

SYLLABUS

**OPINION NO. 1937-225 Teachers' Retirement Salaries.**

A person who is drawing a teacher's retirement salary and has removed from Nevada to another State and is again engaged in the profession of teaching school may continue to draw the teacher's retirement salary from the State of Nevada.

INQUIRY

CARSON CITY, January 30, 1937

May a person who is drawing a teacher's retirement salary and has removed from the State of Nevada to another State and is again engaged in the profession of teaching school continue to draw the teacher's retirement salary from the State of Nevada?

OPINION

Section 6003 to section 6021, Nevada Compiled Laws 1929, as amended, constitute the governing statutes in relation to the payment of school teachers' retirement salaries.

The statutes provide that every school teacher who shall have complied with all the requirements of the Act and shall have taught for a prescribed number of years in certain designated schools shall be entitled to retire, and upon retirement to receive during life an annual retirement salary. (Sec. 6014, Nevada Compiled Laws 1929, as amended 1935 Statutes, page 38; section 6015, Nevada Compiled Laws 1929, as amended 1935 Statutes, page 38.)

There is no provision in the law for the cancellation of the retirement salary except as contained in section 6019, Nevada Compiled Laws 1929, which is limited solely to persons who are reemployed as teachers in the State of Nevada.

There being no provision in the law for the cancellation of the teacher's retirement salary on the grounds that the person so receiving such a retirement salary has removed from the State of Nevada and is reemployed in the profession of teaching school in another State, your inquiry is answered in the affirmative.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

By: W. HOWARD GRAY, *Deputy Attorney-General*

HON. HENRY C. SCHMIDT, *State Controller, Carson City, Nevada.*

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**OPINION NO. 1937-A**

CARSON CITY, March 26, 1937

WILLIAM L. LEWIS, *Warden, Nevada State Prison, Box 607, Carson City, Nevada*

Re: Guy Holdaway N. S. P. No. 3359.

DEAR WARDEN LEWIS: I have a letter from Mr. W. S. Harris, Secretary, Nevada State Prison, with reference to the above-named prisoner, and asking in fact whether the date from which his commitment runs should be considered the original date of commitment from sentence of death or of the modified commitment on a charge of second degree murder, pursuant to the

determination of the Supreme Court of this State directing that the judgment and commitment be modified so as to show the prisoner guilty of second degree murder and the commitment to be for that crime and for a term of from ten years to life.

#### STATEMENT

It appears from the statement and record that Holdaway was sentenced or committed by the Eighth Judicial District Court of the State of Nevada in and for Clark County on May 9, 1933, on a jury verdict of guilty of first degree murder, the penalty under the jury, sentence, judgment, and commitment being death by the administration in Nevada State Prison of lethal gas. It appears also that the prisoner appealed the case to the Supreme Court of this State where the judgment of the lower court was *modified* so as to find the prisoner guilty of murder in the second degree, and that said District Court on October 9, 1935, also *modified* its sentence, judgment and commitment so as to find the prisoner guilty of murder in the second degree and to require him to serve a minimum of ten years, the maximum being life.

#### QUERY

Should Holdaway have credit as from the date of the original commitment, or should his term begin as from the date of the said modified sentence, judgment, and commitment?

#### OPINION

It will be noted that the sentence was not a new sentence; the judgment was not a new judgment; and the penalty was not a new penalty. In other words it is not a new case. The judgment was simply *modified*; the commitment was simply modified; and the sentence or penalty was merely modified. Although the prisoner was originally sent to Nevada State Prison under sentence of death, the time served by him up to the time of the modification pursuant to the action of the Supreme Court on the appeal in this case was actually punishment, not for murder in the first degree but for murder in the second degree, the crime which the Supreme Court held the prisoner had actually committed. The entire punishment for the crime must be punishment for the crime actually committed as found by the Supreme Court, not for the crime of murder in the first degree originally found by the jury in its verdict or specified in the original judgment, sentence, and commitment of the court.

From the foregoing it follows that the date of the beginning of Holdaway's present modified sentence and commitment should run from the date of the original commitment and not from the date on which it was modified. The records of the prison should therefore show Holdaway's punishment as from the date of the original commitment or sentence, *i.e.*, from May 9, 1933.

I am returning herewith the papers in the case which Mr. Harris sent me with the request for his opinion.

Sincerely yours,  
GRAY MASHBURN, *Attorney-General*.

