otherwise alter this opinion.

For the reasons heretofore set forth herein the query is answered in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

HON. E. E. WINTERS, District Attorney, Churchill County.

SYLLABUS

163. Liquor License Taxes.

The Tax Commission has no power or authority to change the express terms of the law governing the taxation of liquor as classified by the law as to alcoholic content and as to quantity taxed.

INQUIRY

CARSON CITY, May 8, 1935.

Section 16 of the 1935 State Liquor License Tax Law, i.e., chapter 160, Statutes 1935, provides, among other things, that packages containing liquor which contains more than eight percent and not over fourteen percent of alcohol by weight shall have affixed thereto stamps of the amount of two and one-half cents per quart or fraction thereof, and that liquor containing from fourteen percent to under twenty-two percent of said alcohol, the stamps affixed to the package container shall be of the amount of five cents per quart or fraction thereof.

Can the Tax Commission, in its rules and regulations pertaining to the administration of this Act, vary from the language of said section 16 so as to permit of a lower denomination stamp or stamps to be used on the packages containing liquor of the above alcoholic content, as such portion of such section imposes, in many instances, especially on wines, as high a liquor tax as is imposed on liquor containing a much higher alcoholic content?

OPINION

The Tax Commission is an administrative board and possesses no power to deviate in any manner from the plain express provisions of the statute in question. It may have the power to promulgate reasonable rules and regulations for the proper administration and enforcement of the law, but cannot in such rules and regulations change in anyway the mandates of that law; to so hold would be to sanction the delegation of legislative power which is not countenanced in our scheme of government.

The provisions of section 16, pertaining to the taxation of liquor, are clear and unambiguous. The Legislature has said most definitely what the tax shall be. It has classified the liquor as to alcoholic content and also as to the quantity taxed and expressed its will thereon. If its classification is unreasonable and the effect of the tax is inequitable, the only power existent to change such classification or the tax thereon is the Legislature. The Tax Commission is powerless to act in this matter so as to change the express terms of the law.

The inquiry is answered in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

HON. WM. KELLY KLAUS, State Inspector.

SYLLABUS

164. Liquor Stamp Act.

1. A winery should be classed as a wholesaler of wines and liquors, licensed as such, and furnished the necessary liquor stamps for its product.

2. Each gallon, or fraction thereof, of beer should be taxed two cents; therefore, the proper amount of liquor stamps required on a keg containing 3.385 gallons would be eight cents.

INQUIRY

CARSON CITY, May 10, 1935.

1. The Nevada Liquor Stamp Act provides that no one but wholesalers and importers may purchase liquor stamps, except that dealers are permitted to purchase them for purpose of stamping stocks of liquor on hand at effective date of statute. There is no express provision in the statute for the purchase of stamps by wineries.

What is the status of a Nevada winery selling to wholesale and retail trade, with respect to the securing of liquor stamps to be affixed to its products?

2. The Liquor Stamp Act provides a tax on beer of two cents per gallon on all quantities of one gallon or over.

What is the proper amount of liquor stamps required to be placed on one-eighth keg of beer, the content of which is 3.385 gallons?

OPINION

Answering query no. 1:

The Act in question most clearly contemplates the taxing of any and all kinds of liquors, including wines. No liquor can be sold unless the revenue tax is paid thereon and the stamps showing such payment are affixed to the liquor sold. The Act expressly provides that no stamps may be purchased by anyone except importers and wholesalers, after the stock on hand on effective date of the Act is properly stamped by the dealers in possession thereof (section 16).

While the Act does not expressly provide for the sale of stamps to or the securing thereof by wineries, we think the terms of the Act, properly construed, clearly contemplate the purchase and affixing of the stamps to wine containers by local wineries where such wine is used in local

State trade. Section 3 of the Act provides that no person shall engage in business as a wholesale dealer of wines and liquors in the State unless he first secures a wholesale wine and liquor dealer's license. Section 17 provides that such licenses shall permit the wholesaler to sell wines and liquors any place within the State. A local winery no doubt sells wines in wholesale quantities as well as in retail lots. Being so engaged it would be most unreasonable to suppose it could not obtain the necessary liquor stamps and affix the same to its product in order that such product could be legally sold in the trade. Our conclusion is that such local winery is to be classed as a wholesaler of wines and liquors, licensed as such and furnished the necessary liquor stamps for its product.

Answering query No. 2:

The intent of the Legislature with respect to the tax on beer is that each gallon or fraction thereof was and is to be taxed two cents. We think the language of section 16 is to be so construed, otherwise an almost impossible situation would arise with respect to the taxation of this beverage if other provisions of section 16 of the Act were attempted to be applied, especially where the beer is sold in keg containers similar to the one mentioned in the inquiry.

The tax on beer being two cents per gallon or fraction thereof, it follows that the amount of stamps on a keg containing 3.385 gallons should be eight cents. Stamps of smaller denomination may be used provided the total amount thereof make eight cents and such total affixed to the container.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

HON. WM. KELLY KLAUS, State Inspector.

SYLLABUS

165. Expenses--Sale of Liquor Stamps.

Actual expenses incurred by Sheriffs in the sale of liquor stamps, as agents of the Tax Commission, are payable from the expense fund.

INQUIRY

CARSON CITY, May 11, 1935.

Is the Sheriff of a county entitled to be reimbursed for actual expenses incurred by him with respect to the sale of stamps in the administration of the State Liquor Stamp Tax Law?

OPINION

Sheriffs of the respective counties are made agents of the Tax Commission, when appointed by such Commission, for the purpose of the sale of liquor stamps. Section 18 of the Act. Three (3) percent of the revenue derived from sales of liquor stamps is set apart for the expenses of administering the Act by the Tax Commission. Section 19. Actual expenses incurred by Sheriffs in the sale of liquor stamps, as agents of the Commission, are administrative expenses under the Act and payable from the expense fund.

The language in section 18 that “the said sheriffs are hereby required to serve as such agents with no additional compensation,” relates to salary or per diem of such Sheriffs for services rendered as such agents, and not to actual outlay for incidental administrative expenses relative to the sales of liquor stamps paid or incurred by them.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

HON. WM. KELLY KLAUS, State Inspector.

SYLLABUS

166. Health Officers--Fees.

1. All physicians, including city and county health officers, who are duly licensed to practice medicine in this State, may give the examination required under chapter 79, 1935 Statutes of Nevada, issue the said certificate, and make a charge for the services so rendered. It is not part of such officers' legal duties to give the examination and issue said certificate without charge.

2. It is not the duty of the State Board of Health to furnish the blank form of certificate to city and/or county health officers.

STATEMENT

CARSON CITY, May 13, 1935.

Chapter 79 of the 1935 Statutes of Nevada, approved March 21, 1935, as amended by chapter 162 of said 1935 Statutes of Nevada, approved March 30, 1935, requires that every person prior to engaging in employment in and about any of the places enumerated in section 1 of said chapter 79, shall first secure from “a city or county physician, or other physician, duly

licensed to practice medicine in the State of Nevada,” a certificate showing the holder thereof to be free from “any venereal disease, smallpox, diphtheria, scarlet fever, yellow fever, tuberculosis, consumption, bubonic plague, Asiatic cholera, leprosy, trachoma, typhoid fever, epidemic dysentery, measles, mumps, German measles, whooping cough, chickenpox or any other infectious or contagious disease,” as enumerated in section 2 of said chapter 162. Said statutes also make an employer who employs a person who is “afflicted or affected” with one of the above-enumerated or any other infectious or contagious disease guilty of a misdemeanor. Section 1 of said chapter 162 further provides that: “such certificate shall be received at least twice a year, and during the period of employment, such employee shall display such certificate at the place of employment in a conspicuous place in view of the public.”

The above-mentioned provisions of the law clearly make it mandatory that no person can lawfully engage in such employment, and no employer can lawfully employ one who has not obtained the required certificate from a city or county health officer or county physician duly licensed to practice medicine in this State.

INQUIRY

1. Do city and county health officers have the right to make a charge for the examination given the applicant prior to the issuance of the required certificate, or is it part of such officers' legal duties to give the examination and issue said certificate without charge?
2. Is it the duty of the State Board of Health to furnish the blank form of certificate to city and/or county health officers?

OPINION

1. Sections 5240 and 5265, N. C. L. 1929, set forth and define the duties of city and county health officers. Without enumerating same it will suffice to say that there is nothing contained in said sections requiring such officers to perform the duties here under consideration without charge, or at all.

Chapters 79 and 162 of the said 1935 Statutes of Nevada contain no express provision requiring such services to be performed by said officers without charge; neither is there any language in said statutes from which it can be held that such an implied requirement was the intention of the Legislature. We therefore hold that all physicians, including city and county health officers, who are duly licensed to practice medicine in this State, may give the said examination, issue the said certificate, and make a charge for the services so rendered.

The first interrogatory inquiry No. 1 is answered in the affirmative. The second interrogatory inquiry No. 1 which immediately follows the conjunction “or” is answered in the negative.

2. There is nothing in any of the statutes heretofore cited or in any other law of the State of Nevada which requires the State Board of Health to furnish the said blank form of certificate to city and/or county health officers. Attention is here called to the fact that the law does not

require that such certificate be issued in printed form; same may therefore be issued either in printed form, typed, written in longhand, and otherwise, at the discretion of the physician issuing the same.

For the foregoing reasons query No. 2 is answered in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

NEVADA STATE BOARD OF HEALTH (Attention Hon. E. E. Hamer, M.D.), Carson City, Nevada.

SYLLABUS

167. Employment and Preference.

Section 6173 and 6177, Nevada Compiled Laws 1929, are not unconstitutional as repugnant to article 1, section 1, of the Nevada State Constitution or the “privileges or immunities,” “due process of law,” or the “equal protection of the law” clauses of the fourteenth amendment of the Constitution of the United States. The provision which prohibits employment of aliens is not violative of the constitutional provisions of Nevada or of the United States, nor are the provisions giving first preference to honorably discharged soldiers, sailors and marines of the United States violative of the same.

STATEMENT

Sections 6173-6179, inclusive, N. C. L. 1929, embrace two certain Acts of the Legislature, one approved March 6, 1879, and the other approved March 28, 1919, as amended. The pertinent part of said section 6173 provides that “only citizens or wards of the United States, or persons who have been honorably discharged from the military service of the United States, shall be employed by any officer of the State of Nevada, or by any contractor with the State of Nevada, or any political subdivision of the State, or by any person acting under or for such officer or contractor, in the construction of public works, or in any office or department of the State of Nevada, or political subdivision of the State, and in all cases where persons are so employed, preference shall be given, qualifications of the applicants being equal, first, to honorably discharged soldiers, sailors and marines of the United States, who are citizens of Nevada; second, to other citizens of the State of Nevada; * * *.”

Section 6177, N. C. L. 1929, reads as follows:

From and after the passage of this act, no Chinaman or Mongolian shall be

employed, directly or indirectly, in any capacity, on any public works, or in or about any buildings or institutions, or grounds, under the control of this state.

The remaining sections of the two Acts are merely incidental to and provide the enforcement provisions essential to effectuating the legislative purposes and intent as manifested by the two sections above quoted from. Therefore, said sections 6173 and 6177, N. C. L. 1929, are the only sections material to this opinion.

INQUIRY

Are the said sections 6173 and 6177, N. C. L. 1929, or either of them, or either of the Acts of which they are a part, unconstitutional as repugnant to article I, section 1, of the Nevada State Constitution, or of the “privileges or immunities,” “due process of law,” or the “equal protection of the law” clauses of the fourteenth amendment of the Constitution of the United States?

OPINION

That certain Act of the Legislature entitled “An Act to prohibit the employment of Chinese and Mongolians in certain areas,” approved March 6, 1879, Statutes 1879, page 81, same being also embraced in sections 6177, 6178, and 6179, N. C. L. 1929, are, in our opinion, and we do hold, repealed by implication by the Act of the Legislature approved March 28, 1919, Statutes 1929, page 296, as amended, and contained in sections 6173 to 6176, inclusive, N. C. L. 1929.

This brings us to a consideration of said 1919 Act, as amended. The primary purpose of said section 6173 is to prevent employment by the State or a political subdivision thereof, or public works contractor of the State of persons not citizens or wards of the United States or persons honorably discharged from the United States military service, and to give a first preference to honorably discharged soldiers, sailors and marines of the United States, who are citizens of Nevada, and a second preference to other citizens of Nevada.

Neither said section, nor any part of said 1919 Act, has ever been construed by the Nevada Supreme Court, and we therefore base our conclusions upon authorities from the courts of last resort of other States and of the United States construing statutes similar to the one in question.

The legal questions to be determined are specifically as follows:

First. Is the provision which prohibits the employment of aliens violative of the above-cited constitutional provisions?

Second. Is the provision giving first preference to honorably discharged soldiers, sailors and marines of the United States violative of same?

The questions will be answered separately in the order propounded.

The first interrogatory has been definitely settled by the Supreme Court of the United States and approved by many other appellate courts. The leading case on this subject is *Heim v. McCall*, 239 U. S. 176, 60 L. Ed. 206, Ann. C. 1917B, 287, 36 Sup. Ct. 78, wherein it is held that section 14 of the Labor Law of the State of New York, being chapter 36 of the Laws of New York of 1909, is not repugnant to any State or Federal constitutional provision and therefore is valid and constitutional within the above-cited clauses of the fourteenth amendment of the Constitution of the United States, and also within the meaning of a State constitutional provision similar to article I, section 1, of the Nevada State Constitution.

Said section 14 reads as follows:

Sec. 14. Preference in employment of persons upon Public Works--In the construction of Public Works by the State or a municipality or by persons contracting with the State or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such Public Works, preference shall be given citizens of the State of New York. In each contract for the construction of Public Works, a provision shall be inserted, to the effect that, if provisions of this section are not complied with, the contract shall be void. * * *

The court, quoting from the New York Supreme Court decision in this case, at page 187 of the U. S. Report, says:

The Supreme Court made its decision upon the power of the State to provide that laborers shall be employed upon public works, and that the State has the same right in conducting its business that an individual has and had, therefore, a perfect right to enact Sec. 14 of the Labor Law, and it does not violate any rights of an alien under existing treaties.

The Federal Supreme Court in this case stamped its approval upon the quotation from the Supreme Court decision of the State of New York, and held that said quotation correctly states the law with reference to this subject.

Again, at page 188 of the U. S. Report, the court uses the following apt language:

The basic principle of the decision of the Court of Appeals was that the State is a recognized unit, and those who are not citizens of it are not members of it. Thus recognized it is a body corporate, and like any other body corporate, it may enter into contracts and hold and dispose of property. In doing this, it acts through agencies of government. These agencies, when contracting for the State or expending the State's moneys, are trustees for the people of the State. (Citing authority.) It is the people, *i.e.*, the members of the State, who are contracting or expending their own moneys through agencies of their own creation. And it was hence decided that in the control of such agencies and the expenditure of such moneys, it could prefer its own citizens

to aliens without incurring the condemnation of the National or the State Constitution. “The statute is nothing more,” said Chief Judge Bartlett, concurring in the judgment of the court, “in effect than a resolve by an employer as to the character of its employees.”

Notwithstanding the simplicity of the determining principle propounded by the Court of Appeals, its decision is attacked in many voluminous briefs.

This decision, after citing numerous authorities in support of its holding, concludes on page 194 of the U. S. Report with the following paragraph:

From these premises, we conclude that the Labor Law of New York and its threatened enforcement do not violate the Fourteenth Amendment or the rights of plaintiffs in error thereunder, nor under the provisions of the treaty with Italy.

The decision in *Heim v. McCall*, supra, was rendered November 29, 1915, and since such time has never been overruled, modified or criticized, but has been cited and followed as definitely settling and establishing the law on the subject on innumerable occasions. Among the cases approving of this doctrine and citing said *Heim v. McCall* as authority, are the following:

Lubetsch v. Pollock, 6 Fed. (2d) 240, holding Washington law prohibiting aliens from engaging in commercial fishing in State waters constitutional.

Anton v. Van Winkle, 297 Fed. 341, holding statute prohibiting aliens from conducting pool or billiard hall constitutional.

State v. Caldwell, 170 La. 854, 129 So. 369, holding criminal law prohibiting employment on public works of nonvoters constitutional, as against “due process,” “equal protection,” and “privilege or immunity” clauses.

Lee v. Lynn, 223 Mass. 111, 111 N. E. 701, holding Act of 1909, as amended in 1914, giving preference to citizens in the construction of public works constitutional.

State v. Deckebach, 113 Ohio St. 353, 149 N. E. 196. City ordinance denying aliens the right to poolroom license held not unconstitutional as denying equal protection of laws.

Alsos v. Kendall, 111 Ore. 376, 227 P. 291, holding State statute denying resident aliens licenses to fish in navigable rivers is not violative of the “equal protection” or “due process” clauses of the Federal Constitution.

Smith bell & Co. v. Natividad, 40 Philippine, 146, 147, upholding Act No. 2760 of the Philippine Legislature, limiting registry of vessels to citizens or natives of Philippines, citizens of the United States residing in the Philippines, or corporations composed of such classes, constitutional.

Gizzareli v. Presbrey, 44 R. I. 336, 117 Atlantic, 360, upholding ordinance prohibiting motor bus licenses to one who is not a United States citizen, as not violative of treaty with Italy, or the fourteenth amendment of the United States Constitution.

Asakura v. Seattle, 122 Wash. 87, 210 P. 32, holding city ordinance excluding aliens from engaging in pawnbroking business constitutional.

From what has already been said, and the foregoing authorities, it naturally and necessarily follows that the first interrogatory must be and is hereby answered in the negative.

There are several authorities dealing with the second question, *i.e.*, statutory provisions giving preference to honorably discharged ex-service men of the United States military service. In opinion of the justices, 166 Mass. 589, 44 N. E. 625, it is held:

An Act giving to veterans in the army and navy of the United States during the Civil War, who have passed the Civil Service examination, preference in appointments to Government offices or employment, is in all respects constitutional. Also that a provision in the Act giving discretion to the appointing power to appoint veterans to certain offices or employment and to waive the Civil Service examination is constitutional.

Provisions of statutes giving preference to honorably discharged soldiers, sailors and marines of the United States military service on public works, and other State employment, which are, in legal effect, the same as the Nevada statute in question, have been held constitutional in several cases. A few of said cases are the following: Goodrich v. Mitchell (Kans.), 75 P. 1034; State v. Addison (Kans.), 92 P. 581; State v. City of Seattle (Wash.), 235 P. 968; Conkel v. State, 168 Wis. 335, 170 N. W. 715; State ex rel. Beebe v. City of Seattle (Wash.), 269 P. 850; Cook v. Mason (Cal.), 283 P. 891.

The above-cited cases directly hold that statutes of other States, the same in legal contemplation as the statute here under consideration, are, in all respects, valid and constitutional.

It is a fundamental rule of statutory construction that all Acts of the Legislature are presumed to be constitutional, and every presumption is in favor of the constitutionality of statutes. Ex Parte Goddard, 44 Nev. 128, 190 P. 96, and every Act of the Legislature must be deemed in harmony with the constitutional provisions until the contrary clearly appears. State v. Jon, 46 Nev. 418, 211 P. 676, 30 A. L. R. 143.

It is also held: "When a statute is assailed as being unconstitutional, every presumption is in favor of its validity, and unless it is clearly in derogation of some constitutional provision, it must be sustained." Vineyard Land & Stock Co. v. District Court, 42 Nev. 1, 171 P. 166.

In conclusion, we believe that the foregoing direct cases from foreign jurisdictions holding similar statutes constitutional, coupled with the presumption in favor of constitutionality,

is amply sufficient to justify our holding said section 6173 and all parts of said 1919 Act, as amended, of which said section is a part, constitutional, and not repugnant to or violative of article I, section 1, of the Nevada State Constitution or of any portion of the fourteenth amendment of the Constitution of the United States.

The inquiry is, in accordance with the reasons heretofore fully set forth, answered in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

HON. MERVYN H. BROWN, District Attorney, Winnemucca, Nevada.

SYLLABUS

168. School Teachers' Retirement Salaries.

A teacher who does not teach during a given year, due to the failure of his or her Board of Trustees of the school district in question to notify him or her on or before May 15, in writing, of not being reelected for the succeeding school year, is entitled to the same credit for service, under the Teacher's Retirement Salary Act, during the term referred to, as if he or she had in fact actually performed his or her duties as such teacher in the school in question during that time.

STATEMENT

CARSON CITY, May 27, 1935.

The Board of Trustees of a school district in this State failed to notify four (4) teachers, then employed in the district, on or before May 15, 1934, that their services for the following school year would not be required, the board proceeding to employ other teachers to take their places. Three of the dismissed teachers brought suit in the district court of that county, claiming that, under section 5998, Nevada Compiled Laws 1929, they were automatically reelected on account of the failure of the board to notify them on or before May 15 that they had not been reelected. The district judge presiding rendered a decision thereafter, holding that the three (3) dismissed teachers were entitled to payment of their salaries for the school year of 1934-1935, although they had not actually taught in the district a single day of that period, on the ground that the above-cited section of Nevada Compiled Laws provides that the school board should have notified them of their reelection or dismissal, in writing, on or before May 15, 1934.

INQUIRY

In the light of the above fact, should the school term of 1934-1935 apply on the thirty school years of teaching required under section 6014, Nevada Compiled Laws 1929, as one of the requisites necessary for application for a teacher's retirement salary? It is understood, of course, that the other requisites will be fulfilled before application for the retirement salary is made.

OPINION

From the facts stated in the above inquiry, and from the facts set forth in the opinion of the judge who tried the case above mentioned, which we have examined, it is most clear that the Board of School Trustees wholly failed to legally notify the teachers in question of their rejection as teachers held themselves in readiness to perform their duties as teachers for the then coming school year, and presented themselves as teachers for the then coming school year, and presented themselves at the school for this purpose on the opening day thereof, in September, 1934, whereupon they found other teachers had been employed in their stead. The court found in favor of the teachers in question and gave them judgment for the amount of the salaries they would have been paid in the event of services performed, less a very small amount earned by one (1) of them thereafter, and prior to the suit, in other employment he secured when he found he was rejected as teacher.

We think the facts demonstrate beyond all question that the teachers in question were able, willing, and ready to perform their teaching contracts in this particular matter, and that they, through no fault of their own, or which could or can be imputable to them, were denied this privilege and prevented from so doing.

While section 6014, Nevada Compiled Laws 1929, *i.e.*, section 12 of the Teachers' Retirement Salary Act of 1915, contemplates and requires certain years of continuous employment in the schools of Nevada as a prerequisite to the right to enjoy the benefits conferred by the Act, it does not for that reason necessarily follow that teachers prevented, through no fault of their own, from teaching for a school year, are thereby precluded from having such year included in the computation of their period of service necessary under the Act in order to be or become eligible for the retirement salary. To so hold would be to penalize them for something over which they had absolutely no control.

We therefore conclude that the teachers mentioned in the above inquiry are entitled to the same credit for service, under said Teachers' Retirement Salary Act, during the 1934-1935 school term mentioned, as though they had in fact actually performed their duties as such teachers in the school in question during that time.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

HON. CHAUNCEY W. SMITH, Superintendent of Public Instruction, Carson City, Nevada.

SYLLABUS

169. School Teachers' Retirement Salaries.

Under the provisions of section 6014, Nevada Compiled Laws 1929, the employment of a Nevada teacher, who has met all the requirements of the Teachers' Retirement Salary Act, as a local supervisor for industrial training in the Vocational Education Department of this State may apply on the thirty school years referred to in said section, where the teacher in question not only supervises, but actually teaches industrial training of an educational nature.

STATEMENT

CARSON CITY, May 27, 1935.

Section 12 of an Act entitled "An Act to provide for the payment of retirement salaries to public school teachers of this state, and all matters properly connected therewith," approved March 23, 1915, as amended, being section 6014, Nevada Compiled Laws 1929, provides, in part, as follows:

Every public school teacher who shall have complied with all the requirements of this act, and who shall have served as a legally qualified teacher in the public schools, or as a teacher in the state orphans' home, or as a teacher in county normal schools, or partly as such teacher and partly as superintendent or supervising executive or educational administrator, for at least thirty school years, at least fifteen of which shall have been in the schools of this state as above specified, including the last ten years of service immediately preceding retirement, under a legal certificate, shall be entitled to retire. * * *

INQUIRY

In the light of the above-quoted section, may the employment of a Nevada teacher, who has met all the requirements of the Act above referred to, as a local supervisor for industrial training in the Vocational Education Department of this State apply on the thirty (30) school years referred to in section 6014, where the teacher in question not only supervises, but actually teaches industrial training of an education nature?

OPINION

It is our opinion that the teacher referred to in the inquiry comes squarely within the purview of section 12 of the above-cited Act, same being section 6014 Nevada Compiled Laws 1929.

The inquiry is therefore answered in the affirmative.

Respectfully submitted,
GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

HON. CHAUNCEY W. SMITH, State Superintendent of Public Instruction, Carson City,
Nevada.

SYLLABUS

170. Teachers' Vacation Salaries.

Where a school principal's contract for a school year provides for a two weeks' vacation with pay during the Christmas and New Year season, beginning December 21; the principal resigns, the resignation to be effective January 6; and the resignation is accepted by the school board, it is the mandatory duty of the said school board to pay the principal's salary during the eleven days (December 21 through December 31) as if said principal had been actually and physically discharging the duties of his office during said eleven days.

STATEMENT

CARSON CITY, May 27, 1935.

A school principal within this State had a contract for the school year 1934-1935. In the middle of the term another position came his way. He thereupon filed a legal resignation which was duly accepted by the school board. The resignation as accepted by the board stated that it was to become effective January 6, 1935. It later developed that his salary in the new position, assumed January 7, 1935, was paid from January 1, 1935. The old position which he resigned allowed a vacation with pay for two (2) weeks at Christmas and New Years. Said vacation became effective December 21, 1934.

INQUIRY

Would it be legal for the school board to pay said principal for the period from December 21, 1934 (the effective date of said vacation), up to and including December 31, 1934?

OPINION

The facts contained in the foregoing statement clearly show that the school principal in question was actually and legally holding the office of school principal at all times during the period mentioned in the inquiry; his resignation not becoming effective until January 6, 1935, six (6) days subsequent to said December 31, 1934. It is true that said principal was on legal vacation during said period from December 21, 1934, to December 31, 1934, but this fact can in

no way alter or affect his lawful right to collect his salary during said period; neither can it alter nor affect the said school board's duty and obligation to pay the same. In other words, it is just as much said school principal's right to collect, and just as much said school board's duty to pay, his salary during the period mentioned in the inquiry as it would be had said principal been actually and physically discharging the duties of his office during said eleven (11) day period.

We therefore hold that it would not only be legal, but is the mandatory duty of the said school board to pay said salary in accordance with the views set forth herein.

Respectfully submitted,
GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

HON. CHAUNCEY W. SMITH, State Superintendent of Public Instruction, Carson City,
Nevada.

SYLLABUS

171. Nevada Liquor Laws--Importers' Licenses.

A Nevada retail dealer in wines, liquors and beers may not receive such wines, liquors and beers in shipments or deliveries to him in Nevada from a dealer in such goods outside of the State, the Nevada liquor stamp tax being paid thereon at the time, and the orders for such goods being first taken by salesmen or agents of a Nevada importer or wholesale dealer in such goods, but which said importer or wholesaler in Nevada does not receive or actually handle the goods prior to the delivery thereof to the retail dealer, without obtaining an importer's license under the Nevada Liquor Stamp Tax Act of 1935.

INQUIRY

CARSON CITY, May 28, 1935.

Can a Nevada retail dealer in wines, liquors and beers receive such wines, liquors and beers in shipments or deliveries to him in Nevada from dealer in such goods outside of the State, the Nevada liquor stamp tax being paid thereon at the time, and the orders for such goods being first taken by salesmen or agents of a Nevada importer or wholesale dealer in such goods, but which said importer or wholesaler in Nevada does not receive or actually handle the goods prior to the delivery thereof to the retail dealer, without obtaining an importer's license under the Nevada Liquor Stamp Tax Act of 1935?

OPINION

The Nevada Liquor Stamp Tax Act of 1935, while it is a revenue measure, nevertheless

contains penal provisions and prohibitions which are within the police power of the State, inserted in such Act for the purpose of facilitating its enforcement and preventing indirect ways and means of evading its provisions.

Paragraph "i" of 1 of the Act defines an importer, to wit:

“Importer” means any person who, in the case of wines, beers or liquors which are brewed, fermented or produced outside the state, is first in possession thereof within the state after completion of the act of importation.

We think the proper and logical construction of this definition is, that when the act of importation, *i.e.*, the transportation of the wines, beers or liquors into the State ends, that the first person who then and there actually receives such liquor with the right to thereafter dispose of its by sale or barter or trade is an importer, irrespective of whether he is a retail dealer or not, and in order to exercise the right to import such goods into the State such person must secure an importer’s license. Section 2 of the Act provides:

No person shall be an importer of wines, beers or liquors into the State of Nevada unless he first secures an importer’s license from the State of Nevada as hereinafter provided.

An importer’s license shall authorize the holder thereof to be the first person in possession of such wines, beers, or liquors within the State of Nevada after completion of the act of the importation of wines, beers or liquors which are brewed, fermented or produced outside of the state.

Thus it appears from the law itself that no person in the State of Nevada can be legally the first in possession of wines, beers, or liquors shipped into or delivered into Nevada unless such person has first secured an importer’s license. (Person being defined in section 1 as natural person, partnership, association, company, corporation, organization or the manager, agent, servant, officer or employee of any of them) It is the right of possession immediately after and upon the completion of the act of importation and delivery that is licensed under an importer’s license.

We think the Legislature intended, and by the terms of the Act have clearly expressed that intention, that wines, beers or liquors imported into the State shall be first actually received by a person licensed to so receive them, in order that proper check of and safeguards to the revenue-producing features of the law could be reasonably, expeditiously, and economically made by the administrators thereof, and while a licensed importer in Nevada may receive orders for such goods from a retailer and direct the shipment of goods to him from without the State, still if such importer does not actually receive the goods so ordered and thus be the first person in Nevada legally entitled to the possession thereof in Nevada, there is a manifest evasion of the law, and such importer’s license will not protect the retail dealer who in fact is the first person in the State who is in possession of such goods. Your inquiry is answered in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

HON. WM. KELLY KLAUS, State Inspector, Carson City, Nevada.

SYLLABUS

172. Court-Martial Fines.

The provisions of the Constitution of Nevada directing the payment of all fines to the State Treasurer for the benefit of the common schools apply to fines imposed by court-martial for offenses committed in the military forces of this State.

INQUIRY

CARSON CITY, June 6, 1935.

Section 46, chapter 153, Statutes 1929 (Nevada Military Code), provides for the disposition of fines imposed by court-martial.

Do the provisions of the Constitution of Nevada, directing the payment of all fines to the State Treasurer for the benefit of the common schools apply to fines imposed by court-martial for offenses committed in the military forces of this State?

OPINION

The above-mentioned law of the State of Nevada constitutes a code providing for a State militia, the provisions thereof govern the membership of such militia, and provides for courts-martial for punishment of those who violate said law of the State and the rules and regulations of the Federal War Department as well as the State Department, so that under said law the infractions thereof and of said rules constitute penal offenses, and the militia being a department of the State, if for no other reason, comes squarely within the provisions of the State Constitution.

Section 46, chapter 153, Statutes 1929, the same being section 7160. Nevada Compiled Laws 1929, provides that:

All fines collected shall be paid by the officer collecting the same to the commanding officer of the organization of which the person fined is or was a member, and accounted for by said commanding officer in the same manner as other State funds.

Section 3, article 11, Constitution of Nevada, provides among other things, that:

All fines collected under the penal laws of the state; all property given or bequeathed to the state for educational purposes, and all proceeds from any or all said sources shall be and the same are hereby formally pledged for educational purposes, and shall not be transferred to any other funds for other uses.

It is our opinion that all fines collected by reason of conviction in courts-martial in the State of Nevada are to be deposited in the State Treasury for apportionment according to law to the proper educational funds for the benefit of the schools of the State.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

HON. JAY H. WHITE, The Adjutant General, State of Nevada, Carson City, Nevada.

SYLLABUS

173. Motor Vehicle Registration and Licensing--Nonresident--Definition and Status as Carrier.

“Nonresidence” implies a temporary stay of comparatively short duration within the State when applied to operators of motor trucks and busses used in transporting people or property, more so than when applied to pleasure cars or automobiles privately owned. The registration licensing of nonresident motor vehicles under the 1931 Motor Vehicle Registration Act is limited to such nonresident vehicles as are engaged in the transportation of persons or property over and along the public highways of Nevada for hire; such vehicles include those operated in common and contract carrier service. In addition to the licenses required under the Motor Vehicle Carrier License Act of 1933 (chapter 165, 1933 Statutes), all nonresident motor vehicles, even though registered and licensed in some other State and having affixed to the vehicles the current year license plates of that State, used on the highways of this State in the carrying of persons or property for hire, must not only comply with the provisions of chapter 165, 1933 Statutes, but must also be registered, and the license fee therefor paid, in accordance with the provisions of the Motor Vehicle Registration Act of 1931. A nonresident motor vehicle owner or operator engaged as a “private carrier of property” within Nevada is not subject to the registration license if he is only passing through the State, or is engaged in carriage of brief duration and only temporarily within the State, and his motor vehicle is properly registered and licensed in the State of his domicile.

INQUIRY

CARSON CITY, June 12, 1935.

The Legislature of 1933, under chapter 177, provided that nonresident owners of automobiles from other States, when properly registered in another State for the current year, could obtain a permit in the State of Nevada for the balance of the year without the payment of registration fees upon application to proper authorities.

In view of this change will you kindly render a written opinion defining a nonresident under chapter 177, Statutes of 1933, and also the status of nonresident operations, whether they be common, contract or private carriers as defined in chapter 165, Statutes of 1933, as amended.

OPINION

Section 1 of chapter 177, Statutes of Nevada 1933, amended section 17 of chapter 202, Statutes 1931, the same being the Motor Vehicle Registration Act of 1931, by striking out subparagraphs (c) and (d) thereof, and amending subparagraph (b), subparagraph (a) of said section not being changed. Prior to the amendment of 1933 nonresident or foreign motor vehicles operated or designed to be operated within this State for the transportation of persons or property for compensation, or for the transportation of merchandise, were required to be registered and the license fee therefor paid if such vehicles were so used within the State for a period of more than five days, and this irrespective of any other motor vehicle licensing law of the State. Section 17, paragraph b, supra. Nonresident motor vehicles not used for the carriage of persons or property for compensation were not required to be so registered in this State provided they were registered in their home State, and application for permit to operate such vehicles in Nevada was made within five days after entry into the State. Section 17, paragraph a, supra. Nonresident was and is defined in said 1931 Act as follows:

“Nonresident.” Every person who is not a resident of this state, and who does not use his motor vehicle for a gainful purpose. Section 1, 1931 Act.

We think under the Motor Vehicle Registration Act of 1931, prior to the 1933 amendment thereof, that all nonresident motor vehicles used on the highways of Nevada for a gainful purpose, *i.e.*, the carriage of persons or property for compensation, or for the carriage of merchandise, must have been registered and licensed under the Act, except where they operated wholly within the five-day exemption then provided in the law.

Did the amendment of 1933 change the 1931 Act in this respect?

We think that it did. Subparagraph (b) of section 17 was very materially amended in 1933. Such paragraph now reads:

All nonresident owners and/or operators of motor vehicles used or to be used on the public highways of this state in the carrying of persons and/or property for hire, shall be governed by the provisions of all laws of this state pertaining thereto, and shall, in addition to the licenses provided for by this act, before commencing operations in

this state, comply with and secure the licenses provided by the motor vehicle carrier licensing laws of this state.

The language of this paragraph is clear and unambiguous. It means that all nonresident owners or operators of motor vehicles in Nevada used in the carrying of persons or property *for hire* shall be governed by the provisions of the laws of this State pertaining to such carriage, *i.e.*, chapter 165, Statutes 1933, and, *in addition to the licenses* provided by such other laws, *secure the registration of such motor vehicles and pay the license fee therefor* that is provided in the 1931 Motor Vehicle Registration Act. Thus the Legislature made it most clear that in addition to the licenses required under chapter 165, 1933 Statutes, which said chapter is commonly known as the Motor Vehicle Carrier License Act of 1933, that all nonresident motor vehicles, even though registered and licensed in some other State and having affixed to the vehicles the current-year license plates of that State, used on the highways of this State in the carrying of persons or property *for hire* must not only comply with the provisions of the Motor Vehicle Carrier License Act of 1933, but must also be registered, and the license fee therefor paid in accordance with the provisions of the Motor Vehicle Registration Act of 1931.

Chapter 165, Statutes 1933, as amended by chapter 126, Statutes 1935, provides for the licensing of all motor vehicle carriers including nonresidents, exempting only certain classes of operators. See sec. 3, chap. 126. This later statute brought within its purview a class of carriers not mentioned or contemplated by section 17 of the Motor Vehicle Registration Act of 1931, *i.e.*, “private motor carrier of property.” See sec. 1, chap. 126, 1935 Stats. We think subparagraph (b) of section 17 of the Motor Vehicle Registration Act of 1931, as amended in 1933, does not provide for the registration license of nonresident “private motor carriers of property” as such carriers are defined in section 1 of said chapter 126, 1935 Statutes, but that said subparagraph (b) only relates to nonresident motor carriers of persons and property *for hire*, notwithstanding the definition of “nonresident” in said 1931 Act, quoted above. The Legislature in the 1933 amendment of said section 17 of the 1931 Act modified the licensing provisions thereof with respect to nonresidents and limited such provisions to nonresident motor vehicles operated in Nevada *for hire*.

It is, therefore, our opinion that the registration licensing of nonresident motor vehicles under the 1931 Motor Vehicle Registration Act is limited to such nonresident vehicles as are engaged in the transportation of persons or property over and along the public highways of Nevada *for hire*, and that such vehicles include those operated in common and contract carrier service.

We note that it is desired that the term “nonresident” under chapter 177, Statutes 1933, be defined. The term nonresident is not defined in said chapter 177, but it is defined in the 1931 Motor Vehicle Registration Act of 1931, and quoted above herein, but, as we have hereinbefore pointed out, so far as this definition is concerned with the registration license it was, in effect, modified by said chapter 177 and the licensing thereof limited to motor carriers for hire.

Nonresident clearly means one not a resident of Nevada. Residence, in effect, is a matter of intention. Residence may be shown in a variety of ways, a common illustration being the

showing of residence within the State for the required period of time in order to vote; again by evidence of living within the State and engaging in business or employment therein. But, under our motor vehicle licensing laws, as they now stand, we think that the term “nonresident” implies a temporary stay within the State and of comparatively short duration, especially when applied to operators of motor trucks and busses used in transporting people or property, more so than in the case of pleasure cars or automobiles privately owned. No fixed determination of the term can be written into this opinion. Each case must depend upon the facts thereof. It may be said, however, that for the purposes pertaining to registration of motor vehicles a person may be a resident of more than one State at the same time. *Morse v. Lash Motor Co.*, 139 Atl. 637.

We think that a nonresident motor vehicle owner or operator engaged as a “private carrier of property” within Nevada is not subject to the registration license if he is only passing through the State, or is engaged in carriage of brief duration and only temporarily within the State and his motor vehicle is properly registered and licensed in the State of his domicile.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

PUBLIC SERVICE COMMISSION, Carson City, Nevada.

SYLLABUS

174. Apportionment of County School Funds.

Under the provisions of section 5799, Nevada Compiled Laws 1929, “the last preceding annual school report” means, in the apportionment of the county school fund in a given year, the apportionment should be made as to the per capita of pupils according to the number of pupils in average daily attendance shown by the annual school report of the school term, or terms, ending in June of that year.

INQUIRY

CARSON CITY, June 21, 1935.

Section 152 of the School Code, the same being section 5799, Nevada Compiled Laws 1929, providing for the apportionment of county school funds into the respective district school funds, provides that the Superintendent of Public Instruction shall apportion such county school fund with respect to the number of pupils in a district according to the last preceding annual school report.

Does the language “the last preceding annual school report” mean the annual report of the

school term ending in June of that year, or does it mean the annual school report of the June of the preceding year?

OPINION

Section 103 of the School Code, the same being section 5752, reads as follows:

The public school year shall commence on the first day of July and shall end on the last day of June.

We think the words in paragraph "b" of said section 152, *i.e.*, "the last preceding annual school report" means the annual school report returned to the Superintendent of Public Instruction and also to the Deputy Superintendents of Public Instruction at the close of each school term, and inasmuch as these annual school reports must show the number of pupils in attendance in each school during the school term for which the report was made certainly indicates the intention of the Legislature that the annual school report of the very last preceding school term is the report upon which the Superintendent of Public Instruction must base his apportionment of county school funds on a per capita basis for each pupil in average daily attendance, otherwise we think there would be no accurate computation as to the number of school children in average daily attendance if the Superintendent of Public Instruction were to go back to a previous year and make the per capita apportionment on the number of pupils in average daily attendance of such previous year.

We respectfully call attention to Opinion No. 71, dated February 4, 1932, in the Opinions of the Attorney-General for 1931 and 1932, wherein the question of whether the Superintendent of Public Instruction had the authority to call for or accept any other than the preceding annual school report as the basis for the apportionment of State or county school funds was passed upon by this office. It was there pointed out that prior to 1925 it was necessary that a school census be taken each year for the purpose of determining the number of children of school age within the State, in order to apportion the school funds in accordance with the law as it then existed. It was further pointed out in this opinion that in 1925 the Legislature provided a different mode of apportioning the school moneys, and that that mode was and is upon the basis of the number of pupils in average daily attendance in the school, as shown by the annual report thereof of the preceding school year, in lieu of the school census report theretofore, and prior to 1925 the lawful basis of such apportionment. So that in effect said Opinion No. 71 is really determinative of the question submitted here, and, further in view of the statutory definition of what constitutes a school year as above-quoted. We are of the opinion that in the apportionment of the county school fund in the year 1935, the apportionment should be apportioned as to the per capita of pupils according to the number of pupils in average daily attendance shown by the annual school report of the school term or terms ending in June of 1935.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

HON. CHAUNCEY W. SMITH, Superintendent of Public Instruction, Carson City, Nevada.