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#### SYLLABUS

#### **OPINION NO. 1937-226 Motor Vehicles—Dealers' License Plates—Effect of Senate Bills Nos. 61 and 74 (Chapters 151, 152, Statutes of 1937).**

Senate Bills Nos. 61 and 74 (chapters 151, 152, Statutes of 1937) do not prohibit use of manufacturers' and dealers' license plates, issued pursuant to the Motor Vehicle Registration Act, in operation of motor vehicles for the purpose of testing, demonstrating, or selling such vehicles, except where they were acquired by such manufacturer or dealer under motor convoy carriers' licenses.

## INQUIRY

CARSON CITY, March 26, 1937

Complaint has been made to the Motor Vehicle Department that Senate Bills numbers 61 and 74, recently enacted into laws and approved by the Governor, so amended the motor vehicle laws of Nevada as to preclude the use of "dealers' license plates" by motor vehicle dealers in the operation of motor vehicles for the purpose of testing, demonstrating and selling the same.

Do such motor vehicle laws, as amended by Senate Bills numbers 61 and 74, preclude the use of dealers' license plates on the highways of this State; if so, to what extent?

## OPINION

Senate Bill No. 61, as approved by the Governor, amends certain sections of the Motor Vehicle Registration Act of 1931, chapter 202, Statutes of 1931, as amended, while Senate Bill No. 74, as so approved, amends certain sections of the Motor Carrier License Act of 1933, chapter 165, Statutes of 1933, as amended. The first act deals with the registration of motor vehicles and provides for manufacturers' and dealers' license plates. The second Act provides for the licensing of carriers by motor vehicle as therein defined.

Section 1 of Senate Bill No. 61 amends section 16 of the said registration law which deals with the use of "dealers' plates" by motor vehicle dealers in lieu of registration plates for each vehicle as is required by the law for all other persons. This section was amended in two particulars, *i.e.*, one amendment prohibiting the issuance of registration certificate and registration plates to any manufacturer or dealer, or any officer, employee or servant, or any person within the third degree of consanguinity or affinity or any officer of any such manufacturer or dealer, or of a manufacturer or dealer if such are natural persons, when such certificates or plates are to be attached to or used in the conveying of any motor vehicles in, into or through or out of this State, as motor vehicle conveying is defined in the Motor Carrier License Act. Such amendment requires an affidavit of such persons making application for registration license plates that the same will not be used in convoy service. The other amendment to section 16 provides any manufacturer or dealer may operate new motor vehicles from the railroad depot, warehouse or other place of storage to his place of business where such depot, warehouse, etc., is in the same city or town with such place of business or not more than five miles therefrom without attaching thereto such dealers' plates. Section 17 of said Act was amended by said bill, among other things, with respect to the use of manufacturers' and dealers' license plates of other States or countries by nonresidents on the highways of this State, which amendment prohibits the use of such plates by non-residents of this State. Other than above stated, Senate Bill No. 61 did not or does not change the law with respect to the use of "dealer's plates" as such use existed prior to such amendment. The Motor Vehicle Registration Act as now amended permits of the same use of "dealers plates" as it did prior to such amendments, save and except such plates cannot be used for the purpose of defeating the "motor convoy carrier" licensing provisions of the Motor Carrier Licensing Act; and nonresidents of the State are prohibited from using such plates issued by other States or countries on motor vehicles operated in this State.

Section 2 of Senate Bill No. 74 contains the definition of "motor convoy carrier," to wit:

(g) The term "motor convoy carrier" when used in this Act shall mean any person whether engaged in any of the carrier services hereinbefore defined, or otherwise, \* \* \* who drives or tows by means of another motor vehicle, or other motive power, or carries in another motor vehicle, or who drives a single motor vehicle, or causes to be driven, towed, or carried any motor vehicle or vehicles, or causes a single motor vehicle to be so driven, over and along the public highways of this State, when such motor vehicle or vehicles is so driven, towed or carried for

the purpose of selling or offering the same for sale or exchange, or storage prior to sale, or delivery subsequent to sale, or for use in public or contract carrier service.