SYLLABUS

175. Motor Vehicle Registration and Fees.

Under the provisions of the 1935 amendment of section 25 of the Motor Vehicle Registration Law of 1931, as amended by the Statutes of 1933, no reduction from the five (\$5) dollar flat fee can be legally granted or permitted for the registration for half-year or any other time of all trucks and trailers of an unladen weight of three thousand (3,000) pounds or less; motor trucks and trailers of an unladen weight of over three thousand (3,000) pounds are not affected by the 1935 proviso amendment and as to them a half-year's registration may be granted. A half-year's registration may be granted as to motorcycles.

STATEMENT

CARSON CITY, June 22, 1935.

The 1935 Legislature, at pages 375, 376, Statutes 1935, amended section 25 of the Motor Vehicle Registration Law of 1931, as amended at pages 250, 251, Statutes of 1933, by providing a flat fee of \$5 for the registration of all trucks and trailers, on and after January 1, 1935, of an unladen weight of three thousand pounds (3,000) or less, instead of the registration fee based upon the weight of such vehicles. Said section 25, ever since its enactment in 1931, provides a flat fee of \$5 for the registration of motorcycles. Paragraph c of section 14 of the 1931 law permits a half-year registration on and after July 1 of each year at one-half the yearly registration fee.

INQUIRY

In view of the 1935 amendment of section 25, can a half-year's registration be legally granted on all motor trucks, trailers and motorcycles mentioned in said section?

OPINION

Section 25 of the Motor Vehicle Registration Law of 1931, as amended by the 1935 Legislature, so far as material here, reads:

(c) For every motorcycle, the sum of five dollars.

(d) For every truck, trailer, truck-tractor and semitrailer, forty - five cents per hundred pounds, or major fraction thereof, of unladen weight as shown by a public weighmaster's certificate; *provided*, that on and after January 1, 1935, there shall be

paid to the department for registration of every truck or trailer having an unladen weight of three thousand pounds or less, a flat registration fee of five dollars only.

The 1935 amendment of this section, material here, is found in these words:

provided, that on and after January 1, 1935, there shall be paid to the department for registration of every truck or trailer having an unladen weight of three thousand pounds or less a flat registration fee of five dollars only.

This language is identical with that incorporated in the 1933 amendment of section 25 with respect to the registration fees on stock passenger cars and reconstructed and specially constructed passenger cars (1933 Stats. 250), and which said 1933 amendment was the subject of an identical inquiry and opinion in 1934. See Opinion No. 131, 1932-1934 Opinions Attorney-General.

Opinion No. 131 dealt with the identical question submitted here, except it concerned the passenger cars as above stated. We there construed the amendment and its effect as a proviso upon section 25 and paragraph c of section 14 of the 1931 law, holding that the 1933 amendment was such a proviso as, under the rules of statutory construction there set forth, so qualified paragraph c of section 14, and the language in section 25 immediately preceding it, as to clearly show the legislative intent to be that no reduction was to be granted under the 1933 amendment from the five (\$5) dollar flat fee for a half-year's registration.

The same rules of statutory construction are to be applied to the proviso incorporating the 1935 amendment into section 25 with respect to trucks and trailers of an unladen weight of three thousand (3,000) pounds or less, and we adopt Opinion No. 131 as the law on the question here, and hold that no reduction from the five (\$5) dollar flat fee can be legally granted or permitted for the registration for half-year or any other time of all trucks and trailers of an unladen weight of three thousand (3,000) pounds or less.

As to motorcycles it is to be noted that the registration fee therefor is incorporated in a separate paragraph of section 25, *i.e.*, subparagraph (c). This paragraph has never been changed since its original enactment in 1931. Motorcycles are not mentioned in the 1935 proviso amendment. We conclude motorcycles are still subject to and controlled by paragraph © of section 14 of the 1931 law as regards half-yearly registration.

Motor trucks and trailers of an unladen weight of over three thousand (3,000) pounds are not affected by the 1935 proviso amendment and as to them a half-year's registration may be granted pursuant to paragraph (c) of section 14 of the 1931 law.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

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

SYLLABUS

176. School Supplies.

A member of a County Board of Education cannot legally sell school or other supplies to a county high school.

INQUIRY

CARSON CITY, June 24, 1935.

Can a member of the County Board of Education legally sell school or other supplies to a county high school?

OPINION

County Boards of Education have same powers as Boards of School Trustees. Sec. 5724, N. C. L. 1929.

County high schools are under same supervision, and subject to same laws, rules and regulations governing the other schools of the State school system. Sec. 5828, N. C. L. 1929, as amended 1931 Stats. 32.

County Boards of Education thus occupy the same position under the school laws of the State as Boards of School Trustees, and the members of such boards are bound by the same prohibitory laws.

A school trustee is prohibited from being pecuniarily interested in any contract made by the Board of Trustees of which he is a member. Sec. 5720, N. C. L. 1929.

This section of the school law was construed by Attorney-General Diskin in Opinion No. 10, dated January 24, 1923, as prohibiting the sale of goods, wares and merchandise to a school district by a member of the Board of Trustees of such district. We concur in this opinion, and under the statutes above cited, we think such prohibition extends to members of County Boards of Education in like situations.

Your inquiry is answered in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

HON. CHAUNCEY W. SMITH, State Superintendent Public Instruction.

SYLLABUS

177. "Resident Children" of School Districts.

1. Under the provisions of section 5772, Nevada Compiled Laws 1929, as amended by the 1935 Statutes, "resident children" include all normal children between the ages of six and eighteen years who have not completed eight grades in an elementary school and who shall have actually resided within the school district with their parents or guardians for a period of at least three months at the time of the taking of the census of resident school children in the month of April, and normal children living in unorganized school territory in the State who have not completed eight grades in an elementary school and who may be attending school in an organized school district at the time of taking said census.

2. School children whose parents or guardians reside or have their homes outside of Nevada, or in any other organized school district within Nevada, cannot be brought within a school district in Nevada for the purpose of augmenting the number of resident children therein, so as to provide a school in such district and enable such school to receive an apportionment of the school funds of the State and county.

INQUIRY

CARSON CITY, June 24, 1935.

1. What constitutes a "resident child" or "resident children" within the meaning of section 5772, Nevada Compiled Laws 1929, as amended at pages 378, 379, Statutes of Nevada 1935?

2. Can children whose parents or guardians reside or have their homes outside of Nevada, or in any other organized school district within Nevada, be brought within a school district in Nevada for the purpose of augmenting the number of resident children therein, so as to provide a school in such district and enable such school to receive an apportionment of the school funds of the State and county?

OPINION

Answering query No. 1:

The definition of "resident child" and "resident children" is found in a section of the school law dealing also with the taking of census of school children, and in this connection the residence of school children within a school district depends somewhat upon the time of the taking of the school census. Section 5772, Nevada Compiled Laws 1929, as amended, 1935

Stats., 378, provides that it shall be the duty of school census marshals to take a census of the resident school children of the school districts in the month of April. The section then defines the term “resident child” or “resident children” to include:

1. All normal children between the ages of six and eighteen years who have *actually resided* in the school district with parent, parents, guardian, or guardians, for a period of at least *three months*.
2. Children living in unorganized territory in the state who may be attending said school shall be counted for apportionment purposes.

It is also provided in said section which children are to be excluded from the term “resident children,” *i.e.*:

1. All children residing in the district (or who may be attending said school through residing in unorganized Nevada territory), who have already completed the eighty grades in an elementary school.
2. All children whose parents or guardians reside or have their homes outside of Nevada, or in any other organized school district within the State of Nevada.

Thus it clearly appears from the statute that two classes of children only are to be recognized as resident children for the purposes of the school laws, and the maintaining of schools thereunder, *i.e.* (1) Normal children between the ages of six and eighteen years who have not completed eight grades in an elementary school and who shall have actually resided within the school district with their parents or guardians for a period of at least three months at the time of the taking of the census of resident school children in the month of April, and (2) Normal children living in unorganized school territory in the State who have not completed eight grades in an elementary school and who may be attending school in an organized school district at the time of taking said census. All other children are to be excluded from said census. Thus it is most clear what children constitute “resident children” under the section of the law dealing with the taking of the census of such children for the purpose of determining the number thereof in any particular school district in order to have a correct apportionment of school funds, and, also, in order to determine whether a school is maintainable in a district and entitled to an apportionment of such funds.

But apportionment of school funds no longer depends upon the annual school census. Opinion No. 71, Opinions Attorney-General 1931-1932.

School census is now taken at the discretion of the State Board of Education. Section 5770, Nevada Compiled 1929.

The basis upon which the apportionment of school funds is now made is the number of pupils in average daily attendance in schools as shown by the annual report of the last preceding school year. Opinion No. 71, *supra*, Opinion of Attorney-General No. 174, dated June 21, 1935.

The apportionment thus made must be made for and concerning “resident child” or “resident children.” See section 5729, Nevada Compiled Laws 1929, and section 5772, as amended, 1935 Stats., 378. What then constitutes a “resident child” or “resident children” within the meaning of the school law, aside from the connection of such terms with the taking of the school census?

Statutes and different sections of a statute relating to the same general subject must be construed in *pari materia*. This is the rule laid down in many cases by our Supreme Court. The Legislature having expressly stated who are resident children in section 5772, as amended in 1935 Statutes, page 378, with respect to the taking of school census and there expressly provided, in effect, that no school funds shall be apportioned save for the benefit of a “resident child” or “resident children,” and the law with respect to the basis of apportionment of school funds not requiring an annual school census to be taken, as hereinbefore pointed out, but requiring that such apportionment be based upon the number of pupils in average daily attendance as shown by the annual report of the last preceding school year, and no other or different definition of “resident child” or “resident children” appearing elsewhere in the school law, we think it is inescapable that the Legislature intended that the terms “resident child” and “resident children,” as defined in said 1935 amendment, are the terms to be used in defining school children under the law with respect to apportionment of school funds according to the annual report of the last preceding school term.

The Legislature is presumed to have knowledge of the state of the law upon the subject upon which it legislates, and if it desires to change the existing law in any particular, it will so legislate. Clover Valley Land & S. Co. v. Lamb, 43 Nev. 375.

The Legislature not having established a different rule for defining or determining resident children with respect to apportionment of school funds from that established for census purposes, we conclude that the same rule and definition is applicable to both situations, and that the time of determining the status of the child or children for school purposes under the law with respect to apportionment of school funds, according to the number of resident children shown by the annual report of the last preceding school term, is the date of such report, and that the status of school children is to be then determined by applying the statutory definition of “resident child” or “resident children” to the children shown on such report and treating such report in all respects as the census report of the census marshal, computing the time of residence of such children within the district back from date of said report.

We think to constitute a “resident child” or “resident children,” either under the school census sections of the school law, or under the apportionment statutes that such child or children must unqualifiedly come squarely within the statutory definition thereof, and that residence of such children must be established in the district in accordance with the time mentioned in the 1935 amendment, *i.e.*, 1935 Statutes, 378, as hereinbefore pointed out.

Answering query No. 2:

Whatever may have been the practice with respect to the importing of children of school age into a district for the purpose of augmenting the number of children therein so as to maintain

a school in such district, the Legislature, in the 1935 amendment, most certainly provided that such practice is not in accord with the law. The language excluding from the terms “resident child” or “resident children”: “All children whose parents or guardians reside or have their homes outside of Nevada, or in any other organized school district within the State of Nevada” is a direct prohibition upon such practice. But this is not all. In the same amendatory section it is provided:

Whenever the attendance of any school child or school children is the determining factor in the organization of a school district or in the maintenance of a one-teacher school already established, such child must be a “resident child” or such children must be “resident children” within the meaning of this act before any such school district shall be entitled to receive any apportionment of school money.

Thus the Legislature has expressly provided that the continuance or maintenance of a school depends upon “resident child” or “resident children” as defined in such section. And, as we have pointed out, the status of such children now depends upon the time and length of such residence and the determination thereof according to the will of the Legislature, it follows that any importation of children or the bringing of children into a school district for the purpose of augmenting the number of children therein, where such children so brought into the district or their parents or guardians cannot qualify so as to constitute the children resident children under the law, as hereinbefore construed, would be a manifest evasion of the law.

Your inquiry No. 2 is therefore answered in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

HON. CHAUNCEY W. SMITH, State Superintendent of Public Instruction.

SYLLABUS

178. Bullion Tax Levy--Tailings.

On February 15, 1935, the Nevada Tax Commission, through its secretary, duly mailed a notice addressed to A. L. Scott, Administrator of the Estate of Milton D. Painter, Pioche, Nevada. The notice stated that the Commission had under consideration his report of net proceeds of mines for the annual period ending December 31, 1934; had assessed the Painter estate with royalties received; required said administrator to pay taxes thereon at the rate of \$2.95 to the County Assessor of Lincoln County; and that said assessment was final unless application for hearing thereon was filed within fifteen days from the time of receipt of notice. The said notice reached him in Washington, D. C., via Pioche, Nevada, on April 17, 1935. He made written

application on April 19, 1935, for a hearing on said assessment.

1. The notice mailed by the Secretary of the Tax Commission was sufficient legal notice.
2. The said tax levy did become final prior to the date that the administrator and applicant made application for hearing.
3. The administrator is not entitled to a hearing before said Tax Commission on his protest against the payment of said tax assessment at this or any future time.
4. The said bullion tax levy is lawful and valid under the law of Nevada. Under the provisions of section 6481, Nevada Compiled Laws 1929, the "proceeds from tailings" owned and processed by a third party, not the owner of a mine or mining claim proper, in the strictest sense that can be applied to the term, are subject to taxation.

STATEMENT

CARSON CITY, June 24, 1935.

On February 15, 1935, the Nevada Tax Commission through its Secretary, W. D. Atkinson, duly placed in the United States mails by deposit in the post office at Carson City, Nevada, a notice addressed to A. L. Scott, administrator of the estate of Milton D. Painter, Pioche, Nevada. Said administrator legally resides, so far as the Tax Commission is aware, at Pioche, Nevada.

It is admitted in writing by said administrator that said notice apprised him of the fact that the Tax Commission had under consideration his report of net proceeds of mines for the annual period ending December 31, 1934, and had assessed said Painter estate with royalties received in the sum of \$2,632.53, and therefore required said administrator to pay taxes thereon at the rate of \$2.95 in the total sum of \$77.66 to the County Assessor of Lincoln County, and that said assessment was final unless application for hearing thereon is filed within 15 days from the time of receipt of notice. It is further stated by said administrator in his letter to the Tax Commission of April 19, 1935, which has been treated by said Commission as a formal written application for a hearing of protest against the payment of said assessment, that the said notice reached him in the city of Washington, D. C., via Pioche, Nevada, on April 17, 1935. Said administrator and applicant complains that said notice is not a correct or sufficient one under the law of Nevada, due to the fact that said notice was not sent to him by registered mail with a request for a return receipt. He therefore made written application on April 19, 1935, "for a hearing on said assessment," complaining that said bullion tax levy is illegal and void under the laws of this State.

INQUIRY

1. Was the notice mailed by the secretary of the Tax Commission a sufficient legal notice or was the same defective due to the fact that it was not mailed to the administrator by registered

mail?

2. If the answer to query No. 1 relating to notice is to the effect that said notice is sufficient, valid and legal, did said tax levy become final prior to the date of said application for hearing? (April 19, 1935.)

3. If the answer to query No. 2 is in the affirmative, is the administrator entitled to a hearing before said Tax Commission on his protest against the payment of said tax assessment at this, or any future time, by reason of his said application of April 19, 1935? (It is contended by applicant that said notice did not reach him in Washington, D. C., until April 17, 1935.)

4. Regardless of the answers to the foregoing inquiries relating to the sufficiency and the legality of the notice, is the said bullion tax levy lawful and valid under the law of Nevada?

OPINION

1. Section 8917, Nevada Compiled Laws 1929, reads as follows:

Service by mail may be made, when the person making the service and the person on whom it is to be made reside at different places, between which there is a regular communication by mail.

Section 8920, Nevada Compiled Laws 1929, reads as follows:

In case of service by mail, the notice or other paper must be deposited in the post office, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of the deposit, but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day for every twenty-five miles of distance between the place of deposit and the place of address. Such extension, however, not to exceed forty days in all.

These sections provide when and the method by which service may be made by mail, and the same are very clear and are applicable here. Said section 8920 provides that the extension of time need not exceed *forty (40) days in all*. Assuming, but not admitting, that said notice necessarily had to be, under the law, forwarded to the administrator and applicant at Washington, D. C., then said applicant would be entitled to the said 15 days as provided by law and as set forth in said notice, plus 40 days as provided by said section 8920, a total of 55 days within which to make his application for a hearing on his protest against the payment of said assessment. Section 9029, Nevada Compiled Laws 1929, provides the legal method of computing time in such cases. The rule set forth in said section, so far as the same is pertinent, is as follows:

excluding the first day and including the last, unless the last day be a Sunday or other

nonjudicial day, in which case it is also excluded.

In this case the first day was the date of the mailing of said notice by the secretary of the Tax Commission (February 15, 1935), which is excluded. Beginning with February 16, 1935, we count 55 days, which brings us to and including the 11th day of April, 1935, which was a Thursday, and was not a nonjudicial day, and is the last day upon which the administrator and applicant could have legally made application for a hearing on said assessment. Said tax levy therefore became final prior to the making of the application for the hearing, and said application is therefore of no legal effect.

We therefore hold that the said notice was a sufficient, valid, and legal one, and that the same need not, under the law of this State, be sent by registered mail.

2. Under the law of this State the said notice did become final prior to the date that the administrator and applicant made application, due to the fact that said application was not made within the time required by the law of Nevada.

3. The application for a hearing having been made on April 19, 1935, eight days after the legal time therefor had expired, the same is of no legal effect and should be disregarded by the Tax Commission; and in the event the said assessment of \$77.66 is not fully paid, together with accrued interest and penalties, within the time required by law, the property should be sold for delinquent taxes as other property is sold.

4. The legal question to be answered here is whether or not the *proceeds from tailings* owned and processed by a *third party*, not the owner of a mine or mining claim proper, in the strictest sense that can be applied to the term, are subject to taxation under the revenue law of this State. It has been held “* * * tailings may be located as placer ground.” 40 C. J. 781. Certainly, no one would contend that placer ground is not subject to the laws governing taxation of mining property; and if this be true, why are not “tailings” subject to such laws the same as placer ground? It is held that the word “mine” in its generic sense is a term of wide meaning and application. 40 C. J. 781. We are of the opinion that the words “mine” or “mining claim,” as used in the revenue laws of Nevada, are broad enough to include the word “tailings” without an express mention thereof.

Article X, section 1 of the State Constitution, as amended in 1906, reads as follows:

The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, when not patented, the proceeds alone of which shall be assessed and taxed, and, when patented, each patented mine shall be assessed at not less than five hundred dollars (\$500) except when one hundred dollars (\$100) in labor has been actually performed on such patented mine during the year, in addition to the tax upon the net proceeds; and, also excepting such property as may be exempted by law for municipal, educational, literary, scientific or other charitable purposes.

It is transparently clear to us that under this constitutional provision standing alone, the

proceeds of unpatented mines and mining claims are subject to taxation. We hold that the words “mines and mining claims,” as used in this section of the Constitution, are not confined to patented or unpatented mining claims, but are to be construed in their generic or more comprehensive sense to include the proceeds of “tailings.” Said section, as amended in 1906, has been held self-executing. Wren v. Dixon, [40 Nev. 170](#); [161 P. 722](#), [167 P. 224](#); Ann. Cases 1918D, 1064; and therefore the Nevada Tax Commission needs no legislative authority to empower it to levy an assessment against the proceeds of a mining claim or “tailings,” provided, of course, that it is the proper legal taxing body, because “the Legislature is controlled by the Constitution in the taxing of mines,” and it is so held in State v. Eastabrook, [3 Nev. 173](#). There is nothing in the Constitution inhibiting the Legislature from empowering the Tax Commission to levy said assessment.

Aside from the foregoing constitutional authority of said Commission to levy said assessment, we will now determine whether or not cumulative authority therefor has been vested in it by the Legislature.

The Nevada Tax Commission has the power and it is its duty to levy a tax assessment against the proceeds of all operating mines. Sections 6554 and 6578, Nevada Compiled Laws 1929.

These sections are broad enough, in our opinion, to include the assessment of the proceeds of tailings being worked by a third party. As early as 1871, which is probably about as early as the separate workings of tailings became important, the Legislature passed an Act entitled “An Act providing for the taxation of the net proceeds of mines.” Said Act expressly subjected tailings to the bullion tax. Statutes 1871, page 87. In the Revenue Act of 1891, “tailings” were again included as under the bullion tax. The pertinent part of section 6481, Nevada Compiled Laws 1929, which is a part of said 1891 Act, reads as follows:

All proceeds of mines, including ore, tailings, borax, soda and mineral-bearing material, of whatever character, shall be assessed for purposes of taxation, for state and county purposes quarterly in the manner following: * * *

It is clear from this section that there is express legislative authority for the assessment of the proceeds of tailings, unless the same has been repealed by subsequent Act, as said administrator and applicant contends. There are two later Acts which bear upon the taxation of the output of mines, one approved March 23, 1917, Statutes 1917, page 328, same being found in section 6542, Nevada Compiled Laws, et seq., which created the Nevada Tax Commission, and the other approved March 15, 1927, Statutes 1927, page 100, Nevada Compiled Laws 1929, section 6578, et seq.