Section 3 of such bill contains the amendment relating to the license fee required of motor convoy carriers which reads as follows:

(3) Every "motor convoy carrier" as hereinbefore defined, shall be required to be licensed; and the fee therefor shall be as follows: For each motor vehicle driven, towed or carried by any motor convoy carrier, or driven singly, as set forth in section 2 of this Act, a flat fee of seven dollars and fifty (\$7.50) cents shall be paid by the person or persons engaged in such motor convoy carriage, for which said fee the said Public Service Commission shall issue for each motor vehicle driven, towed, carried or driven singly by such motor convoy carrier, a distinctive certificate to the effect that such motor vehicle may be driven, towed or carried, as the case may be, over and along the public highways of this State, from the point of entry into the State, or point of origin of such carriage within the State, to the destination within the State, or to the point of departure from the State; *provided*, no such certificate shall be transferable from the motor vehicle for which issued to any other motor vehicle whatsoever, nor transferable from the motor convoy carrier to whom issued to any other person whatsoever. Such certificate shall be effective for the uses and purposes for which issued until the sale, exchange, or delivery of the motor vehicle by the motor convoy carrier to another person; *provided*, such certificate shall not be effective beyond the current year in which issued. No unladen weight license fee shall be assessed on any motor vehicle driven, towed or carried under the provisions of this section nor shall any license plates be issued for any such motor vehicles by the Public Service Commission or any other State department; *provided further*, no registration plates, dealers' plates, or any other license plates whatsoever, or any license or certificate, other than the said certificate provided in this section, issued by this or any other State shall be deemed or construed to permit any conveying of motor vehicles as in this Act defined, nor shall such certificate be deemed or construed as a license for the operation of any motor vehicle used in the carrying of the motor vehicle for which said certificate was issued or is required; *provided*, nothing in this Act contained shall be construed to prohibit a manufacturer or dealer within this State from delivering, under a manufacturer's or dealer's license, plates at any point within or without the state any motor vehicle sold or exchanged or to be sold or exchanged by him that theretofore was not acquired by such manufacturer or dealer under a motor convoy carrier license.

For the purpose of securing to the State reasonable compensation for the use of its highways and to provide for the policing thereof in the conveying of motor vehicles, mostly, by the towing of one car by another, for sale, and storage of such vehicles for sale, a practice that was prevalent in 1934 and 1935 and carried on mostly by dealers and other persons in adjoining States, the Legislature in 1935 provided license fees therefor in the Motor Carrier License Act. The 1935 law proved ineffective as the dealers found a way around such law by driving such vehicles through the State singly under registration license plates of this or some other State. Thus the necessity for the 1937 amendments to the law as provided in Senate Bill No. 74.

The definition of "motor convoy carrier," above quoted, is all inclusive, and standing alone probably would include Nevada dealers within its provisions in practically every transaction concerning the movement of motor vehicles over the highways, and of course the provision in section 8 of the bill prohibiting the use of dealer's plates in the conveying of motor vehicles precludes the use of such plates by all dealers in motor convoy service. Does such prohibition extend to all operations or movements of motor vehicles by Nevada dealers? We think not. The use of dealers' plates by Nevada dealers or Nevada manufacturers, if any such manufacturers

exist, is prohibited only in the conveying of motor vehicles. We think the Legislature intended that as to other movements of motor vehicles by dealers that the established use of dealers' plates should continue.

It is most significant that section 8 of Senate Bill No. 74 contains the following proviso; *i.e.*:

*provided*, nothing in this Act contained shall be construed to prohibit a manufacturer or dealer within this State from delivering, under a manufacturer's or dealer's license, plates at any point within or without the State any motor vehicle sold or exchanged or to be sold or exchanged by him that theretofore was not acquired by such manufacturer or dealer under a motor convoy carrier license.

It is the general rule of statutory construction that the office of a proviso is to restrain or qualify some preceding matter and that it should be confined to what immediately precedes it *unless it clearly appears to have been intended for some other matter*. It is to be construed with the section it forms a part. If it be a proviso to a particular section, it does not apply to other *unless plainly intended*. Sutherland, Statutory Construction, 296. A proviso may qualify the whole or any part of an Act, or it may stand as an independent proposition or rule, if such is clearly seen to be the meaning of the Legislature, as disclosed by an examination of the entire Act. Black, Interpretation of Laws, 273. *In re McKay's Estate*, 43 Nev. 114; *State v. Beemer*, 51 Nev. 192; *State v. Miller*, 55 Nev. 123; *Leader Printing Co. v. Nichols*, 50 Pac. 1001. It is clear that the above-quoted proviso not only qualifies the matter preceding it in section 8 of the bill, but that it also qualifies the effect of the above-quoted definition of a motor convoy carrier found in section 2 of the bill; in brief, the proviso qualifies the whole Act with respect to dealers and the use of dealers' plates, and the effect of the law, as so qualified, is to only prohibit the use of dealers' plates in motor convoy service, and clearly permits the use of such plates by dealers on all other motor vehicles which such dealers are entitled to operate.

The Motor Vehicle Registration Act, as amended, and the Motor Carrier License Act, as amended, must be construed in *pari materia*, in that both Acts relate to the same subject matter, *i.e.*, motor vehicles; likewise Senate Bills Nos. 61 and 74 must be construed in *pari materia* as they relate to the same subject. Senate Bill No. 61 sanctions the use of dealers' plates and, as hereinbefore stated, changed the existing law on the subject of dealers' plates but very little, evidencing beyond question that the Legislature intended that manufacturers' and dealers' plates were to be issued and used for the purposes stated in the Motor Vehicle Registration Act, and that such use was to be prohibited in the conveying of motor vehicles only, is certainly made clear in the Motor Carrier License Act, as amended by Senate Bill No. 74.

Under the proviso above quoted, a Nevada dealer is not prohibited from delivering at any point within or without the State under his dealer's license plates any motor vehicle sold or exchanged or to be sold or exchanged by him that he had not acquired under a motor convoy carrier license. If he acquired such motor vehicles under a motor convoy carrier license; *i.e.*, for example, where such dealer purchased motor vehicles at the factory and drove them separately or towed them with other motor vehicles into the State to his place of business and had paid the motor convoy carrier fee which under the law he must do, and received the certificate therefor, he would then have acquired the motor vehicles under a motor convoy carrier license, and, under the law as amended by Senate Bill No. 74, could not thereafter operate such motor vehicles over the highways for the purpose of sale and delivery under his dealer's license plates, but he would not be injured by such prohibition for the reason that the law permits the use of his motor convoy carriers' certificates in operating such acquired motor vehicles for the purpose of sale, exchange or delivery thereof by such dealer during the then current year. On the other hand, for example, motor vehicles acquired by such dealer in shipments by rail to his place of business, or motor vehicles received by him as trade-ins on other motor vehicles are not acquired by him under motor convoy carrier licenses, therefore, under the law as qualified by said proviso he is entitled to operate such motor vehicles under his dealer's plates for the purpose of testing, demonstrating and selling the same. We think the Legislature did not intend to curtail the use of Nevada manufacturers' and dealers' license plates, as the use thereof has been sanctioned and provide for

by the law of this State since the year 1925 at least, which sanction, however, did not extend to the use of such plates in the conveying of motor vehicles, a practice that has come into existence in very recent years and pertains mainly to the transporting of new motor vehicles from the factory, assembling plant, or place of storage to the dealer's place of business. It is clear that the Legislature intended that this practice should be regulated, and we think the Legislature has extended the regulation to the practice of conveying used cars by dealers and others engaging in used-car business as a business and engage in the conveying thereof, and as to them has prohibited the use of dealers' plates in the operation of such cars on the highways, but, that as to bona fide Nevada dealers, who in the transactions concerning the sale of new motor vehicles handled by them and in the course of business receive in exchange used motor vehicles, that they may use their dealers' plates in testing, demonstrating and selling such motor vehicles, save and except where such motor vehicles are acquired under the motor convoy carrier's licenses under circumstances analogous to those hereinbefore pointed out.

NOTE—Since preparing this opinion we have been advised that Senate Bills Nos. 61 and 74 will be chapters 151 and 152, respectively, of Statutes of Nevada 1937.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

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

MOTOR VEHICLE DEPARTMENT AND PUBLIC SERVICE COMMISSION, *Carson City, Nevada*.

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SYLLABUS

**OPINION NO. 1937-227 Prevailing Wage Skilled Labor on Public Works—Effect of Chapter 139, 1937 Statutes of Nevada.**

Chapter 139 providing prevailing wage in locality on public works applies to skilled labor employed by public works contractors and subcontractors only. It does not apply to public bodies and their employees engaged in such work and does not apply to unskilled labor.

INQUIRY

CARSON CITY, April 2, 1937

1. Does chapter 139, Statutes of Nevada 1937, in view of its title, relate to the State Highway Department and its employees with respect to the adoption and fixing of prevailing wages of the locality for such employees performing highway construction, reconstruction, repair work or other work thereon?

2. Does said chapter 139 limit the adoption of prevailing wages of the locality to employees of public works contractors and subcontractors, or does it also relate to all public bodies and their employees performing the public works contemplated by the Act?