The above-cited 1917 Act contains *in the title*, the following clause: “* * * and repealing all acts and parts of acts in conflict herewith.” Nowhere in the body of the act is the same provision included, neither is there any other repealing clause in the body of said Act, which omission renders said titular clause mere surplusage and of no legal effect. The rule of statutory construction is too elemental to need citation of authority that the title of an Act containing

subject matter not incorporated in the body thereof is of no legal effect whatever, so far as said subject matter is concerned. Said 1927 Act also contains a repealing clause *in the title*, but does not do so in the body of the Act. Why the Legislature would actually insert such a worthless clause in said titles and deliberately omit same from the body of said Acts, we are not called upon to decide, but we do decide that there is no express repeal of the “tailings” provision of said 1891 Act contained in either of said subsequent Acts or any other legislative Act of the State.

We will now consider whether this “tailings” provision of the 1891 Act, section 6481, Nevada Compiled Laws 1929, was repealed by implication by either of said later Acts. “Repeals by implication are not favored.” State v. Ducker, [35 Nev. 214](#), 127 P. 990; Dotta v. Hesson, [38 Nev. 1](#), 143 P. 305.

“Repeals by implication are not favored, but the presumption is always against repeal where express terms are not used.” Kondas v. Washoe County Bank, [50 Nev. 181](#), 254 P. 1080.

“Repeals by implication are not favored, and if it be not perfectly manifest, either by irreconcilable repugnancy, or by some other means equally indicating the legislative intention to abrogate a former law, both laws must be maintained.” Carson City v. Board of County Commissioners, [47 Nev. 415](#), 224 P. 615.

Applying the above tests laid down by our Supreme Court to the question, we find that neither the 1917 nor the 1927 Act are irreconcilably repugnant, or repugnant at all to said 1891 Act, so far as the assessment of the proceeds of tailings is concerned. On the contrary the 1891 Act expressly provides for such assessment, while neither of the later Acts provide against such assessment which would be necessary before we would hold that there is an “irreconcilable repugnancy” which our Supreme Court says is necessary to a repeal by implication. Further applying the rules above set forth, we find that by construing said 1891 Act together with said 1917 and 1927 Acts, which the Supreme Court says we must do, instead of finding a repugnancy, we find that the revenue laws of Nevada, aside from the heretofore-cited constitutional provision, give ample authority to the Tax Commission for the imposition of the tax in question. It is our opinion that the reason why the Legislature omitted the word “tailings” from the said 1917 and 1927 Revenue Acts, is because in the words *proceeds of all operating mines*, as used in sections 6554 and 6578, Nevada Compiled Laws 1929. We therefore hold that the said “tailings provision” of the 1891 Act is not repealed by implication, or otherwise, but is now in full force and effect.

Even if said provision of the said 1891 Act could be held repealed by implication by one of the heretofore-cited later Acts, which in our opinion it could not, such holding would not in the least alter this opinion, for the reason that both of said later Acts expressly provide for the assessment of the proceeds of all *operating mines*, and as pointed out in the early part of this opinion, said words are sufficiently broad to include “proceeds of tailings.”

We believe that the Supreme Court of this State definitely drove its stakes and came very close to deciding this question in accordance with this opinion in the case of State v. Kruttschnitt, [4 Nev. 178](#), wherein it is held, at page 200, that the Constitution requires the taxation of the

proceeds of mines, and that this means the entire proceeds thereof. As heretofore stated, the proceeds of *tailings* are in legal contemplation the proceeds of a *mine* within this constitutional provision, and therefore must be taxed by said Tax Commission. Common knowledge tells us that “tailings” and the proceeds thereof are a direct production of the mine proper, and unless there be a mine from which they can be extracted, then there can be no tailings; then by what logical token can it be said that the proceeds of a mine proper may be taxed, but the proceeds of tailings extracted therefrom cannot, regardless of how valuable such tailings may be? The mere statement of the proposition suggests its absurdity.

A person who would object to this bullion tax would object to any tax at all according to our Supreme Court in the case of *State v. Kruttschnitt*, supra, wherein it is said, at page 204, “the man who can see only injustice to the mines in the revenue law as now framed and interpreted would never see anything but injustice in any system which required him to contribute his share to the public burthens. He would doubtless see much justice in a system that would excuse himself entirely, and throw all the burthens of supporting the State government on other classes.”

In the case of *Rogers v. Cooney*, [7 Nev. 213, at 217 and 218](#), the court holds “it is admitted by the parties and so found by the Court below that the land in question is of no value except for the tailings, and that they are valuable only for the gold and silver which they contain. So it is manifest from the evidence that neither plaintiffs nor defendant claimed the land for any purpose except that of securing such tailings; in other words, it is claimed by them for mining purposes only. Although not a mining claim within the strictest meaning of the expression as generally used in this country, still it is so closely analogous to it, that the propriety of subjecting to the acquisition and maintenance of the possessor of it to the rules governing the acquisition of the right of possession to a strictly mining claim, at once suggests itself.”

If the working of *tailings* does not constitute the working of a *mine* within the constitutional and statutory provisions, as claimed by administrator and applicant, then the *proceeds of tailings* are most certainly subject to either a real property or a personal property tax, either of which would be must more burdensome than the tax of which complaint is made. It is pointed out that under the section of the Constitution heretofore quoted the proceeds of all unpatented mines shall be taxed. Section 6553, Nevada Compiled Laws 1929, reads as follows:

All property subject to taxation shall be assessed at its full cash value.

If, as the administrator and applicant contends, the proceeds of tailings are not subject to the bullion tax, then under the Constitution and said section 6553 the tailings would have to be taxed as property, as no one can dispute the fact that said tailings are property, and oftentimes valuable property, and they are subject to taxation in some form to be sure. The particular tailings here being considered most certainly must be property if they were during the year 1934 being leased by said administrator and applicant to the Caliente Cyaniding Company.

The records of the Tax Commission show that neither a real nor personal property tax has been levied against the proceeds of said tailings, but that a bullion tax at the rate of \$2.95 has been so levied, in the total amount of \$77.66. The affidavit of the Caliente Cyaniding Company, lessee of the estate of Milton D. Painter, deceased, filed with said Commission on February 4,

1935, shows that the sum of \$2,632.53 in royalties was paid to said administrator and applicant as the estate's share for the 12 months' period ending December 31, 1935, upon which said administrator and applicant seeks by his application of April 19, 1935, to escape a bullion, any, and all taxes.

The tax assessment in question is a legal, just, and equitable one, and must be collected in accordance with law.

For the foregoing reasons it is our opinion that the applicant and administrator's application to the Tax Commission of April 19, 1935, for a hearing in which he may protest the payment of said assessment should be denied.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

NEVADA TAX COMMISSION, Carson City, Nevada.

SYLLABUS

179. Residence of School Teachers.

Under the provisions of chapter 99, 1935 Statutes, the language "shall be residents of the State of Nevada qualified under the laws of this State to teach in the public schools thereof" means actual bona fide residents, qualified to teach in Nevada schools, who have been actually domiciled within the State for the period of time required under the Constitution, *i.e.*, six months, and within the county for thirty days, for persons to qualify as electors of said State prior to the contract of employment as such teachers.

INQUIRY

CARSON CITY, June 28, 1935.

Section 1 of chapter 99, 1935 Statutes of Nevada, reads as follows:

It shall be the duty of the respective boards of school trustees in this state, when employing teachers for their respective schools, in all schools employing two and not exceeding four teachers, at least fifty (50%) per cent thereof shall be residents of the State of Nevada qualified under the laws of this state to teach in the public schools thereof; in all schools in which more than four teachers are employed at least seventy-five (75%) percent thereof must be residents of the State of Nevada, qualified under the laws of this state to teach in the public schools thereof.

I would appreciate your advising me as to what constitutes residence in Nevada within the purview of the 1935 Act.

OPINION

The language of the Act in question beyond any doubt, evidences an intention on the part of the Legislature to provide for the employment in the public schools of this State bona fide residents of the State in the percentages named, because the language certainly, by reason of the specified percentages, permits of the employment of teachers who are not residents of the State to the extent of fifty (50%) percent in schools employing not to exceed four (4) teachers, and twenty - five (25%) percent in schools employing more than four (4) teachers. That a line of demarcation between residents and nonresidents was intended by the Legislature in the enactment of this statute is most clear. How that line is to be determined is the question, the Legislature not signifying beyond expressly stating that certain percentages of the teachers employed "shall be residents of the State of Nevada qualified under the laws of this state to teach in the public schools thereof."

There is no provision in the laws of Nevada making citizenship or bona-fide residence within the State a condition precedent to becoming qualified to teach in the schools of the State. We must look elsewhere for a reasonable rule of definition or determination of the term "resident" as pertaining to the statute in question.

The word "resident" generally means: "One who resides or dwells in a place for some time." Web. Dict.

But the word has a great variety of meanings. It is difficult to give an exact definition of what is meant by "resident" as used in statutes and, although often construed by the courts, the word has no technical meaning. The construction of the word is generally governed by the connection in which the word is used, and the meaning is to be determined from the facts and circumstances in each particular case. 54 Cor. Jur. 712, sec. 1.

The term "resident" has been construed to mean:

A dweller, or one who dwells or resides permanently in a place, or who has fixed residence, as distinguished from an occasional visitor. 54 Cor. Jur. 712, sec. 2.

And again as:

One who has his residence in a place. Black, Law Dict., page 1032.

The word "residence" imparts the dwelling at a certain place, either permanently or for a considerable length of time by the resident:

Residence. Living or dwelling in a certain place permanently or for a considerable

length of time. The place where a man makes his home, or where he dwells permanently or for an extended time. Black, Law Dict., page 1032.

“Residence” means a fixed and permanent abode or dwelling-place for the time being, as contradistinguished from a mere temporary locality or existence. 8 Wend. 134.

As they are used in the New York Code of Procedure, the terms “residence” and “resident” mean legal residence; and legal residence is the place of a man’s fixed habitation, where his political rights are to be exercised, and where he is liable to taxation. 16 How. Pr. 77.

We think the Legislature, in the enactment of the statute in question, had in mind the term “resident” and “residence” as defined above, and that in using the language “shall be residents of the State of Nevada” that fixity or permanency of such residence within the State, prior to the employment as teacher, was to be the rule and that such teacher must have had an intention then, and prior thereto, of making Nevada his or her State of domicile, and that the mere act of abiding at some place in the State for the purpose of teaching in the schools of the State was not to be taken as the criterion of residence within the meaning of the statute. (See *Brown v. Hows*, 42 S. W. (2d) 210.)

Domicile means:

That place in which a man has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce him to adopt some other permanent home. Black, Law Dict., page 386.

Domicile is but the established, fixed, permanent, or ordinary dwelling-place or place of residence of a person, as distinguished from his temporary and transient, though actual, place of residence. It is his legal residence, as distinguished from his temporary abode; or his home, as distinguished from a place to which business or pleasure may temporarily call him. 29 Conn. 74.

Construing the language of the statute, quoted above, in the light of the definitions above cited and quoted with respect to “residents,” “residence,” and “domicile,” we think it clear that the Legislature had in mind Nevada teachers who are or were *domiciled* in the State at the time of the contract of employment. To construe the statute otherwise would be to impute to the Legislature an absurdity and prevent the carrying into effect the evident intent of the Legislature that bona-fide residents of Nevada, when qualified to teach in the schools of the State, shall be employed as teachers to the extent provided in the statute.

We think also, in determining who are Nevada residents for the purposes of the statute in question, that the Legislature had in mind “legal residence,” and that for the purpose of determining preferential rights to teach, under the statute, the legal residence within the State

prior to the time of employment shall be for the period of time required by the Nevada Constitution for a person to qualify as an elector of the State, *i.e.*, bona-fide actual residence within the State for six (6) months and county thirty (30) days. Art. I, sec. 1, Const. Nev.

This office so held with respect to preferential rights of Nevada residents on public works and highway work. (See Opinion No. 126, Opinions Attorney-General, 1932-1934.)

We are, therefore, constrained to hold that the language in said chapter 99, *i.e.*, “shall be residents of the State of Nevada qualified under the laws of this state to teach in the public schools thereof,” means actual bona-fide residents, qualified to teach in Nevada schools, who have been actually and bona fide *domiciled* within the State for the period of time required under the Constitution for persons to qualify as electors of said State, prior to the contract of employment as such teachers.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

HON. CHAUNCEY W. SMITH, State Superintendent of Public Instruction.

SYLLABUS

180. Nevada Industrial Commission--School Bond Issue.

Chapter 150 of the 1931 Statutes of Nevada, authorizing the acquisition of a site, construction, equipment and furnishings of school buildings in Pahranaagat Consolidated School District No. 1 in Lincoln County, Nevada, and the issuance of bonds therefor, after an election held pursuant thereto, is a valid and constitutional law.

INQUIRY

CARSON CITY, June 28, 1935.

Is chapter 150 of the 1931 Statutes of Nevada, authorizing the acquisition of a site, construction, equipment and furnishings of school buildings in Pahranaagat Consolidated School District No. 1, in Lincoln County, Nevada, and the issuance of bonds therefor, after an election held pursuant thereto, valid and constitutional?

OPINION

This statute violates no constitutional provision and is therefore, in my opinion, a valid and constitutional law.

I wish to point out that the first sentence of section 2 of chapter 6 of the 1935 Statutes of

Nevada, page 11, validates all Acts of the Board of School Trustees of Pahranaagat Consolidated School District No. 1, with relation to the holding of an election held for the purpose of voting on the bond issue as provided by said 1931 Act, or in any other way connected with or relating to the particular bonds issued pursuant to said 1931 statute; and they are thereby ratified and made valid and legal. Said section 2 validates and makes the particular bonds involved, *i.e.*, bonds numbered 1 to 60, both inclusive, issued pursuant to said 1931 Statutes of Nevada, of said school district, legal and binding bonds and obligations thereof.

For the foregoing reasons it is my opinion that the bonds issued pursuant to the said 1931 statute, and particularly identified and validated by said 1935 statute, are legal and binding obligations of said Pahranaagat Consolidated School District No. 1.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

HON. D. J. SULLIVAN, Chairman, Nevada Industrial Commission, Carson City, Nevada.

SYLLABUS

181. School Gymnasiums.

The respective boards of school trustees of the various school districts of this State are empowered by law to spend moneys belonging to the school district, for the purpose of building "gymnasiums" to be used by the school districts and the pupils of the schools, in connection with the school, where the funds are already available in the respective school funds of said districts.

INQUIRY

CARSON CITY, July 2, 1935.

Is it within the authority of the Lander County Board of Education to proceed to make application to the Public Works Administration for a grant to construct a gymnasium, and to enter into, and contract for, and proceed with the construction of a gymnasium to be used in connection with the Lander County Austin high school, where the funds in an amount sufficient to pay the school district's share of the cost thereof are now available in the Lander County Austin High School Fund?

The foregoing inquiry is made by Hon. Howard E. Browne, District Attorney of Lander County, and is confined to a particular case. For the reason that the same question has arisen in the past, and very probably will again arise in the future, we are going to answer said inquiry so as to apply to the powers of all Boards of School Trustees of all of the school districts of this State, and for this reason the form of said inquiry is transposed, as follows:

Are the respective Boards of School Trustees of the various school districts of this State empowered by law to spend moneys belonging to the school district, for the purpose of building "gymnasiums" to be used by the school districts and the pupils of the schools, in connection with the school, where the funds are already available in the respective school funds of said districts?

OPINION

The legal question to be determined in order to answer the foregoing inquiry is as follows:

Do the respective Boards of Trustees of the school districts have the authority to authorize the construction of a gymnasium by resolution of the board, for the use of the districts and pupils of the schools where the necessary funds therefor are in possession of the said school funds?

If this question is answered in the affirmative it will naturally follow that said Boards of Trustees have the authority to make requests for the Federal grant mentioned in Mr. Browne's inquiry.

The pertinent part of section 5824, Nevada Compiled Laws 1929, reads as follows:

It shall be the duty of the county board of education to furnish annually, an estimate of the amount of money needed to pay all the necessary expenses of running said school; * * * *and to do any and all other things necessary to the proper conduct of the school.* (Italics ours.)

The powers delegated to the County Boards of Education by the above section are very broad and, certainly, under such powers, if such money is available in their funds to provide for the construction of a gymnasium, and such boards consider said gymnasium necessary to the proper conduct of the school, it seems reasonable that it is within the powers expressly granted them by the above section to pass a resolution ordering the construction thereof.

It is here pointed out that one of the courses required to be taught in the Nevada high schools is "physical education," and in order to properly teach such course it is most certainly necessary that the school boards acquire the necessary facilities therefor. A gymnasium is such a necessary facility and such power is included in the words, "*any and all other things necessary to the proper conduct of the school,*" contained in said section 5824, Nevada Compiled Laws 1929. The said schools being required to teach said physical education, it would be, we hold, unreasonable to hamper the boards by failing to give them the authority to construct the necessary facilities for the teaching thereof when they have the money on hand with which to pay for the construction of the necessary facilities.

We wish to further point out that gymnasiums have for many years past been constructed by resolution of the school boards where the same were deemed necessary in the discretion of

said boards, and where the money for building same was available in the school funds, and we are clearly of the opinion that said act of the boards have been legal and valid, and strictly within the powers of said boards. The fact that such has been considered the law of this State, without question, for a long time past, we believe, would be considered by our Supreme Court as cogent evidence of the fact that it is proper and legal procedure. (See State v. Lanie (Nev.), 27 P.(2d) 537.)

The rule, of course, would be otherwise if the school district's share of the funds were not available and finances had to be provided by bond issue; the question would in such case necessarily have to be submitted to the voters of the district at an election, pursuant to chapter 95 of the 1933 Statutes of Nevada.

The Statutes of Nevada relating to the powers of school boards have not been exhaustively construed by the Supreme Court of the State, but the following authorities, nevertheless, are determinative of the point involved (Dotta v. Hesson, 38 Nev.1), which is cited under section 5824, Nevada Compiled Laws 1929. A reading of this case discloses that the same is merely authority for the fact that "An Act authorizing the construction of a high school building at Wells, Nevada, was held constitutional and not violative of the constitutional inhibition against the passage of special laws contained in section 21, article IV of the State Constitution." In an official opinion of this office, being official Opinion No. 180, written June 28, 1935, by the Attorney-General personally, it is held: That chapter 150 of the 1931 Statutes of Nevada, "authorizing the construction of a high school building in Pahranaag Consolidated School District No. 1, in Lincoln County, Nevada," after an election held pursuant to said Act is constitutional.

McCullouch v. Bianchini (Nev.), 292 P. 617, 297 P. 503, is a case which discusses the building of a gymnasium to be used for school purposes after the adoption of the necessary resolution. This case is important to the extent that it states that a gymnasium building is a "necessary school facility."

In McNair v. School District No. 1 of Cascade County (Mont.) 288 P. 188, it is held that a gymnasium is a necessary and essential part of a school plant, and that the same is included within the word "schoolhouses." There are numerous references in this case to decisions construing what is to be considered as a schoolhouse for school purposes. Quoting the court at page 190:

Construing that enactment literally, as counsel for the plaintiff would have us do, no authority is found in the statute for the establishment and equipment of laboratories, domestic science rooms, manual training shops or playgrounds; yet it is a matter of common knowledge that all these modern adjuncts to education were maintained in and in connection with schools at the time the act was passed.

Education may be particularly directed to either mental, moral, or physical powers or faculties, but in its broadest and best sense it embraces them all.

At page 191:

This court has held that the term “*schoolhouse*,” as used in the statute, does not mean simply the house, but refers to the entire school plant. (State ex rel. Jay v. Marshall, 13 Mont. 136, 32 P. 648), and, under statutes at least no broader than ours, it has been uniformly held that playgrounds established and used in connection with public schools are a part of the school plant, and their taking for that purpose is a taking for public use; that such ground is as essential to the school as is the ground on which the schoolhouse stands.

And in Arizona, where the statutory authority to issue bonds extended only to the purpose of erecting “schoolhouses,” the Supreme Court found therein sufficient authority to warrant the issuance of bonds for the construction of a high school stadium, to all intents and purposes an “athletic field and outdoor gymnasium.” Alexander v. Phillips, 31 Ariz. 503, 254 P. 1056, 52 A. L. R. 244. This result was reached by holding that a schoolhouse is a place “appropriated for a use prescribed or permitted by law to public schools,” and, finding that school boards were empowered to add special courses to the prescribed branches of study and employ instructors, and that the school in question had added physical culture and athletics and employed instructors, the court pointed out the benefits of such training, and then said: “It seems to us that, to hold things of this kind are less fitted for the ultimate purpose of public schools, to wit, the making of good citizens *physically*, mentally and morally, than the study of algebra and Latin, is an absurdity. Competitive athletic games, therefore, from every standpoint may properly be included in a public school curriculum,” and “a structure whose chief purpose is to provide for the better giving of such competitive athletic games and sports, as aforesaid, is reasonably a schoolhouse within the true spirit and meaning” of the law.