3. Does said chapter 139 apply to unskilled labor employed on public works?

OPINION

Chapter 139, Statutes of Nevada 1937, was Assembly Bill No. 36. Such bill was materially amended during its journey through the recent Legislature, and, as amended, passed both houses and was approved by the Governor. The title of the Act reads: "An Act providing for the adoption of a prevailing wage for employment on State, county, city, municipal or other public work in the State of Nevada, defining prevailing wage, providing a penalty for the violation of the provisions hereof, and other matters properly relating thereto." The title indicates, if it does not expressly state, that the intention of the Legislature was to provide for prevailing rates of wages for all employees engaged in public work for and in behalf of the State, or any of its political subdivisions or departments. Had the body of the Act followed the thought indicated by

the title there might be substantial ground for holding that the State Highway Department and its employees come within the provisions of the Act.

An examination of the entire Act, however, discloses that the Legislature limited the Act to contractors and subcontractors who contract with public bodies for the construction, alteration or repair of public buildings, other improvements or any public work, and the employees of such contractors. In brief, the Legislature started with a broad title but limited the provisions of the Act. The body of the Act is narrower than the title, and it is the provisions of the body of the Act that governs. In this there is no conflict with the Constitution. An Act of the Legislature may be confined within limits much narrower than the limits expressed in the title of the Act so long as the subject of the Act is expressed in the title thereof. 25 R.C.L. 865, sec. 109; *State v. Douglas*, 46 Nev. 121. The title of chapter 139 sufficiently expresses the subject of the Act.

We think it most clear that the Act in question only relates to contractors and subcontractors contracting with public bodies to perform public work and that the provisions of the Act relative to the ascertaining, adoption and establishment of the prevailing rate of wages to be paid their employees relates to the wages for such employees only, and that the Act does not relate to nor require the State Highway Department to comply with the provisions of the Act with respect to its employees. Neither does such Act relate to nor require political subdivisions and other departments of the State to comply therewith with respect to the employees thereof when engaged in public works.

The Act does require the State Highway Department and all other public bodies contemplating the letting of public works contracts to ascertain, in the manner provided in section 2 of the Act, the prevailing wage then paid in the locality where such work is to be performed and to make the information so obtained available to all contractors and subcontractors bidding on such public works contracts. It is also incumbent upon the Highway Department and all other public bodies awarding public works contracts to incorporate therein the stipulation requiring the contractors and subcontractors to pay the prevailing wage of the locality to the skilled labor employed on the project.

The Act does not relate to unskilled labor employed by contractors and subcontractors on the public work covered by the Act. Said chapter 139 does not repeal the minimum wage statute for unskilled labor on public works performed by or contracted for by the State, county, district, municipality, or other subdivision of the State, or any board or commission thereof. Wages of unskilled labor on such works are governed by chapter 7, Statutes of Nevada 1935.

A strict construction of chapter 139 would limit the effect thereof to "skilled mechanics" employed by the contractors and subcontractors, but we think the language found in section 2 of the Act sufficiently evidences the legislative intent to be that skilled labor was meant, *i.e.*, employees skilled in some work or use of appliances and machinery, although not being trained in the use of tools as the term mechanic implies. The language in section 2, "The public body \* \* \* shall ascertain the general prevailing wage in the locality \* \* \* for each craft or type of workman \* \* \*," implies skilled labor. We think the Legislature intended the provisions of the Act to relate to all skilled labor employed by such contractors and subcontractors and not skilled mechanics, as such term is commonly understood, alone.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

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

ROBERT A. ALLEN, *State Highway Engineer, Carson City, Nevada*.

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SYLLABUS

**OPINION NO. 1937-228 Liquor License and Stamp Tax Act—Effect of Amendments to Sections 19 and 20 on Apportionment of Revenues.**

Amendments to sections 19 and 20 of such Act cover the apportionment of revenues thereof from January 1 to March 26, 1937. Intent of Legislature not being to change the destination of such revenues.

#### INQUIRY

CARSON CITY, April 3, 1937

Sections 19 and 20 of the Liquor License and Stamp Tax Act of 1935, *i.e.*, chapter 160, Statutes 1935, provide that three percent of the revenue derived from the provisions of the Act shall be set aside for the purpose of paying the cost of administration; that for the period ending December 31, 1935, \$24,000 shall be apportioned to the Contingent University Fund and \$100,000 to the State Distributive School Fund. Like appropriations were made for the period ending December 31, 1936. It also provided in section 20 that the balance of the revenue derived under the Act should be apportioned to the State Emergency Employment Bond Interest and Redemption Fund for the purpose of retiring of bonds issued for relief purposes in cooperation with the Federal Government pursuant to chapter 97, Statutes 1935.

The 1937 Legislature in chapter 170, Statutes 1937, amended said sections 19 and 20 of the 1935 Act and provided therein that five percent of the revenues derived shall be set aside for administrative purposes and that from the balance of said revenue remaining fifty percent shall be apportioned to the State Distributive School Fund, fifteen percent to the University Contingent Fund and thirty-five percent to the State Emergency Employment Bond Interest and Redemption Fund. No limitation as to periods of time within which such apportionments are to be made appear in the amended sections. Chapter 170 was approved and became effective March 26, 1937. It contains no reference to the disposition of the revenues during the period between January 1 and March 26, 1937.

In view of the foregoing amendments relating to the apportionment of the revenues in question and the absence of any expressed apportionment of such revenues between January 1 and March 26, 1937, would the 1935 Act relative thereto continue in effect up to March 26, or would the effect of such Act end on December 31, 1936, and there being no legislation covering such apportionments in effect until March 26, 1937, would revenues derived under the Act during said period be placed in the General Fund of the State?

#### STATEMENT

We think the inquiry presents a question that is to be determined by ascertaining the intent of the Legislature in enacting the amendments to sections 19 and 20 of the Act in question. It is a cardinal rule of statutory construction that the intent of the Legislature is to be ascertained. The legislative intent must control and rules of statutory construction are but aids in ascertaining such intent. *State v. Ducker*, 35 Nev. 214; *Ex Parte Smith*, 33 Nev. 466; *State v. Hamilton*, 33 Nev. 418. Courts 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 the language used. *State v. Eggers*, 36 Nev. 373. In the construction of statutes, courts may consider the purpose of the change sought to be effected as it may be deduced from consideration of the whole subject matter. *State v. Brodigan*, 37 Nev. 245. Courts may, in the construction of statutes, consider the prior existing law on the subject under consideration. *State v. Brodigan*, 37 Nev. 245.

It is most clear that the 1935 Legislature intended that the revenues from the provisions of the Liquor License and Stamp Act of 1935 should be apportioned to the funds therein named and that such funds were to be used for the purposes for which the funds were created. Thus the intent of the Legislature was and is clearly expressed in the 1935 Act. The Legislature of 1937 expressed the same intent concerning revenues derived from the same source and under the same law, except it made a change in the amount of the revenue apportioned by basing the apportionment upon a percentage basis instead of definite sums of money and eliminated the time limitation. Here again is a clear expression of legislative intent, and that intent is that the



revenues derived under this Act, as amended, are to go to the same funds as did the revenues derived under the Act prior to the amendment thereof.

Two different Legislatures having so clearly evidenced the same intent, we think that the 1937 Legislature, while not expressly so stating, nevertheless intended that the amendments to the prior law were to relate back and govern the apportionments of the revenues collected pursuant to such law between January 1 and March 26, 1937. The Legislature is presumed to have knowledge of the state of the law upon the subject upon which it legislates. *Clover Valley Land & C. Co. v. Lamb*, 43 Nev. 375.

The 1937 Legislature undoubtedly had before it the executive budget and the estimates of anticipated revenues for the coming biennium, and undoubtedly the estimated receipts under the Act in question were also under consideration for the immediate future. The carrying on of all State governmental and administrative functions and the financing thereof undoubtedly required careful thought on the part of the legislators, and knowing that legislation was mandatory with respect to the revenues in question, here enacted the amendments to the Act and therein disposed of such revenues in practically the same manner as its predecessor. This we think sufficiently establishes the legislative intent in this matter, and not having expressly stated any of such revenues collected in the interim were to be placed in the General Fund is indicative that all such revenues were to be apportioned in accordance with the provisions of the amended Act.

Further, we are advised that the revenues derived under the law in question between January 1 and March 26, 1937, were not apportioned prior to March 26 to any fund. If so, then the amended Act would apply in any event as to the apportionment, there being no fixed time in the Act when the actual apportionment of the moneys was or is to be had.

We conclude that while the effect of the 1935 Act with respect to the apportionment of the revenues ended December 31, 1936, still the intent of the succeeding Legislature was that the amended law was to govern the apportionment of such revenues received during the period January 1 to March 26, 1937.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

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

HON. HENRY C. SCHMIDT, *State Controller, Carson City, Nevada*.

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SYLLABUS

**OPINION NO. 1937-229 Motor Vehicle—Exempt License—Power District.**

A power district is not entitled to an exempt license for a motor vehicle.

INQUIRY

CARSON CITY, April 13, 1937

Is the Lincoln County Power District entitled to an exempt license for a motor vehicle under the laws of the State of Nevada?