For the foregoing reasons the inquiry is specifically answered in the affirmative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

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

SYLLABUS

182. State Buildings.

1. Materials and Research Laboratory Building. Chapter 133, 1935 Statutes of Nevada, pages 282-285, does not limit, or definitely fix, the total amount which the State and Federal

Government may together expend in order to provide the laboratory building mentioned in the law; however, the State of Nevada is limited to a maximum of \$21,000 in bonds of the State as its contribution to said enterprise. Article IX, section 3, of the Constitution of the State of Nevada, as so amended, does not require that said law expressly provide for the levying of any such tax as the sole and exclusive method of paying the \$21,000 in bonds of the State, and the interest thereon, provided for in said law. It is legal and constitutional for said law to provide for the payment of said bonds, and the interest thereon, out of the Highway fund of the State, and to pay the same out of the Highway Fund. The bonds when so issued constitute a legal, valid, and binding obligation against the State of Nevada to pay the same and the interest thereon out of that fund.

2. Supreme Court and State Library Building. Chapter 81, 1935 Statutes, is an exact copy of chapter 133, 1935 Statutes, insofar as the provisions for the issuance and sale of bonds and total cost of the building therein provided for and other matters incident thereto are concerned. We adopt, as our opinion, as to the similar matters of inquiry made concerning chapter 81, the opinion rendered in regard to chapter 133.

STATEMENT

CARSON CITY, July 3, 1935.

The 1935 Legislature of the State of Nevada passed, and the Governor of the State approved, on March 28, 1935, a law designated in the 1935 Statutes of Nevada as chapter 133, which may be found in the printed 1935 Statutes of Nevada, pages 282-285, both inclusive. This law provides, among other things, for the construction at Carson City, Nevada, of a building commonly known as and referred to as the "Materials and Research Laboratory Building" to be used by and for the benefit of the Department of Highways of the State of Nevada and its officials and employees. This law contains, at the beginning thereof, a rather complete preamble in the first three paragraphs thereof. This preamble states the purposes which induced the enactment and approval of this law; and, in the third and last paragraph of said preamble, *i.e.*, the paragraph immediately preceding the enactment clause of said law, there is a rather complete statement of the reasons why said law was enacted and approved at that particular time. It is there that the inducing causes which motivated the enactment and approval of the law at that particular time were that the \$9,000 there specified to be furnished by the Federal Government was "a gift or grant to the State of Nevada, and without requiring a refund thereof, as an incident to the furnishing of employment and to encourage its building program," and that this was "of great advantage to the State of Nevada," and that that time was "the opportune time to take advantage of such benefits." It was clearly the understanding at that time that the limit of the maximum amount which the Federal Government would contribute to such enterprise was thirty percent (30%) "of the cost and expense of the materials and labor used in the construction of such building," and that such contribution by the Federal Government was to be about \$9,000.

The body of the law then provides, among other things, for the erection and furnishing of said laboratory building and other matters incident thereto; that the cost thereof is not to exceed \$30,000; that the Governor, State Controller, and State Treasurer, as a commission, are directed

and authorized to issue bonds of the State of Nevada in the sum of \$21,000, "to supplement the amount of money so to be granted by the Federal Government"; that said bonds are to be sold; and that said bonds are to be redeemed out of the State Highway Fund of the State of Nevada.

At the time said law was so passed and approved it was quite generally understood, and we believe was a fact, that the limit of the amount the Federal Government would contribute to such an enterprise was thirty percent (30%) of the cost and expense of the material and labor used in the construction of such building, although there was some talk and some general impression that such contribution by the Federal Government had already been or was soon to be increased to forty-five percent (45%) thereof. The Federal Government, or its proper agencies, soon thereafter, and some considerable time prior to the date hereof, made and announced said increase of its contributions in such cases to said forty-five percent (45%) of said costs and expenses of the material and labor used in the construction of such buildings. Because of said increase in said contribution to such enterprises by the Federal Government and because of the fact that it was stated in said section 2 of said Act that "the cost of said building and construction thereof, together with the heating and lighting systems incident thereto, together with the heating and lighting systems incident thereto, and the expenses of the transfer of the materials and research laboratory from its present quarters and its installation therein, *shall not exceed the sum of \$30,000,*" the question arose as to whether said sum of \$30,000 was the limit and maximum of the total cost and expense of said laboratory building, including both the amount to be contributed by the Federal Government and the amount to be contributed by the State Government of the State of Nevada therefor, and some controversy or discussion has resulted because of this situation. If the total amount of the bonds of the State authorized by said chapter 133, *i.e.*, \$21,000, be issued and sold as provided in said law and the money secured thereby be used in said enterprise, and if the Federal Government makes said grant and gift to the State on the recently increased basis of 45% of the cost and expense of the material and labor used in the construction of the said laboratory building, then the total estimated cost and expense of said enterprise or project will be about \$38,181.82 instead of the \$30,000 mentioned in said chapter 133 as the cost of said building for construction and the other matters incident thereto as provided for in said section 2. For this reason Hon. Jesse H. Evans, counsel for the administrator of the Federal Emergency Administration of Public Works wrote this office several days ago calling attention to this situation and the uncertainty resulting therefrom as to what should be the total cost and expense of said laboratory building, including both the contribution therefor of the State of Nevada and of the Federal Government, and as to whether the constitutional amendment referred to in his letter requires the levying of a tax for the payment of the bonds to be issued by the State of Nevada, as provided for in said Act, instead of payment out of the State Highway Fund mentioned in the Act. The constitutional amendment referred to by Mr. Evans in his letter is the amendment to article IX, section 3, of the Constitution of the State of Nevada as proposed in Senate Joint Resolution No. 2 of the 1933 Legislature of this State, 1933 Statutes of Nevada, pages 357, 358, which was adopted by the people of this State at the November, 1934, general election, and is now a part of the Constitution of the State of Nevada. Insofar as this constitutional amendment is pertinent to the inquiries involved in this opinion, and the opinion itself, it simply provides that the State may contract public debts but not to exceed, in the aggregate, exclusive of interest, one (1) percent of the assessed valuation of the property of the State, except for the payment of certain extraordinary expenses not involved in this matter; that

“every such debt shall be authorized by law for some purpose or purposes, to be distinctly specified therein”; and that “every such law shall provide for levying an annual tax sufficient to pay the interest semiannually and the principal within twenty (20) years from the passage of such law.”

INQUIRY

In said letter Mr. Evans makes the following statement, and asks the following information:

The legal data sheets prepared by you and included in the State’s application do not cover these two questions. May I ask that you consider these two points in order that we may determine whether the \$30,000 limitation of cost may be exceeded and whether the constitutional amendment which you set forth does not require the levying of a tax for the debt service upon these bonds?

Mr. Robert A. Allen, State Highway Engineer of the State of Nevada, has asked the official opinion of this office calling for the same general information; and in order to make this opinion cover both inquiries and questions of a similar nature which have arisen in the State and which have resulted in similar inquiries of this office, we have reframed the questions so as to cover the entire situation as it relates to matters of this kind, and, to that end, have adopted the following questions and, in order that there may be no misunderstanding, shall give our opinion as to each of these questions immediately following the particular question.

1. Does chapter 133, 1935 Statutes of Nevada, pages 282-285, absolutely limit the total expenditure or cost, both State and Federal, of the research laboratory provided for therein, and the heating and lighting systems and other things incident thereto, to the sum of \$30,000, or is it merely a means of determining the limit and maximum of the amount the State may spend therefor?

OPINION

It is the unqualified opinion of this office, after a careful examination of said chapter 133, and of the purpose of this legislation at the particular time it was enacted and approved as stated both in the body and in the preamble of said Act, that it was not the intention of said Act to limit, and that it does not limit, or definitely fix, the total amount which the State and Federal Government may together expend in order to provide the laboratory building mentioned in said law.

In arriving at this unqualified opinion and conclusion, we are not unmindful of the fact that section 2 of said Act contains this language: “the cost of said building and construction thereof, together with the heating and lighting systems incident thereto, and of the expenses of the transfer of the materials and research laboratory from its present quarters and its installation therein, *shall not exceed the sum of thirty thousand (\$30,000) dollars*, approximately thirty (30%) percent of which, to wit, about nine thousand (\$9,000) dollars is to be a grant from the

Federal Government as hereinbefore indicated.” It is our view and opinion that the above-quoted language was used solely as the basis or measuring stick to measure the comparative amount which the State Government and the Federal Government, respectively, would contribute to the enterprise or project. The sum of \$30,000 there mentioned was, in our opinion, simply the measuring stick by which the maximum amount to be contributed to this enterprise or project by the State was to be measured. It will be noted that, in section 4 of the Act, it is provided that the amount of State bonds authorized by the Act, as the measure of the State’s participation in said building, etc., is \$21,000, and that, in section 2 of the Act, it is stated that the grant from the Federal Government is to be approximately \$9,000, which amount to \$30,000. It is also noted that the amount the State is to contribute to this enterprise is definitely fixed at \$21,000, and that this is “*to supplement the amount of money to be granted by the Federal Government.*” In our opinion the only limitation in the Act on the amount which this building and the matters incident thereto as stated in the Act is to cost the State is \$21,000. It is further evident from above-quoted language in said section 4 that this sum of \$21,000 is for the purpose of supplementing whatever amount of money the Federal Government may grant and give to the State for use in this enterprise.

It is perfectly clear to us that the purpose of this legislation is, at least, fourfold. The first purpose was and is to provide a laboratory building for the State Highway Department at Carson City, Nevada. Its second purpose was and is to limit the amount of money the State of Nevada, separate and distinct from the contribution of the Federal Government and its agencies, should contribute to said enterprise or project. And its third purpose, and, in our opinion, the immediate incentive and consideration that motivated the inception and initiation of this enterprise at that particular time, was the grant and gift of the Federal Government for the consummation of the enterprise. It is also clear to us that the chief incentive for the law at the particular time it was passed and approved was to put the State of Nevada in a position where it could take advantage of the willingness and offer of the Federal Government at that time to make the outright grant and gift to the State mentioned in the Act, and the probable increase of the amount of such gift which was then contemplated. It was also evident from the language of the last paragraph of the preamble of said Act, page 283 thereof, that the “furnishing of employment” in these days of unemployment, the desire to assist the Federal Government to “encourage its building program,” the “great advantage to the State of Nevada” which would accrue therefrom, the fact that that was “the opportune time to take advantage of such benefits,” and the very fact that such an outright grant and gift from the Federal Government to the State as was then contemplated and hoped for, would be of great “benefit” and “advantage” to the State of Nevada, were all great inducements to the passage and approval of this law. These were the inducing causes for this legislation. The law itself expressly so states. It expressly says, immediately preceding the enacting clause of the Act, that the above-enumerated “benefits” and great advantages then existed, and that “therefore” the law was enacted. It was because of these “benefits” and “advantages” that the law was passed and approved at that particular time. The Act expressly so states. Never before had the State of Nevada been in a position where the Federal Government would so liberally contribute to the construction of any buildings of the State. The Act says that it was “*the opportune time to take advantage of such benefits.*” In fact, it was the only time, so far as then known, when the State could ever take advantage of such benefits. While the State needed the building and other matters incident thereto, and while the work incident thereto would furnish employment to our

unemployed people, and the construction would encourage the building program of the Federal Government, and the building would be of great advantage to the State, the important matter and the chief motivating influence which induced this legislation at that particular time was the fact that the Federal Government was offering to make the grant and gift to the State, without requiring a refund thereof, of a considerable sum of money. In other words, the inducing cause which motivated this legislation at that particular time was the “*gift*” from the Federal Government. The mere fact that the Federal Government later became willing to increase this “*gift*” certainly would not have prevented the legislation. In fact, the increase of the amount of the Federal “*gift*” would have been an additional inducement for this legislation. The chief concern of the Legislature and Governor was evidently not the total amount which the enterprise was to cost both the State and the Federal Government, but the maximum amount this State would be required to contribute toward the enterprise. The State needed the building. It was willing to contribute \$21,000 toward the cost and expense of the construction of the building and the other matters incident thereto, as specified in the Act. It was not concerned as to the amount the Federal Government was to contribute toward this enterprise; provided, of course, the joint contributions of the State and Federal Government did not produce an unnecessarily large and expensive building. When the plans and specifications were drawn, it was found that \$30,000 was not sufficient to construct and equip such a laboratory building as was contemplated at the time the bill for this law was prepared and introduced in the Legislature. The increase of the Federal contribution to the enterprise from thirty (30%) percent to forty-five (45%) percent enables the State to construct and equip the laboratory building as originally contemplated.

For the foregoing reasons, it is the unqualified opinion of this office that said Act does not limit or definitely fix the total amount which said building, equipment, and matters incident thereto, are to cost at a maximum of \$30,000; but that said sum of \$30,000 is merely the measuring stick or basis by which the total amount of the State’s contribution to this enterprise was measured and determined and the amount of bonds to be issued by the State ascertained for its contribution thereto. It is the further unqualified opinion of this office that there is no limitation as to the cost of said building, equipment, and matters incident thereto in said act, except that the State of Nevada is limited to a maximum of \$21,000 in bonds of the State as its contribution to said enterprise.

INQUIRY

2. Does said article IX, section 3, of the Constitution of the State of Nevada, as so amended, require that said law expressly provide for the levying of a tax, as the sole and exclusive method of paying the \$21,000 in bonds of the State, and the interest thereon, provided for in said law; or is it legal and constitutional, in view of said amended article IX, section 3 of the Constitution, to provide for the payment of said bonds and interest out of the Highway Fund of the State, and to pay the same out of said Highway Fund, as is provided for in said law; and are the bonds so to be issued and so to be paid for out of said Highway Fund of the State valid and legal bonds and obligations of the State of Nevada?

OPINION

It is the unqualified opinion of this office that said article IX, section 3 of the Constitution of this State, as so amended, does not require that said law expressly provide therein for the levying of any such tax as the sole and exclusive method of paying said bonds and the interest thereon; that it is entirely legal and constitutional, notwithstanding the provisions of the Constitution, as so amended, for said law to provide for the payment of said bonds and the interest thereon out of said Highway Fund of the State of Nevada, to be levied and collected after the passage and approval of said Act, as provided for therein; that it is entirely legal and constitutional to pay said bonds and interest out of said Highway Fund; and that said bonds when so issued constitute a legal, valid, and binding obligation against the State of Nevada to pay the same and the interest thereon out of that fund.

We assume that the constitutionality and validity of the method provided for in said law for the payment of said bonds and the interest thereon, *i.e.*, out of said State Highway Fund, is questioned upon the theory that said State Highway Fund, and the money therein, is not derived from a tax, or upon the theory that the tax mentioned in said article IX, section 3 of the Constitution, as amended, means or contemplates an ad valorem tax on property. In this connection, we call attention to the fact that all the money which goes into and constitutes said State Highway Fund is derived from a tax, some of it levied upon gasoline sold in this State, and the remainder from a license tax levied upon trucks and a registration tax levied upon automobiles by the State. This fact is so well known that we hardly think time and space justify a citation of the particular statutes of this State levying and requiring the payment of such gasoline, licensing, and registration taxes. These statutes are, however, easily available to anyone desiring to examine them. The moneys coming into and constituting the State Highway Fund are continually being levied and collected under the law and placed in that fund. In other words, the moneys which will be taken from the State Highway Fund and used for the purpose of redeeming the bonds of the State authorized in said law were not in that fund at the time of the passage and approval of the Act, but are moneys levied and collected by the State as gasoline, licensing, and registration taxes and fees since the passage and approval of the Act.

For the foregoing reasons, it is our opinion that the law, by reference at least, does provide for the levying of the tax and appropriates the money to pay said bonds and the interest thereon, and complies with the requirements of said article and section of the Constitution.

As to the legality and constitutionality of said bonds, it is our opinion that the bonds are legal and constitutional, and are valid and binding obligations upon the State of Nevada. In this connection, we call attention to the very early case of State ex rel. Nightingill v. County Commissioners of Storey County, [1 Nev. 264-271](#). This case was decided by the Supreme Court of this State in 1865, and has not been modified or reversed since that time. It has stood the test in this State for seventy years, and represents the great and overwhelming weight of authority in this country, and certainly ought to be recognized as the law of the State. In that case the State Legislature passed a law for the issuance and sale of State bonds to raise a fund to encourage enlistments and pay bounties for volunteer soldiers in the great Civil War. The law provided for a tax to be levied upon the taxable property in the State to pay said bonds and the interest thereon. The County Commissioners of Storey County, however, failed and refused to assess the tax against the taxable property in that county. Mandamus proceedings were instituted to force

the levy of the tax in that county; but the Supreme Court dismissed the application for mandamus, and held that the particular tax levied was unconstitutional and void, but that the bonds were valid and binding obligations of the State, and in doing so used the following language (page 271):

So much of the law under consideration as provides for the levy of the twenty-five cent tax, is unconstitutional and void. *This, however, does not affect the validity of the bonds.* The money attempted to be raised was for a legitimate purpose--one for which the Legislature might lawfully appropriate money.

From the above-quoted language, and a reading of the case, it is evident that there was no levy of a tax provided for in the law involved in that case, for the Supreme Court itself says that the levy was “void.” If void, then there certainly was not any levy of a tax. For the foregoing reasons, it is our opinion that the bonds provided for in said chapter 133 in the sum of \$21,000 will be, when issued, valid and legal bonds and obligations of the State of Nevada.

As to validity of the bonds to be issued pursuant to this law, it should be remembered that they are not to be sold either to the public or to the Federal Government, but only to the State itself and the various departments thereof named in the Act. It is so provided in the Act itself. Since the State issues the bonds and sells them to itself or to its various departments specified in the Act, it certainly is the one most interested in their validity and in seeing to it that the law under which they are to be issued is valid and constitutional, and that the bonds are valid and properly executed. Arrangements have already been made to issue the bonds and to sell them to the various departments of the State as provided for in the Act. This should be ample evidence that the State and its officers charged with the duty of seeing that these bonds are valid and constitutional before so purchasing them have examined both the law and the manner of issuing and paying the bonds, and consider both of them valid and constitutional.

SUPREME COURT AND STATE LIBRARY BUILDING

In view of the fact that the Board of Control of the State of Nevada and the State Highway Engineer of the State of Nevada have made similar inquiries concerning an exactly similar law of this State, *i.e.*, chapter 81, 1935 Statutes of Nevada, pages 177-181, we here include a reference to said chapter 81 and to the foregoing portion of this opinion as and for our opinion on said similar inquiry relating to that chapter of the Nevada Statutes. Said chapter 81 was prepared and introduced in the Legislature as a bill long before the bill now known as said chapter 133; and both of them were introduced by the same Senator, *i.e.*, Ira L. Winters, of Ormsby County. Said chapter 133 is an exact copy of said chapter 81, insofar as the provisions for the issuance and sale of said bonds and the total cost of the building therein provided for and other matters incident thereto are concerned. Said chapter 81 was approved by the Governor on March 21, 1935, while said chapter 133 was not approved by the Governor until March 28, 1935. Said chapter 81 provides for the construction and furnishing of a building for the Nevada Supreme Court and State Library and for the Attorney-General’s office, and also for the heating and lighting systems incident thereto, an elevator and equipment therefor, and the fixtures, furniture, and furnishings of said building, and other matters incident thereto. Like said chapter

133, section 2 of said chapter 81 states that the cost of said building, etc., shall not exceed \$125,000, and in section 4 thereof provides for a bond issue by the State in the sum of \$90,000, “to supplement the amount of money so to be granted by the Federal Government.” In other words, the provisions of the two laws insofar as they relate to the matters involved in the above-specified inquiries, as to the total cost of the building, the amount of the State bond issue, and the inducing causes for the legislation, in both chapters, are the same.

For the foregoing reasons we refer to the foregoing portion of this opinion relating to said chapter 133, and adopt it as our opinion as to the similar matters of inquiry made concerning said chapter 81.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

HON. ROBERT A. ALLEN, State Highway Engineer.

BOARD OF CONTROL OF THE STATE OF NEVADA.

HON. JESSE H. EVANS, Counsel for the Administrator of the Federal Emergency Administration of Public Works.

SYLLABUS

183. Private Motor Carrier Licenses and Fees.

A person, operating a private boarding house, owning and operating a motor truck on the public highway in which he transports supplies and merchandise purchased and used by him in the feeding of his boarders, is a private motor carrier of property and subject to the license fee provided for in chapter 126, 1935 Statutes.

INQUIRY

CARSON CITY, July 5, 1935.

A person operates a private boarding house at a mine wherein such person boards miners and employees of the mine and receives pay for such board directly from such miners and employees. The boarding house is not operated by the mining company. The proprietor of the boarding house owns and operates a motor truck on the public highway in which he transports the supplies and merchandise purchased and used by him in the feeding of his boarders.

Is such person in the operation of such motor truck a private motor carrier of property and subject to the license fee therefor as provided in chapter 126, Statutes of Nevada 1935?

OPINION

A private motor carrier of property is defined in chapter 126, Statutes of Nevada 1935, as follows:

The term “private motor carrier of property” when used in this act shall be construed to mean any person engaged in the transportation by motor vehicle of property sold, or to be sold, or used by him in furtherance of any private commercial enterprise. Sec. 2, chap. 126.

We think the proprietor of the boarding house in question here is engaged in a “private commercial enterprise,” and the transportation in his motor truck on the public highway of the supplies and merchandise purchased by him and used in the business of feeding miners and mine employees for compensation is the transportation of property used in furtherance of such enterprise and that such proprietor comes squarely within the statutory definition of a private motor carrier of property, and that he is subject to the licensing provisions of the statute unless exempted therefrom by clear and express provisions of the exempting section. It may be thought that the operation of a private boarding house does not constitute a commercial enterprise, but we think the authorities show to the contrary.

Commerce, in its simplest signification, means an exchange of goods; but, in the advancement of society, labor, transportation, intelligence, care and various mediums of exchange become commodities, and enter into commerce. The subject, the vehicle, the agent, and the various operations become the objects of commercial regulation. Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in all its forms, including purchase, sale, and exchange of commodities. *Snead v. Cent. Georgia R. Co.*, 151 Fed. 608.

Commercial partnership is such as is formed for the purchase of any personal property, and the selling thereof, either in the same state or as changed by manufacture. *Shreveport Ice etc. Co. v. Mandel Bros.*, 54 So. 831.

Partnership formed for operation of a cafe or restaurant is a *commercial partnership*. *Blanchard v. Patterson*, 119 So. 902.

“Commercial” does not necessarily mean or involve trading in merchandise by barter or sale only. *Jordan v. Tashiro*, 278 U. S. 123.

The proprietor of the boarding house in question here is undoubtedly engaged in a commercial enterprise within the meaning of the term in the statute in question. He may not directly sell the supplies and merchandise transported by him to his customers in their then condition, but he does sell them to his boarders in the form of food when he furnishes meals to them for compensation. Clearly a commercial transaction.

Is such proprietor liable for the motor carrier license provided by the statute for private motor carriers of property?

Section 3 of said chapter 126 provides, among other things:

None of the provisions of this act shall apply * * * to any person engaged in transporting his own personal property in his own motor vehicle of an unladen weight of not to exceed 5,000 pounds; provided, any such person shall not transport his own goods, wares and merchandise, other than livestock or farm produce, *for the purpose of sale or resale* without first securing the license in this act provided, and paying a license fee therefor of \$25, which said fee shall be the only license fee required of such person notwithstanding any other provision of this act to the contrary. * * * (Italics ours.)

The proprietor being a “private motor carrier of property” when transporting his supplies and merchandise used by him in the furtherance of his commercial enterprise, and being engaged in a commercial enterprise in the sale of such supplies and merchandise to his boarders in the form of food, is certainly liable for the license fee unless he can point to an exemption in the statute that exempts him from payment thereof. Such exemption law or section of the law must present a clear case, free from all doubt, as such exemption laws, being in derogation of the general rule, must be strictly construed against the claimant and in favor of the public. 17 R. C. L. 522, sec. 42; 37 C. J. 237, sec. 91; 61 C. J. 391, sec. 395; 61 C. J. 392, sec. 396; 101 U.S. 528; 21 Wall. 492; 22 L. Ed. 596.

No such clear, or any, exemption appears in said chapter 126, or any other statute of Nevada pertaining to the question here. We think it most clear the proprietor of the boarding house, in the operation of his motor truck in the manner and for the purpose detailed in the inquiry is a “private motor carrier of property” and liable for the license fee therefor.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

THE PUBLIC SERVICE COMMISSION OF NEVADA.

SYLLABUS

184. Bonds--Irrigation District Officials.

Irrigation district officials who are required by law to furnish official bonds cannot be bonded by the State under chapter 131, 1935 Statutes, or any other statute.

INQUIRY

CARSON CITY, July 23, 1935.

Can irrigation district officials, who are required by law to furnish official bonds, be bonded by the State under chapter 131, Statutes of Nevada 1935, or any other statute?

OPINION

Your inquiry goes to the point whether officials of duly created irrigation districts of this State according to law can secure their official bonds from the State under the State Bonding Act or Acts.

In 1933 the Legislature enacted the first State Bonding Act and provided therein for the bonding of State and county officers only. (See chapter 24, 1933 Stats.)

In 1935 the Legislature amended the 1933 Bonding Act and incorporated in the amendatory Act provisions authorizing the bonding of irrigation district officials, and amended the title of the original 1933 Act so as to incorporate in the amended title reference to such irrigation district officials. This amendatory Act was approved March 16, 1935, and is now chapter 52, Statutes 1935. This chapter undoubtedly provides for State bonding of irrigation district officials, and pursuant to its terms such officials could have been and, in fact, must have been bonded, but the same Legislature, later in the session, enacted another amendatory or rather a revisory statute on the same subject, not only amending the original 1933 State Bonding Act and the title also, but in effect completely revising the 1933 Act, and incorporating therein a repealing section which repeals all Acts and parts of Acts in conflict with it. This later Act is now chapter 131, Statutes 1935, and was approved March 28, 1935, therefore being much later in time than chapter 52 and must, for that reason, be taken as the latest expression of the legislative will on the subject.

It is to be noted that the title of the 1933 Act was amended in chapter 131 to cover the bonding of officers of the State, counties, townships and incorporated cities, and chapter 131 was made broad enough to meet this amended title, and provides for the bonding of those officers, but all reference to irrigation district officials was stricken or left out of this title and Act, whereas specific reference was made thereto in said chapter 52 and the title of the 1933 Act there amended. This is a most significant fact, and we think it is inescapable that the Legislature clearly intended that irrigation district officials were and are not to come within the State Bonding Act, to wit, said chapter 131.

By enumerating both in the amended title in chapter 131 and in said chapter itself the officers who are to be bonded under its terms, the Legislature certainly precluded the bonding of any officer not enumerated therein. One of the cardinal rules of statutory construction is "the expression of one thing is the exclusion of another." Ex Parte Arascada, 44 Nev. 30.

Following this rule it is clear that irrigation district officials are excluded from the purview of said chapter 131, and chapter 131 being the later expression of the legislative will must control over an earlier statute on the same subject, in fact the Legislature, in the enactment of chapter 131, so revised and reenacted the State Bonding Act as to effect a repeal of the 1933

Act and also chapter 52, Statutes 1935.

Your inquiry is answered in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.

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

SYLLABUS

185. School Teachers' Retirement Salaries.

A public school teacher who stopped teaching in the public schools of this State in 1931, and who made application for the partial retirement salary subsequent to March 12, 1935, based on a past teaching record of at least fifteen years in the public schools of Nevada, is not entitled, under the law, to receive the same.

INQUIRY

CARSON CITY, August 5, 1935.

Is a public school teacher who stopped teaching in the public schools of this State in 1931, and who made application for the partial retirement salary subsequent to March 12, 1935, based on a past teaching record of at least fifteen years in the public schools of Nevada, entitled under the law to receive the same?

OPINION

Chapter 33 of the 1935 Statutes of Nevada is an Act to amend the Public School Teachers' Retirement Salary Act of 1915, Statutes of 1915, page 303. Section 2 of said 1935 Act which amends section 13 of the original Act, as amended in 1919 and 1923, provides, inter alia, the eligibility of public school teachers to receive the benefits of the Act and contains the following proviso:

provided, that application for such retirement salary shall be made within two years of the last month of service or *within two years after the approval of this act.*

It would seem at first glance at this proviso that the school teacher in question is entitled to receive the benefits provided by the statute, having made application therefor within two years after the approval of said 1935 Act. But in determining this question we must be guided by the

intent of the Legislature in passing said 1935 Act. In other words, what did the 1935 Legislature intend to accomplish by amending section 13 of the 1915 Act as amended aforesaid? The determination of this question will, of course, control the answer to the inquiry.

The intention of the legislature, when not in conflict with the constitution, is to govern in the construction of statutes. State v. Boerlin, 38 Nev. 39, 144 P. 738.

The legislative intent in enacting statutes must control, and rules of construction are but aids in ascertaining such intent. State v. Ducker, 35 Nev. 214, 127 P. 990.

The legislative intent in enacting a statute must govern if ascertainable. Mighels v. Eggers, 36 Nev. 364, 136 P. 104.

In the construction of statutes, the intention of the legislature controls the courts, and should be ascertained and followed. Ex Parte Smith, 33 Nev. 466, 111 P. 930.

In the construction of statutes, courts may consider the purpose of the change sought to be effected as it may be deduced from a consideration of the whole subject made. State v. Brodigan, 37 Nev. 245, 141 P. 988.

Courts in interpreting statutes will so construe them as to carry out the manifest purpose of the legislature, even though it may be necessary to disregard the literal meaning of certain of the language used. State v. Eggers, 36 Nev. 273, 136 P. 100.

With the foregoing principles laid down by our Supreme Court as our guide we will now determine what was the manifest intent and purpose sought to be accomplished by the 1935 Legislature when it amended section 13 of said 1915 Act, as amended. To do this we must briefly discuss the proviso contained in said 1915 Act and the amendments thereto. In section 13 of said 1915 Act the proviso is identical with said proviso in the 1935 Act. The amendatory Act of 1919, Statutes of 1919, page 153, and the amendatory Act of 1923, Statutes of 1923, page 56, both contain a proviso identical to the proviso of said 1915 and 1935 Acts.

There was no Public School Teachers' Retirement Salary Fund Law in this State prior to 1915, and it appears clear to us that the intent and purpose of the Legislature in inserting the proviso in said 1915 Act was to give all school teachers who had taught the required period of time and who had been out of service more than two years to nevertheless receive the benefits provided by the Act, should they make application therefor within two years after the approval of said 1915 Act. The reason for this latter provision obviously was to give those teachers who were otherwise qualified and who had left the service more than two years prior to approval of the 1915 law, with no notice that a retirement salary fund law would ever be passed, the opportunity of making application to receive the benefits of the law within two years after the approval thereof. The same reason could not possibly have actuated the Legislature in inserting said latter provision of the proviso in the 1919, 1923 or 1935 amendatory Acts, and neither can we see any other reason or purpose sought to be accomplished by its insertion therein. Were we to give the words "within two years after the approval of this Act" a literal interpretation it would

be possible for teachers who left the teaching profession years ago after having taught for at least fifteen years in the public schools of this State, not necessarily because they were incapacitated for further teaching but, rather, to engage in other work or because it was not financially necessary for them to support themselves and who now find themselves unable to secure a teaching position because of present bodily or mental infirmities to now apply to the Public School Teachers' Retirement Salary Fund Board for a pension, it is evident that the fund for that purpose would be so rapidly depleted by their claims as to become absolutely inadequate. We do not believe that this situation was contemplated by the Legislature of 1935, but think that the Legislature was merely providing for the payment of retirement salaries in monthly installments and not trying to let down the bars to teachers who had left the teaching profession years ago after fifteen years' service in the public schools of this State and who now have become incapacitated for resumption of teaching because of advanced age. To so hold would be to say that the Legislature by the language used in the latter portion of said proviso, and heretofore quoted, intended an absurdity which we refuse to do. We therefore hold that said latter portion of said 1935 proviso was inserted purely through inadvertence on the part of the Legislature, and by mistake and without any intent whatever.

It, therefore, naturally follows that said language must be rejected as surplusage and of no legal effect.

It is held that:

When words occur in a statute which can be given no effect consistent with the plain intent of the statute they must be rejected as without meaning. *Leavitt v. Lovering*, 64 N. H. 607, 15 Atl. 414, 1 L. R. A. 58.

Words or phrases which, if given effect, might defeat the manifest purpose of the statute, will be eliminated or regarded as surplusage. *State v. Bates*, 96 Minn. 110, 104 NW. 709, 113 A. S. R. 612; *Kitchen v. Southern Railway*, 68 S. C. 558, 48 SE. 4, 1 Ann. Cas. 747, and note.

It is here pointed out that the language of section 13 of said 1915 Act, as amended in 1923, and as it stood until approval of the 1935 Act is identical with the language of said 1935 Act except the word "quarterly" appearing in the 1923 Act is changed to "monthly" by the 1935 amendment. This is the only change made by the 1935 Legislature, and obviously the only intent the said 1935 Legislature had in mind in amending said section 13, and the only purpose sought to be accomplished thereby, was to provide for the payment of public school teachers' retirement salaries in "monthly installments" instead of in "quarterly installments" as required by the amendment of 1923. This being true it is the only purpose that it did or could accomplish, and it did not and could not give persons theretofore ineligible to receive the benefits of the law, the right to become eligible thereto by making application for same. In other words it revived no legal rights otherwise dead.

Maintaining the views heretofore set forth we hereby answer the inquiry in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

HON. CHAUNCEY W. SMITH, Superintendent of Public Instruction, Carson City, Nevada.

SYLLABUS

186. School District Bonds--Wadsworth.

The bonds issued by the Board of School Trustees of Wadsworth School District No. 11, by reason of an election held in said District on November 27, 1934, are valid, legal, and binding obligations of said District.

INQUIRY

CARSON CITY, August 19, 1935.

Are the bonds issued by the Board of School Trustees of Wadsworth School District No. 11, by reason of an election held in said district on Thursday, the 27th day of November, 1934, valid, legal, and binding obligations of said district?

OPINION

A reading of the transcript of the election proceedings had by the Board of School Trustees of Wadsworth School District No. 11, furnished us by Hon. Melvin E. Jepson, attorney for said district, shows that the election was called and held strictly pursuant to and in compliance with chapter 95 of the 1933 Statutes of Nevada, which is commonly known as the "Two Box" Bond Election Law of Nevada.

Said chapter 95 of the 1933 Statutes of Nevada is a valid and constitutional law. It has been so held by our Supreme Court in the case of Hard v. Depaoli (Nev.), 41 P.(2d) 1054.

Maintaining the views heretofore set forth, the inquiry is hereby answered in the affirmative.

It is here pointed out that the portion of the minutes of a special meeting of the Board of Trustees of Wadsworth School District No. 11 held at Wadsworth, Nevada, on Thursday, the 13th day of December, 1934, at 2 o'clock p.m., which sets forth the form of the bonds proposed to be issued, discloses that the said bonds intended to be issued and sold to the Nevada Industrial Commission will be signed by M. P. Depaoli as "Chairman" of the Board of Trustees of said district, and by W. J. Ceresola as Clerk thereof, and countersigned by D. W. Dunkle as County

Treasurer of the County of Washoe. There is no such thing, under the law of this State, as a "Chairman" of a Board of Trustees of a school district. It is provided by section 5713 N. C. L. 1929 that it shall be the duty of the Boards of Trustees of school districts within this State

* * * to meet on the first Monday in May, following their election, or as soon as practicable thereafter, after taking the oath of office, at such place as may be most convenient in the district, and to organize by electing one of their number *president* of the board and another as clerk. * * *

It is our opinion that the said word "chairman" as proposed to be used on the bonds, as disclosed by said transcript, was used purely through inadvertence and error, and that the same should be changed to the word "president." We further advise that the Industrial Commission insist that this change be made before it purchases the said bonds.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

HON. DAN SULLIVAN, Chairman, Nevada Industrial Commission, Carson City, Nevada.

SYLLABUS

187. School District Bonds--Gerlach.

The bonds issued by the Board of School Trustees of Gerlach School District No. 27, Washoe County, Nevada, by reason of an election held in said District on May 11, 1935, are valid, legal, and binding obligations of said District.

INQUIRY

CARSON CITY, August 24, 1935.

Are the bonds issued by the Board of School Trustees of Gerlach School District No. 27, Washoe County, Nevada, by reason of an election held in said district on Saturday, the 11th day of May, 1935, valid, legal, and binding obligations of said district?

OPINION

A reading of the transcript of the election proceedings had by the Board of School Trustees of Gerlach School District, No. 27, Washoe County, Nevada, furnished us by Hon. Melvin E. Jepson, attorney for said district, shows that said election was called and held strictly pursuant to and in compliance with chapter 95 of the 1933 Statutes of Nevada, which is commonly known as the “Two Box Bond Election Law of Nevada,” and in strict compliance with all other election laws of the State of Nevada applicable to school bond elections.

Said chapter 95 of the 1933 Statutes of Nevada is a valid and constitutional law. It has been so held in our Supreme Court in the case of *Hard v. Depaoli* (Nev.), 41 P.(2d) 1054.

For the foregoing reasons the inquiry is hereby answered in the affirmative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-
General.

HON. DAN SULLIVAN, Chairman, Nevada Industrial Commission, Carson City,
Nevada.

SYLLABUS

188. Nevada Industrial Recovery Act.

The “Nevada Industrial Recovery Act,” chapter 114 of the 1935 Statutes of Nevada, is not valid and constitutional.

INQUIRY

CARSON CITY, August 28, 1935.

Is the “Nevada Industrial Recovery Act,” chapter 114 of the 1935 Statutes of Nevada, valid and constitutional?

OPINION

This Act, hereinafter referred to as the Nevada Act, is analogous to and patterned after the National Industrial Recovery Act of June 16, 1933, chapter 90, 48 Statutes at Large, 195, 196, U. S. Code, title 15, section 703, hereinafter referred to as the Federal Act, changed, of course, to meet State and local conditions.

Section 2 of the Nevada Act vests the power in the Governor to approve “State codes of fair competition,” when application is made therefor as provided in said section. The corresponding provision of the Federal Act vests such power in the Federal Administrator appointed by the President pursuant to the terms of said Federal Act. Article I, section 1, of the Constitution of the United States, reads as follows:

All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

The pertinent part of article IV, section 1, of the Nevada State Constitution, reads as follows:

The representative authority of this state shall be vested in the senate and assembly, which shall be designated “the Legislature of the State of Nevada”; * * *

The above-quoted State and Federal constitutional provisions are, in legal effect, the same.

The Supreme Court of the United States in the very recent case of *Schechter et al. v. United States of America* (Criminal No. 854), and *United States of America v. Schechter Poultry Corporation et al.* (Criminal No. 864), 79 L. Ed. 888, held the above-mentioned provision of the Federal Act void as an unconstitutional delegation of legislative power to the executive branch of the Federal Government, and in connection therewith says, at page 894, second column, last paragraph:

The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.

This holding and language of the Federal Supreme Court is applicable and binding upon the Legislature of this State because of the heretofore-quoted State constitutional provision which is analogous to the constitutional provision considered by the Supreme Court of the United States in the *Schechter* case, *supra*, and therefore said section 2 of the Nevada Act is unconstitutional and void.

Section 3 of the Nevada Act provides that “national codes of fair competition” shall be presumed to effectuate the policies and requirements of the Act and shall be effective as State codes. Section 13 of the Nevada Act provides that the term “national code of fair competition,” as used in the Act, means any code of fair competition which has been or may be approved, issued, or prescribed by the President, if such code meets the requirements set forth in certain clauses of the Act.

The pertinent portion of article 4, section 17, of the State Constitution reads as follows:

Each law enacted by the legislature shall embrace but one subject, and matters properly connected therewith, which subjects shall be briefly expressed in the title.
* * *

The title of the Nevada Act reads as follows:

An Act to promote the organization and self-government of industry, trade and business for the purpose of securing cooperative action among trade groups through the establishment of codes of fair competition, and providing for the enforcement of the provisions thereof, through administrative agencies and otherwise in cooperating with the national government in its efforts to promote recovery from industrial and business depression.

Said sections 3 and 13 of the Nevada Act attempt to incorporate into Nevada State law “national codes of fair competition,” approved pursuant to the terms of the Federal Act, which national codes would, if valid, have full force and effect as Federal laws. This is a legislative attempt to incorporate Federal laws into our State laws without any mention of an intent so to do in the title of the Nevada Act, and therefore, said sections 3 and 13 of the Nevada Act are unconstitutional as violative of said article 4, section 17, of the Nevada State Constitution.

The only words contained in the title of the Nevada Act which give any intimation that anything contained in the body thereof may in anywise be connected with the National Government are the words, “in cooperating with the national government in its efforts to promote recovery from industrial and business depression.”

This language most certainly gives no intimation that the body of the Act will attempt to incorporate therein Federal laws by reference, and is therefore clearly inadequate and insufficient to support the provisions contained in said sections 3 and 13 of the Nevada Act, within the meaning of article 4, section 17, of the Nevada Constitution.

The foregoing reasoning, we believe, is clearly sustained and comes within the rule laid down by our Supreme Court in the case of Ex Parte Mantell and Raigen, [47 Nev. 95](#), 216 P. 509, wherein the so-called “Whitely Act” was held unconstitutional as violative of article 4, section 17, of the State Constitution, q. v. On page 100 of the Nevada Report the Court states:

Is there anything in the title in question to enable the people or the legislators to grasp the purpose and scope of the bill without reference to any other document? We think not. The so-called title merely declares that it is an act to make the “provisions” of an Act of Congress the law of the State of Nevada. It is true that it undertakes to designate the Act of Congress, the provisions of which it purports to incorporate into a law. Nowhere in the title of the statute does it appear what the provisions of the Act of Congress are. To ascertain what they are, one must look to the Act of Congress itself. That this will not suffice we do not think anyone could be so bold as to contend.

Applying the above language to the Act in question, the so-called title of the Nevada Act *does not even declare* that it is an Act to make the “provisions” of an Act of Congress the law of the State of Nevada; and neither does the body of the bill in sections 3 and 13, but said sections merely declare that *national codes of fair competition approved pursuant to an Act of Congress shall be the law of Nevada*. The title of the Nevada Act does not even undertake to designate the Act of Congress, the provisions of which it attempts to incorporate into law. Nowhere in the title of the statute does it appear what the codes approved by the Federal Administrator pursuant to the terms of an Act of Congress are. One cannot even ascertain what they are by reference to the Act of Congress itself, but one must locate the *codes approved by the administrator pursuant to an Act of Congress* in order to determine the law of Nevada. That this will not suffice we do not think anyone could be so bold as to contend.