OPINION

Subdivision (f) of section 6 of the 1931 Statutes of Nevada, page 322, the same being section 4435.05, Nevada Compiled Laws 1929, provides in part as follows:

All motor vehicles owned by the State of Nevada or by any board, bureau, department, or commission thereof, or any county, city, town or school district in the State, shall be exempt from the payment of the license fee thereon. \* \* \*

The Lincoln County Power District No. 1 is organized under and pursuant to chapter 72, 1935 Statutes of Nevada, page 152.

It is the opinion of this office that a power district organized in the manner in which the Lincoln County Power District was organized is not a board, bureau, department or commission of the State, nor does it come within the terms county, city, town or school district. We, therefore, are of the opinion that your inquiry should be answered in the negative.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

By: W. HOWARD GRAY, *Deputy Attorney-General*

HON. MALCOLM MCEACHIN, *Secretary of State, Motor Vehicle Commissioner, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1937-230 Liquor License and Stamp Tax Act.**

An importer's license only licenses one place of business in the State. If licensee desires to import liquors at other points within the State he must obtain importer's licenses for each place.

INQUIRY

CARSON CITY, April 14, 1937

Can the holder of a license to import liquor, wine, or beer import liquor, wine, or beer to any other place in the State of Nevada other than the place of business at the stated location of that place of business where the license is posted in a conspicuous place in the premises in respect to which same is issued?

OPINION

Section 2 of the Nevada Liquor Stamp Tax Act of 1935, *i.e.*, chapter 160, Statutes 1935, provides:

Sec. 2. 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 the State.

It shall not authorize the sale of any types of wines, beers or liquors.

In order to make such sales the licensee must first secure the appropriate license or licenses applicable to the class or classes of business in which he is engaged.

Sections 3 and 4 of said Act provide licenses for wholesalers of wines and liquors and beer. It is provided in section 7 of the Act that every license issued under the Act, among other things, shall specify the location by street and number of the premises in respect to which the license is issued, and the particular class of liquor or liquors handled. Section 8 provides that the license so issued shall not be transferable and must be posted in a conspicuous place in the premises in respect to which it was issued. Further, an importer is defined in section 1 of the Act to be any person who is first in possession of wines, beers or liquors within the State after completion of the act of importation.

It is clear that the Legislature intended that an importer of wines, beers or liquors should be the person or firm located within the State who is first in possession thereof immediately after the completion of the act of importation, and that such person or firm must, before importing any wines, beers, or liquors from without the State, be licensed to transact an importing business, and that the license must show on its face the location of the very premises where such imported wines, beers or liquors come to rest immediately the act of importation is completed. This certainly implies, if it is not expressly so stated in the law, that only one place of business or premise where the act of importation ceases is to be covered by the license issued therefor, and that if the same person or firm desires to import wines, beers or liquors into the State at another place within the State an additional importer's license must be secured therefor and the license fee paid therefor.

An importer under the Act is not permitted to sell any wines, beers or liquors, but, in order to make sales thereof, must secure other licenses such as wholesalers' licenses. We find in section 17 of the Act that wholesalers' licenses authorize the sale of wines, beers or liquors at any place within the State, a most evident implication that the Legislature intended to limit the importer to one place of business only within the State for each license issued him for that purpose, and then to give him the right as a wholesaler under a wholesaler license to transact the business of selling anywhere in the State under such license. The absence of any language in the Act giving the importer the right to import into the State at any place he desires under a license issued for a particular place, coupled with the granting of blanket right to sell at any place within the State so granted to a wholesaler, is, we think, conclusive evidence that the intent of the law is to limit an importer to one particular place of business under one license and no other. Your inquiry is answered in the negative.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

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

WM. KELLY KLAUS, *Supervisor, Liquor Department, Nevada Tax Commission.*

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SYLLABUS

**OPINION NO. 1937-231 State Labor Commissioner to be Payee of Federal Grants for Deposit in the Unemployment Compensation Administration Fund.**

Under sections of chapter 129, 1937 Statutes of Nevada, pages 262-285, the Unemployment Compensation Administration Fund is created, and the commissioner (State Labor Commissioner) is made the payee of all funds for deposit in the Unemployment Compensation Administration Fund. Under section 302, subsection (b), Title III of the Federal Social Security Act the payee of Federal grants is the State agency charged with the administration of such law; i.e., the State Labor Commissioner in this State.