Having determined that sections 2, 3 and 13 of the Nevada Act are unconstitutional and void we must now determine what is the legal status of the remaining portions of said Nevada Act. Section 14 of the Nevada Act contains a “savings clause” in the usual form; but just what is the office of a “savings clause” when there is nothing left to save? A perusal of the entire Act clearly shows that the remaining sections thereof are merely incidental to and provide the legal machinery necessary for effectuating the legislative purpose sought to be accomplished by said sections 2, 3 and 13. These sections being unconstitutional and not severable from the remaining parts of the Act, it naturally and necessarily follows that each and every part and section of said chapter 114 of the 1935 Statutes of Nevada is void.

For the reasons heretofore fully set forth the inquiry is hereby answered in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General

HON. RICHARD KIRMAN, SR., Governor of Nevada, Carson City, Nevada.

HON. J. H. WHITE, Secretary to the Governor, Carson City, Nevada.

SYLLABUS

189. Nevada Tax Commission--Bonds.

A statement of a bank doing business in Nevada guaranteeing faithful performance of the provisions of section 4, chapter 74, Statutes of 1935, does not constitute an acceptable bond under said provisions.

INQUIRY

CARSON CITY, September 4, 1935.

In your letter of August 29, 1935, you requested this office for its opinion as to:

Whether a statement of a bank doing business in the State of Nevada guaranteeing faithful performance of the provisions of chapter 74, Statutes of 1935, constitutes an acceptable bond under the provisions of section 4, chapter 74, Statutes of 1935.

OPINION

Section 4 of chapter 74, Statutes of 1935, insofar as it applies to the above inquiry, reads as follows:

Before granting any such license said tax commission shall require the applicant to file with said tax commission a bond duly executed by such applicant as principal and by a corporation qualified under the laws of this state, as surety, payable to the State of Nevada, conditioned upon faithful performance of all the requirements of this act and upon the punctual payment of all excise taxes, penalties and other obligations of such applicant as a dealer. * * * In lieu of any such bond or bonds any dealer may deposit with the state treasurer, under such terms and conditions as the tax commission may prescribe, a like amount of lawful money of the United States or bonds of the United States or of the State of Nevada of an actual market value not less than the amount fixed as aforesaid by said tax commission.

It will be noted that the statute calls for a bond to be executed by the applicant as principal and by a corporation qualified under the laws of the State of Nevada as surety, payable to the State of Nevada. To this requirement the Legislature has made available the alternative of depositing lawful money of the United States or bonds of the United States or bonds of the State of Nevada with the State Treasurer, under such terms and conditions as the Tax Commission may prescribe.

It is our opinion that the Tax Commission is precluded from accepting any other security from the applicant than that which is specifically prescribed in the statute, inasmuch as we are unable to find any provision in the statute giving the Tax Commission any discretion in this particular.

A mere statement guaranteeing faithful performance does not constitute a bond.

Furthermore, a bank doing business in the State of Nevada is nowhere authorized by our statutes to do or perform the business of entering into surety bonds or undertakings, nor is it authorized to act as a guarantor in a case of this kind.

The general rule is that a bank is not authorized to become a guarantor. 7 C. J., par. 239, page 595, note 9.

For the foregoing reasons, it is the opinion of this office that the statement referred to in your inquiry is not acceptable under the provision of section 4, chapter 74, Statutes of 1935.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. HOWARD GRAY, Deputy Attorney-General.

NEVADA TAX COMMISSION, Attention W. D. ATKINSON, Statistician.

SYLLABUS

190. Publications for Sale of County Property, and of Bids for Contracts.

1. Where county property is sold under the provisions of subsection 10, section 1942, Nevada Compiled Laws 1929, as amended, five (5) weekly insertions in the newspaper are required to comply with requirements for publication in said section.

2. When bids for a contract are advertised for by the Board of County Commissioners, one publications per week, for a period of thirty (30) days, of the contract required to be published by section 1963, Nevada Compiled Laws 1929, meets the requirements of that section irrespective of whether or not the publication is in a daily or weekly newspaper.

3. When bids for a contract are advertised for by the Board of County Commissioners, under the provisions of section 1963, Nevada Compiled Laws 1929, the publisher can collect for only one publication per week for the required length of time.

INQUIRY

CARSON CITY, September 19, 1935.

1. Where county property is sold under the provisions of subsection 10 of section 1942, Nevada Compiled Laws 1929, as amended, how many insertions in the newspaper are required to comply with requirements for publication in said section?

2. When bids for a contract are advertised for by the Board of County Commissioners under the provisions of section 1963, Nevada Compiled Laws 1929, how many insertions must be made in a daily paper to comply with the provisions of said section 1963, Nevada Compiled Laws 1929?

3. When bids for a contract are advertised for by the Board of County Commissioners under section 1963, Nevada Compiled Laws 1929, how many insertions can the publisher of a newspaper collect for?

OPINION

Answering query No. 1, as indicated above, section 1942, Nevada Compiled Laws 1929, subsection 10, reads as follows:

To sell at public auction, at the courthouse of said county, after at least thirty days' previous public notice (in the same manner as required by law for the sale of like property on execution), * * *.

Section 8846, Nevada Compiled Laws 1929, provides that notice of sale of real property under execution be:
by publishing a copy of said notice once a week * * * in a newspaper, if there be one, in the county * * *.

Section 1942, Nevada Compiled Laws 1929, as amended, requires "at least thirty days' previous public notice." This indicates that there must be thirty (30) days intervening between the day of publication and the day of sale, or in other words, that the day of the first publication nor the day of sale may be included in the period of time constituting the thirty (30) days' previous public notice. 62 C. J., par. 32, page 985, note 89; 62 C. J., par. 42, page 996, note 23.

The notice required by section 1942, Nevada Compiled Laws 1929, as amended, is controlled by section 8846, Nevada Compiled Laws 1929, insofar as the manner in which it shall be given is concerned. Section 8846, Nevada Compiled Laws 1929, provides that the notice shall be published once a week, and construing the two sections together, the notice required by section 1942, Nevada Compiled Laws 1929, as amended, must be published once a week for at least thirty (30) DAYS.

It is the opinion of this office that the notice of sale must be inserted for five (5) weekly publications before such thirty (30) days' notice could be considered as duly given. Attorney-General's Opinion No. 165, 1917-1918; Stevens v. Naylor, 75 Nebr. 325, 106 NW. 446; Carlon v. Aultman (Nebr.), 44 NW. 873; Mathews v. Arthur (Kans.), 59 P. 1067; Billington v. Moore (Ky.), 181 SW. 651; Lower Terretonne Refining & Mfg. Co. v. Police Jury (La.), 40 So. 443, 112 Am. St. Rep. 291.

Answering query No. 2 we find that section 1963, Nevada Compiled Laws 1929, is an Act approved March 24, 1911, and provides, insofar as is pertinent to this inquiry, that "the county commissioners shall advertise such contract or contracts to be let * * * in some newspaper published in their county, for the period of thirty days * * *."

This statute is silent upon the question of how many publications or insertions should be made to comply with this provision.

While some authorities hold that unless expressly required, daily insertions of a notice in a newspaper are not necessary, but that weekly publications for the required length of time would be sufficient (35 C. J., par. 30, page 22, note 54, and cases there cited), others hold that where a statute requires notice for at least a specific number of days, the notice must be published in each successive issue of the paper during the statutory period (35 C. J., par. 30, page 22, note 56, and

cases there cited). While the foregoing authorities involve the publication of notices of judicial sale, the rules in such cases are undoubtedly authority on the question under consideration.

However, since the question presented involves advertising by a county, we have another section of the Nevada Compiled Laws which must be taken into consideration, viz, section 269, Nevada Compiled Laws 1929, which is an Act entitled “An Act fixing the rates for official advertising by the State of Nevada and the several counties of the state,” approved March 16, 1897. Said section 269 reads as follows:

All advertising ordered or required by the State of Nevada, or by the respective counties of the state shall be paid for by the state or the county ordering or requiring the same at the rate of two dollars per square of ten lines nonpareil measurement for the first insertion and one dollar per square for each subsequent insertion; an insertion to be held to be one publication per week whether the newspaper in which such advertising is ordered to be done be published daily or weekly; provided, that nothing herein contained shall prohibit boards of county commissioners from entering into annual contracts for the entire official printing and advertising of their respective counties when in their judgment a saving of public funds will be effected thereby.

This statute clearly establishes the rates for advertising ordered or required by a county where no annual contract for the entire official printing and advertising has been entered into between the County Commissioners and a publisher. This rate is two (\$2) dollars for the first insertion of a given number of lines of a specified size type and one (\$1) dollar for each subsequent insertion.

However, the statute goes farther and defines the word “insertion” as used in the statute as follows:

an insertion to be held to be *one publication per week* whether the newspaper in which such advertising is ordered to be done be published daily or weekly. (Italics ours.)

In other words, this statute fixed the price per insertion and then limits the number of insertions to one per week.

Section 1949, Nevada Compiled Laws 1929, provides that “The board of county commissioners shall not for any purpose contract debts or liabilities except those expressly authorized by law * * *.”

In view of the section last referred to, the Board of County Commissioners is prohibited from contracting for a rate for county advertising in excess of that expressly authorized by law.

This rule, the rule that a demand cannot be created against the public without authority of law, applies to the liability of the public for public printing. *Butler v. Jefferson Co. Fiscal Ct.* (Ky.), 103 SW. 251.

The authorities uniformly hold that the body or official authorized to make the publication has no power to contract for a greater number of publications, and that the newspaper is not entitled to compensation for the number of publications exceeding the number provided by statute. *Endion Impr. Co. v. Evening Telegram Co.* (Wis.), 80 NW. 732; *Logan Co. v. Advocate Pub. Co.* (Colo.), 173 P. 398; *Woodward Co. v. Smith* (Okla.), 89 P.1121.

In view of the foregoing authorities and section 1949, Nevada Compiled Laws 1929, and section 269, Nevada Compiled Laws 1929, this office is of the opinion that the Board of County Commissioners of a county are prohibited from ordering the publication of county advertising more frequently than one publication per week unless there is some special statute repealing or modifying section 269, Nevada Compiled Laws 1929.

Section 1963, Nevada Compiled Laws 1929, requiring the advertising of proposed contracts exceeding the expenditure of five hundred (\$500) dollars does not, in our opinion, either modify or repeal section 269, Nevada Compiled Laws 1929.

If section 1963, Nevada Compiled Laws 1929, were construed to require daily publication, there necessarily would be a conflict between that provision and section 269, Nevada Compiled Laws 1929, which limits the power of the Board of County Commissioners to pay for but one publication per week. In other words, under such a construction one statute would require what another statute prohibits.

Section 269, Nevada Compiled Laws 1929, was enacted and became a law in 1897 as a general statute covering all public advertising by the various counties of the State, and was in force when section 1963, Nevada Compiled Laws 1929, was enacted in 1911.

Our Supreme Court in the case of *Clover Valley Land & S. Co. v. Lamb*, [43 Nev. 375](#), [187 P. 723](#), held that the Legislature is presumed to have knowledge of the state of law upon the subject upon which it legislates, so it must be presumed to have had knowledge of the limitations placed upon the Board of County Commissioners by section 269, Nevada Compiled Laws 1929, when it enacted section 1963, Nevada Compiled Laws 1929.

To construe section 1963, Nevada Compiled Laws 1929, as requiring daily publication of the advertisement therein required, would lead to a conclusion which would be absurd upon its face.

In the case of *In re Lavendol's Est.*, [46 Nev. 181](#), [209 P. 237](#), the court held that if there be any ambiguity or indefinite expressions found in statutes, it is incumbent on the courts to adopt that construction which best accords with the true intent and meaning of all the statutes touching the subject under consideration.

Also in *Nye County v. Schmidt*, [36 Nev. 456](#), [157 P. 1073](#), the court held to the general rule that in construing a statute the court must avoid an interpretation which will result in absurd consequences.

Under the foregoing rules of statutory construction, this office is of the opinion that section 1963, Nevada Compiled Laws 1929, must be construed in accord with all the statutes touching upon the subject of official advertising, and that such construction must avoid such an interpretation as would result in absurd consequences, and that hence this section must be construed with section 269, Nevada Compiled Laws 1929.

Therefore, it is the opinion of this office that one publication per week for a period of thirty (30) days of the contract required to be published by section 1963, Nevada Compiled Laws 1929, meets the requirements of that section irrespective of whether or not the publication is placed with a daily or weekly newspaper.

Answering query No. 3 we look to section 269, Nevada Compiled Laws 1929, to find the rates provided by statute for official county advertising. This section which has heretofore been set out in this opinion fixes the rates at so much an insertion and then defines "insertion" to be one publication per week whether published in a daily or weekly newspaper.

The rule is that where a rate for public advertising is fixed by statute, that rate governs in all contracts between the public and the newspapers. *Logan Co. v. Advocate Pub. Co. (Colo.)*, 173 P. 398; *Woodward Co. v. Smith (Okla.)*, 89 P. 1121.

The cases further hold that a newspaper is not entitled to compensation for the number of publications exceeding the number provided by statute. *Endion Impr. Co. v. Evening Telegram Co. (Wis.)*, 80 NW. 732; *Logan Co. v. Advocate Pub. Co. (Colo.)*, 173 P. 398; *Woodward Co. v. Smith (Okla.)*, 89 P. 1121.

In view of these authorities it is the opinion of this office that the publisher can collect for only one publication per week, and that under the authorities cited in support of answer to query No. 2, the Board of County Commissioners are prohibited from contracting for more than one insertion per week for the required length of time, and that if the Board of County Commissioners have contracted for a publication of the advertisement of the contract required by section 1963, Nevada Compiled Laws 1929, at more frequent intervals than once a week for thirty (30) days, the contract is void by reason of being beyond the scope of their authority.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. HOWARD GRAY, Deputy Attorney-General.

HON. MERWYN H. BROWN, District Attorney, Humboldt County, Winnemucca, Nevada.

SYLLABUS

191. Sale of County Property.

1. A Board of County Commissioners cannot lawfully limit the bids to be received at a sale of county property to sealed bids.

2. Property owned by the county, and sold as prescribed by law, does not need to be appraised.

INQUIRY

CARSON CITY, October 1, 1935.

1. Can the Board of County Commissioners call for sealed bids in selling property, the title of which has been acquired by the county for delinquent taxes?

2. Would it be necessary to have county property, the title of which has been acquired by the county for delinquent taxes, appraised before sale?

OPINION

The Statutes of Nevada contemplate that all county property sold by the Board of County Commissioners must be sold at public auction. Section 1942, N. C. L. 1929; section 6529, N. C. L. 1929.

The purpose of such statutes was stated in Lyon County v. Ross, [24 Nev. 102](#), [112](#), wherein the court said that the purpose of requiring notice and public auction in the sale of county property was “for the protection and benefit of the public and were intended to guard against favoritism, fraud and corruption in the sale of public property.”

Where the statute prescribes the manner of sale of county property, a sale made in any other manner is void. 15 C. J., par. 225, page 538, note 53; Lyon County v. Ross, [24 Nev. 110](#).

The main purpose of auction sales is to obtain the best financial returns for the owner of the property sold; and hence competition among a number of bidders is a necessary element. 6 C. J., par. 1, page 822, notes 3 and 4.

The term “public auction” is synonymous with “public sale.” Public sale is defined as being a sale at auction to the highest bidder. 50 C. J., par. 73, pages 861 and 862.

Judicial sales are public sales, or sales at public auction, unless a private sale is authorized by statute and court order. 35 C. J., par. 44, page 34.

At a judicial sale it was held that a bid may be made by letter where the bid was read and announced at the sale and ample time was allowed after the announcement for others to bid if they so desired. Weriner v. Thornton, 98 Ill. 156.

However, bidding by private signal is held to be improper. 35 C. J., par. 50, page 38; 6 C. J., par. 26, page 829.

The reason given by the courts in prohibiting the bidding by secret or private signal is that such practice, if permitted, would not place the bidders upon equal terms.

In the case of sales under execution, which are sales at public auction, it is held proper to adopt written bids, but the officer making the sale must regularly cry such a bid. *Dickerman v. Burgess*, 20 Ill. 260.

And, a bid may be received by telephone where the officer makes a public outcry of the bid before striking off the property to such bidder. *Victor Inv. Co. v. Roerig*, 22 Colo. A. 257, 124 P. 349.

In view of the foregoing authorities, we are of the opinion that bids at the public sale of county property may be made in writing, but they must be announced to the public present so that those present may have an opportunity to bid higher if they so desire.

A public sale, or auction, is where all persons have the right to come in and bid where bids are not held open except with the bidders' consent and where notice inviting bids is publicly given. *In re Nevada-Utah Mines Corporation*, 198 Fed. 497-499.

The term "public sale," or "public auction," implies that there should be no restrictions placed upon the sale in any manner by the officer or officers whose duty it is to notice and conduct the sale, the object being to secure by a public notice the presence of as many of the public as desire to attend for the purpose of bidding. If the bidding were limited solely to those who presented sealed bids, the sale would be deprived of that competitive element which must be present to determine the highest bidder. For, it is not inconceivable that some who file their sealed bids would not bid higher if they knew that other bids surpassed theirs. Again, sealed bids would limit each bidder to one bid, which would again eliminate from the sale that competitive spirit which is one of its characteristics and which is desirable to obtain the highest price obtainable for the county.

Answering query No. 1, it is the opinion of this office that the Board of County Commissioners cannot lawfully limit the bids to be received at a sale of county property to sealed bids, and that a notice of such sale stating that sealed bids only will be accepted is not in compliance with the statutes of Nevada.

Answering query No. 2, this office is of the opinion that property owned by the county, and sold as prescribed by law, does not need to be appraised. We find no statute requiring the procedure of appraising property which is to be sold at public auction.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. HOWARD GRAY, Deputy Attorney-General.

HON. FRED L. WOOD, District Attorney, Mineral County, Hawthorne, Nevada.

SYLLABUS

192. Motor Convoy Tax.

Where a purchaser has registered his cars in another State and the license plates for the current year have been issued him and such plates are on the cars in question, a convoy tax of \$7.50 cannot be legally collected either where automobiles are purchased in another State, delivery to be taken at the factory, and where the cars are driven across Nevada by the registered owner, or his agent, or someone in his employ, or where automobiles are purchased in another State, delivery to be taken at the factory, and where one of the cars is driven by a registered owner, his agent or employee, and the other automobile is towed across the State of Nevada.

INQUIRY

CARSON CITY, October 25, 1935.

Can a convoy tax of \$7.50 be legally collected in the following cases:

(a) Where automobiles are purchased in another State, delivery to be taken at the factory, and where the cars are driven across the State of Nevada by the registered owner, or his agent, or someone in his employ.

(b) Where two (2) automobiles are purchased in another State, delivery to be taken at the factory, and where one of the cars is driven by a registered owner, his agent or employee, and the other automobile is towed across the State of Nevada.

OPINION

It is presumed for the purpose of this opinion that in either of the cases referred to in your inquiry that the purchaser has registered his car in another State and the license plates have been issued him and that the plates are on the cars in question.

It is the opinion of this office that the convoy tax of \$7.50 cannot be collected in either case.

The statute defines the term "motor convoy carrier," and the tax cannot be levied unless the cars clearly come within the statutory definition.

In both of the situations referred to in your inquiry, one of the elements of the definition

of “motor convoy carrier” is lacking. That is, the cars are not being transported for the *purpose* of sale, or for the *purpose* of being stored for the purpose of sale, or for the *purpose* of public or contract carrier service. Paragraph (g) of section 2, chapter 126, 1935 Statutes of Nevada, page 262.

In the situation referred to in paragraph (a) of your inquiry another element of the statutory definition is lacking, that is, that the car or cars in question are not being towed, or carried, or transported in another motor vehicle.

In both of said cases we presume, from the statements in your letter, that the cars are bearing the license plates of another State of the current year.

The object of the statute, as we view it, and as expressed in the Act itself, is to collect revenue from those who use our highways for a profit-making enterprise. In either and both of the instances referred to, the cars have been purchased in the purchaser’s home State and are being transported by that purchaser from the point of delivery to his home State. The transportation is not a part of an enterprise of commerce inasmuch as the commercial transaction took place and was completed before the car or cars were driven across the highways of the State of Nevada. The owners stand in the same position as any citizen of another State who drives our highways and has on his car the current year’s license plates of his home State. It is not material that the car is driven by a relative or employee for the owner.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. HOWARD GRAY, Deputy Attorney-General.

PUBLIC SERVICE COMMISSION OF NEVADA, LEE S. SCOTT, Secretary, Carson City, Nevada.

SYLLABUS

193. Gasoline Tax.

Sections 6637 and 6644, Nevada Compiled Laws 1929, constitute a general statute. The 1935 Act, being special in nature, controls, and a refund of gasoline tax cannot be made except according to the provisions thereof.

INQUIRY

CARSON CITY, November 13, 1935.

Can one, other than the United States Government, or officer or agent of such

Government, who has paid the tax on gasoline secure a refund of said tax when the application for such refund is made more than three (3) months after the date of purchase under the provisions of the 1923 Statutes, page 151 (sections 6637 to 6644, Nevada Compiled Laws 1929)?

OPINION

It is the opinion of this office that chapter 74, 1935 Statutes of Nevada, page 161, the same being “An Act to provide an excise tax on the distribution of motor vehicle fuel; * * * to provide for refunds * * * and to repeal all other Acts or parts of Acts in conflict herewith,” is controlling. Section 5 of said Act provides at length and specifically how and when refunds may be paid. Section 5 of said Act reads in part as follows:

** * * provided further, however, that application for refund, together with the necessary supporting evidence as provided by this paragraph must be filed with the tax commission within three (3) months from the date of purchase; provided, however, that supporting evidence of sales to the United States Government must be filed with the tax commission within six (6) months from date of such sales; otherwise all rights to such refunds shall be forfeited; * * **

Sections 6637 and 6644, Nevada Compiled Laws 1929, are a general statute and was passed by the Legislature in 1923.

It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special Act, and thus conflict with it, the special Act will be considered as an exception to the general statute. 59 C. J., page 1057.

In the case of Wainwright v. Bartlett, 51 Nev. 170, the Supreme Court of this State held that the general provisions of a statute are controlled by specific provisions of the same statute.

Applying these rules of construction to the statutes involved, we are forced to conclude that the provisions of the 1935 Act, being special in nature, control, and that a refund of gasoline tax cannot be made except according to the provisions thereof, and that the general statute does not apply.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. HOWARD GRAY, Deputy Attorney-General.

NEVADA TAX COMMISSION, Carson City, Nevada.

SYLLABUS

194. "Residence" in School Districts.

The members of a Civilian Conservation Corps stationed within the boundaries of an organized school district are not residing in that school district within the meaning of the term "residing" as used in section 6022 Nevada Compiled Laws 1929, so as to qualify them as signers of a petition requesting the establishment of a night school.

INQUIRY

Are members of a Civilian Conservation Corps stationed within the boundaries of an organized school district residing in that school district within the meaning of the term "residing" as used in section 6022, Nevada Compiled Laws 1929, so as to qualify them as signers of a petition requesting the establishment of a night school?

OPINION

The section of the Nevada statutes which the inquiry involves is section 1 of an Act entitled "An Act to provide for the establishment of evening schools," 1917 Statutes, page 354, the same being section 6022, Nevada Compiled Laws 1929, as amended by Statutes 1929, page 284, and by Statutes 1923, page 137. The portion of said section which is specifically involved reads as follows:

Any board of school trustees or other school board in charge of a public school is hereby authorized to establish an evening school therein whenever fifteen or more bona fide applicants for instruction in such evening school residing in said district shall petition the school board in writing for the same.

The Civilian Conservation Corps was created by an executive order of the President of the United States. The members of that corps are recruited from unemployed boys and young men throughout the country. One of the definite understandings upon which a young man is accepted as a member of the corps is that a definite portion of his monthly wages must be sent to some member of his family or someone who would be dependent upon him for support. The period of enlistment is six months, and during that time the members of the corps are under the command of Army officers in all respects concerning their conduct. They move from place to place by order of their commanding officers. While individual members may resign and obtain honorable discharges, they can only do so when they can show that they have employment. As we understand the organization, the individual members have no choice in regard to which company they may join, or where they may go. We are also informed that the members of the corps are required to live in barracks or assigned quarters and are not permitted to live where they may individually desire.

Under the foregoing facts the question is whether or not the member of a corps are residing in an organized school district within the purview of the statute referred to when stationed and living in a camp situated within the boundaries of a school district.

The question turns entirely upon the construction to be given the words “residing in” as the same are used in the statute above referred to. The word “residing” has been defined as follows:

When used in statutes or actions or suits relating to taxation, right of suffrage, divorce and the like, residing is used in the sense of legal residence; that is to say, the place of domicile or permanent abode; as distinguished from temporary residence. 54 C. J., page 704, par. 6; Herron v. Passailaigui, Fla. 110 So. 539, 543; Cooper’s Adm’r. v. Commonwealth, Va. 93 So. 680; Laue v. Grand Fraternity, Tenn. 177 S. W. 941, 943; L. R. A. 1915 F. 1056, Ann. Cas. 1917 A. 376.

In a leading case, Shattuck v. Maynard, 3 N. H. 123 (1824), the Supreme Court of New Hampshire, speaking through Richardson, C. J., said:

The word reside is used in two senses; the one, constructive, technical, legal; the other denoting the personal, actual habitation of individuals. When a person has a fixed abode where he dwells with his family there can be no doubt as to the place where he resides. The place of his personal and legal residence are the same, so when a person has no permanent habitation or family, but dwells in different places as he happens to find employment there can be no doubt as to the place where he resides. He must be considered as residing where he actually or personally resides. But some individuals have permanent habitations where their families constantly dwell, yet pass a great portion of their time in other places. Such persons have a legal residence in other places and the word “reside” may with respect to them denote either their personal or legal residence.

The words “residing in the district” were construed in the case of People v. Hendrickson, N. Y. Sup. Ct. 104 N. Y. S. 122. This case involved a construction of the words as used in the school laws of the State of New York. The facts of the case were briefly as follows: An orphan child who had been placed with a family by a children’s aid society was refused free attendance to the schools in the district in which the people lived with whom the orphan was residing. The statute required that the common school of the district should be open to *resident* children of the district without any charge for tuition. The statute also provided that in the event nonresident children attended the common school of the district they could only do so upon such conditions as laid down by the board of trustees. The orphan child was denied the free use of the schools upon the ground that he was not a *resident* of the school district. The court in defining the words “residing in the district” based its decision on the policy of the statutes relating to education, which they said consisted of providing free education to the children of the State of New York. The court said:

To construe the word residence as used in the school law as synonymous with the meaning of domicile and to give to it the narrow and technical meaning of the latter word would seriously impair the usefulness of that law and would defeat various provisions of the statute.

The court further said:

The child has no other home or residence. Under the circumstances, he is entitled to receive a free education in the common school of the district in which he actually resides.

The case of *Trumbull v. Moss*, 28 Conn. 253-256, is illustrative of the definition of the word “reside” as applied in regard to “poor laws.” In this case the court in construing a statute relating to town aid to the poor, “residing” was construed to mean that:

Being in a town and in necessitous circumstances is a residing therein within the meaning of the law.

While the court said that the word reside usually involved the element of “stopping and being at a place and abiding in it for some continuance of time,” it specifically refused to recognize that element in defining the word as it was used in the statute which was before it for construction.

From the foregoing references and authorities cited, it can be readily seen that the words “reside,” “residing” and “residence” are elastic words often defined and construed by the courts and employed in a wide variety of signification, and their meanings have been variously shaded according to the variant conditions of their application, for they are capable of different meanings and may receive a different meaning according to the connection in which they are found. 54 J. C., page 702, par. 1.

The foregoing definitions have been well summarized in the “Restatement of the Law, Conflict of Laws,” subdivision E, paragraph 9, page 20, as follows:

Use of the word residence. The word residence is often, but not always, used in the sense of domicile and its meaning in a legal phrase must be determined in each case. It is sometimes used as an equivalent to “domicile”; sometimes it has a broader meaning; and sometimes it has a narrower meaning. It may mean something more than domicile; the domicile namely at which a person is a resident. On the other hand it may mean something less than domicile; a dwelling place adopted for the time being but not necessarily with such an intention of making a home and as to create a domicile. The phrase “legal residence” is sometimes used as the equivalent of domicile.

In statutes relating to taxation and voting, residence means domicile unless the contrary is indicated in the statute.

In statutes relating to gaining a settlement under the poor law and to competence of a divorce court, residence means domicile at which the person in question resides unless the contrary is indicated in the statute.

In statutes relating to gaining a settlement under the poor law and to competence of a divorce court, residence means domicile at which the person in question resides unless the contrary is indicated in the statute.

In statutes relating to attachment, residence means a dwelling place without regard to domicile unless the contrary is indicated in the statute.

For other purposes, the word residence must be given a meaning by the application of the ordinary rules for interpretation of written language.

Another generalization of the definition of the word “residence” appears in 19 C.J., page 397, paragraph 3, as follows:

Residence is used in various statutes as being considered synonymous with domicile, but of course this depends upon the intent of the particular statute as ascertained by the construction of its provisions. The terms are not necessarily synonymous. Generally when a statute prescribes residence as a qualification for the enjoyment of a privilege or the exercise of a franchise, and whenever the terms are used in connection with subjects of domestic policy, domicile and residence are equivalent.

With the foregoing definitions in mind, and looking to the statute involved, we find that the board of trustees may establish an evening school when fifteen or more bona fide applicants for instruction in such evening school residing in said district shall petition the school board in writing for the same. Nowhere in the code of school laws are the words “reside,” “residing” or “residence” defined, with the exception of section 5772, Nevada Compiled Laws, as amended in the 1935 Statutes, page 378. This particular section defines “resident children” for the purposes of making a school census. In this connection, we find by the statute that the term “resident child” or “resident children” as used in this Act, which undoubtedly refers to chapter 175 of the 1935 Statutes of Nevada, include all normal children between the ages of six and eighteen years who have actually resided in the school district with parent, parents, guardian or guardians, for a period of at least three months, also all children living in unorganized territory in the State who may be attending the school in the district in which the census is taken. By the same section the words “resident child” or “resident children” specifically exclude, among others, all children whose parents or guardians reside or have their homes outside of Nevada, or in any other organized school district within the State of Nevada.

While it is not contended that the definitions above referred to are determinative of the meaning of the words “residing in” as used in section 6022, Nevada Compiled Laws, they at least indicate what the Legislature meant by the use of the words “residing in” in a different and separate section of the school code.

Inasmuch as, under the facts as we understand them, the members of the Civilian Conservation Corps are under Army regulations which determine for the members of the corps

where and when and to what locality they shall go to carry on and perform the work for which the corps is organized, and the time they shall remain there while so enlisted, their status is, as we view it, quite similar and comparable to the status of a soldier or sailor in the service of the United States Army or Navy. In the case of *Harris v. Harris*, Ia. 215 N. W. 661-662, the court in considering the jurisdiction of a trial court to hear and try the facts of a divorce case quoted and adopted the following definition and statement of the law from the “Restatement of the Law, Conflict of Laws,” subdivision C, paragraph 21, page 41:

Soldiers and Sailors. A soldier or sailor, if he is ordered to a station to which he must go and live in quarters assigned to him cannot acquire a domicile there though he lives in the assigned quarters with his family; for he must obey orders and cannot choose to go elsewhere. If, however, he is allowed to live with his family where he pleases, provided it is near enough to his post to enable him to perform his duty, he can acquire a domicile where he lives.

In an appeal from an order granting a motion for a change of venue, which order was affirmed, the California District Court of Appeals said, in the case of *Johnston v. Benton*, 239 Pacific 60, that:

We are of the opinion that the evidence above set forth abundantly sustains the order appealed from. It is well settled that the domicile of a person is in no way affected by his enlistment in the civil, military or naval service of his country, and he does not thereby abandon or lose his domicile which he had when he entered the service, nor does he acquire one at the place where he serves.

The above court cited the following authorities: 9 R. C. L. 551; *Stewart v. Kyser*, Cal. 39 Pac. 19; *Budd v. Holden*, 28 Cal. 124; *Estate of Gordon*, Cal. 75 Pac. 672; *Percy v. Percy*, Cal. 207 Pac. 369.

The following statement appears in Keenan on “Residence and Domicile,” page 468, paragraph 251:

It is a well-established principle of the law that a domicile of choice can be acquired only by one who is competent and free of choice. An officer who is subject to removal to another station at any moment by order of his superior is hardly in a position to say that this or that place shall be his permanent domicile.

Applying the foregoing rules of well-recognized law to the facts as they appear to us as recited in the first portion of this opinion, it is quite evident that if the word “residing” is construed in the light of domicile, and if the members of the Civilian Conservation Corps are judged by the same rules as applied to sailors and soldiers, that it would be impossible for them to create a domicile in the State of Nevada within the meaning of that term as used in the law. Consequently, if “residing” means domicile, the members of the Civilian Conservation Corps would not be eligible as signers upon a petition requesting the creation of an evening school.

We are of the opinion that the word “resident” is used in the sense of domicile in section

6022, Nevada Compiled Laws. Our reasoning is as follows: The first requirement of a signer of a petition is that he be a bona fide applicant. By bona fide applicant we believe that the Legislature meant that he who signed the application did so with the intent of attending that evening school as a student throughout the course of education that was given at the school. In other words, to be a bona fide applicant we are of the opinion that one who signs the petition must do so with the intention of carrying through to completion the course of study prescribed for that evening school. If one is engaged in a service where he is not his own master, but comes and goes at the command of a superior officer, it cannot, we believe, be honestly said that when he signed the petition he did so with the intent of pursuing his course of study for any definite period of time. Such an intent would be beyond his power.

Again, the only reason that we see for the Legislature using the words “residing in” in the statute is to differentiate between residents and transients so that the necessary, expense created by the establishment of an evening school would not be incurred by those who come and go at infrequent and irregular intervals. In other words, if the State and county and school district is going to the expense of creating and establishing an evening school, the Legislature, we believe, had in mind that the request for that evening school should be made by those who would be available and would make themselves available as pupils during the period of the course of instruction as given at the school.

For the foregoing reasons, we are of the opinion that the members of the Civilian Conservation Corps are not qualified signers of a petition seeking the establishment of an evening school, and presented in accordance with section 6022, Nevada Compiled Laws, inasmuch as they are not “residing in” the school district within the meaning of that term as used in the section of the statute last referred to.

Therefore, your inquiry is answered in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. HOWARD GRAY, Deputy Attorney-General.

CHAUNCEY W. SMITH, Superintendent of Public Instruction, Carson City, Nevada.

SYLLABUS

195. “Residence” of School Children.

Section 5772 Nevada Compiled Laws 1929, as amended by chapter 175, 1935 Statutes of Nevada, page 378, does not repeal sections 5937 and 5938 Nevada Compiled Laws 1929.

INQUIRY

CARSON CITY, December 5, 1935.

Does section 5772, Nevada Compiled Laws 1929, as amended by chapter 175, 1935 Statutes of Nevada, page 378, repeal sections 5937 and 5938, Nevada Compiled Laws 1929?

OPINION

Section 5772, Nevada Compiled Laws 1929, as amended by chapter 175, 1935 Statutes of Nevada, page 378, relates solely to the designation of a school census marshal and his duties, and in setting forth the duty of the school census marshal the statute defines the terms “resident child” and “resident children.” The purpose of the school census is to determine the number of “resident children” in each school district. The statute specifically includes within that definition certain children and excludes others. The number of “resident children” in a district is ascertained in order that the proper officers may determine how school money may be apportioned among the districts. The statute provides that:

The term “resident children” is further defined in such a way to exclude--

* * * * *

2. All children whose parents or guardians reside or have their homes outside of Nevada, or in any other organized school district within the State of Nevada.

Sections 5937 and 5938, Nevada Compiled Laws 1929, are sections 1 and 2 of an Act contained in the 1913 Statutes of Nevada at page 305. The purpose of the Act is stated in its title as “An Act to provide for the transfer of children from one school district to an adjoining school district in the same county, and other matters properly related thereto.”

These sections provide that when the parents or guardians of a child shall present a written petition to the school board of the district in which the child resides, accompanied by a written permit from the school board of the district in which the child desires to attend, the school board of the district of the child’s residence may make such arrangements with the other school board of an adjoining district in the same county for the attendance of the child as may be most convenient. The intent of the Act is to provide a means by which a child may more conveniently attend school in an adjoining district than he could in the district in which he resides. Provision is also made for the transfer of money from the funds of the district in which the child resides to the district in which he attends school.

The general rule, which has been repeatedly stated by our Supreme Court, is that repeal by implication is not favored and that such a repeal will not be declared unless the sections involved are irreconcilable. This office is of the opinion that there is no conflict between the sections involved are irreconcilable. This office is of the opinion that there is no conflict between the sections of the statute referred to in the inquiry inasmuch as section 5772, as amended by 1935 Statutes, page 378, relates entirely to one subject, and sections 5937 and 5938

relate entirely to another subject.

The inquiry is, therefore, answered in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. HOWARD GRAY, Deputy Attorney-General.

CHAUNCEY W. SMITH, Superintendent of Public Instruction, Carson City, Nevada.

SYLLABUS

196. The Nepotism Law--Employment of School Teachers.

1. If a teacher signs a contract with a school board in a district having more than one teacher, and subsequently, during the period of such contract, marries one of the trustees, her contract is not in violation of the Nepotism Law, as amended by the 1935 Statutes, page 172.

2. A teacher in a Nevada county high school last spring was reelected for the year 1935-1936, and signed a contract with the board. During the summer she married one of the trustees. Thereafter, she obtained a leave of absence for a year and took advantage of that leave. She desires to teach again in that high school, following her leave of absence, and will make application for the position to which she was elected for the year 1935-1936. Under the above set of facts, the school board of the county high school cannot employ the teacher without violating the Nepotism Act when her husband is a member of the school board and the district employs more than one teacher.

INQUIRY

CARSON CITY, December 5, 1935.

1. If a teacher signs a contract with a school board in a district having more than one teacher, and subsequently, during the period of such contract, marries one of the trustees, is her contract in violation of the Nepotism Law, as amended by the 1935 Statutes, page 172?

2. A teacher in a Nevada county high school last spring was reelected for the year 1935-1936, and signed a contract with the board. During the summer she married one of the trustees. Thereafter she obtained a leave of absence for a year and is not now teaching. She desires to teach again in that high school following her leave of absence and will make application for the position to which she was elected for the year 1935-1936. Assuming the above statement of facts to be true, can the school board of the county high school employ the teacher without violating the Nepotism Act when her husband is a member of the school board and the district employs

more than one teacher?

OPINION

The section of the statute involved in the foregoing inquiries is section 4851, Nevada Compiled Laws 1929, as amended by chapter 76 of the 1935 Statutes of Nevada, at page 172, and reads as follows:

SECTION 1. From and after the passage and approval of this act it shall be unlawful for any individual acting as a school trustee, state, township, municipal, or county official, or for any board, elected or appointed, to employ in any capacity on behalf of the State of Nevada, or any county, township, municipality, or school district thereof, any relative of such individual or of any member of such board, within the third degree of consanguinity or affinity; *provided, however,* the foregoing shall not apply to school districts having only one teacher, when the teacher so related is not related to more than one of the trustees by consanguinity or affinity, and shall receive a unanimous vote of all members of the board of trustees or county board of education; *provided further,* that this act shall not be construed to apply at any time to trustees and school employees who are related to them and in service at the time of the passage of this act, and who shall have been duly elected in accordance with the nepotism act of March 16, 1925, as amended February 18, 1927;
* * *.

The purpose of the Nepotism Act is to prevent the employment by public officials and boards of relatives within the degree of relationship prescribed by the statutes, and thus prohibit the bestowal of patronage by reason of relationship rather than merit.

Referring to the facts as stated in inquiry No. 1, it is evident that when the teacher was employed, there being no prohibitory relationship existing between her and any member of the school board, the contract of employment was lawful. Therefore, the objective of the statute was attained, namely, the selection of the teacher free from any bias existing on the part of the school board because of relationship to any one of them by either affinity or consanguinity.

Statutes similar in nature to the one under consideration have been described as disabling legislation and as being against the common right of the individual, and, if they enumerate the disqualifying relationship, they will not be extended to apply to others not enumerated. *Hilbert v. Conlon*, 40 Pa. Co. 281; *Zaleski School Board of Education v. Boal*, 104 Ohio 482, 135 N. E. 540; *State v. Burchfield*, 12 Lea (Tenn.) 30; *Perry Township School District v. Martin*, 43 Pa. Co. 434.

Upon the foregoing authority we are constrained to hold that the Nepotism Act of the State of Nevada should not be extended by implication, and that when its end has been obtained it has served its purpose. There is nothing in the statute which expressly makes the contract of employment referred to in inquiry No. 1 unlawful or void because of the subsequent marriage between the teacher and a member of the school board. As stated above, there was existing no

prohibitory relationship between the teacher and any member of the school board at the time of the employment of the teacher, and thus, as far as we know, the contract was free of that element of bias which the statute seeks to remove from the employment of teachers.

Answering inquiry No. 2, we are presented with the same situation as that presented in inquiry No. 1 with this difference, *i.e.*, that the teacher did not perform her contract for the term provided for in her contract, which was entered into prior to her marriage to a member of the school board.

In place of executing her contract, she was given by the school board what is referred to as a leave of absence.

School boards have only such powers as are expressly conferred upon them by statute. McCulloch v. Bianchini, 53 Nev. 101, 292 Pac. 617.

We are unable to find any statutory authority for the school board of trustees to issue or grant a leave of absence to a teacher except in case of sickness, and then only for a limited length of time.

The contract of employment was for an express term of months and expired of its own force at the end of that time. It would be necessary for the teacher and the school board to enter into a new contract of employment upon her return. Such a contract is expressly prohibited by the Nepotism Act.

So far as the leave of absence is concerned, it has no legal force or effect because such an agreement was beyond the powers of the school board. A leave of absence would not continue or extend a contract of employment; firstly, because the contract expires at the end of a given term; and secondly, because the granting of a leave of absence is beyond the powers of a board of school trustees. The only effect that such a leave of absence would have would be to abrogate the existing contract.

For the foregoing reasons, this office is of the opinion that inquiry No. 1 should be answered in the negative, and that inquiry No. 2 should be answered in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. HOWARD GRAY, Deputy Attorney-General.

CHAUNCEY W. SMITH, Superintendent of Public Instruction, Carson City, Nevada.