INQUIRY

CARSON CITY, April 20, 1937

What State office should be made the payee of funds paid by the United States of America to the State of Nevada for deposit in the Unemployment Compensation Administration Fund created by subsection (a) of section 13 of chapter 129, 1937 Statutes of Nevada, page 262?

OPINION

Chapter 129 of the 1937 Statutes of Nevada, page 262, does not specifically designate the office which should be the payee of funds granted by the United States of America under authority of Title III of the Federal Social Security Act to the State of Nevada for deposit in the

Unemployment Compensation Administration Fund. Subsection (a) of section 13 of chapter 129, 1937 Statutes of Nevada, pages 262-285, creates the Unemployment Compensation Fund and causes it to be set up as a special fund in the State Treasury. This section also provides that moneys which are deposited or paid into this fund are appropriated and made available to the commissioner. The word "commissioner" as used in the Nevada unemployment compensation law, which is chapter 129, 1937 Statutes of Nevada, is defined to mean the Labor Commissioner of the State of Nevada. Section 7 of the Nevada unemployment compensation law provides that contributions shall be paid by each employer to the commissioner for the unemployment compensation fund.

Subsection (b) of section 302, Title III of the Federal Social Security Act, provides that the grant by the Federal Government shall be paid to "the State agency charged with the administration of such law \* \* \*," such law referring to and evidently meaning the State unemployment compensation law. The administration of the Nevada unemployment compensation law is placed under the supervision and control of the Labor Commissioner of the State of Nevada.

Since the Federal Statute provides that the grant for the benefit of the Unemployment Compensation Administration Fund to be made by the Federal Government to the State should be paid to the State agency charged with the administration of the unemployment compensation law of Nevada, we are of the opinion that the effect of the Federal and State laws would be harmonized by making the State Labor Commissioner the payee of Federal Grants for deposit in the unemployment compensation fund of the State of Nevada.

In view of the fact that no special office is designated to receive the Federal grant for the purpose of depositing the same in the Unemployment Compensation Fund, and in view of the fact that the State Legislature specifically designated the Labor Commissioner as the payee of contributions provided for under section 7 of chapter 129, 1937 Statutes of Nevada, this office is of the opinion that it was the intention of the Legislature that the commissioner, *i.e.*, the Labor Commissioner of the State of Nevada, should be the officer who should receive all moneys to be used for the purposes as set forth in the Nevada unemployment compensation law.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

By: W. HOWARD GRAY, *Deputy Attorney-General*

DR. J. D. SMITH, *Director of the Unemployment Compensation Division, State of Nevada, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1937-232 Nepotism.**

Chapter 76, 1935 Statutes, is still the law on nepotism. Teacher employed by County Board of Education prior to the enactment of chapter 76, and who is related to a member of such County Board of Education within the prohibited degree, cannot now be reemployed by such board while such relationship continues.

INQUIRY

CARSON CITY, April 23, 1937

1. Is chapter 76, Statutes of Nevada 1935, pages 172, 173, still in effect, or was it modified, amended, or repealed by the 1937 session laws?

2. L is the son-in-law of A and has been employed from year to year as a teacher and coach in a county high school since 1925. A was subsequently elected a member of the County Board of Education of the same county and is now a member of such board. In view of the foregoing facts and in view of the provisions of chapter 76, Statutes 1935, if still in effect, can such County Board of Education legally employ L at this time as a teacher and coach in said high school?

## OPINION

Answering query No. 1, an examination of the 1937 Statutes (Advance Sheets) fails to disclose that chapter 76, Statutes of 1935, has been amended, modified, repealed or in any manner changed by the last session of the Legislature. Said chapter is still the law on nepotism in this State.

Answering Query No. 2, the provisions of chapter 76, Statutes 1935, among other things, prohibit the employment of any person in any capacity by Boards of School Trustees or County Boards of Education for service in schools governed by them, when such person is related to any members of such board or boards within the third degree of consanguinity or affinity. The relationship disclosed in the inquiry is that of first degree by affinity; consequently, the teacher mentioned in the inquiry is within the prohibition of the statute unless such prohibition as applied to such teacher is so qualified by the second proviso contained therein as to result in an exemption from the operation of the statute. The proviso reads:

*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.

Under the Nepotism Act as amended in 1927 it is legal for a teacher to be employed by a Board of School Trustees or a County Board of Education where such teacher was related to not more than one member of such board within the prohibited degree, and did receive the unanimous vote of all members thereof. Section 4851, Nevada Compiled Laws 1929. In fact such was the law in 1925, 1925 Statutes, page 112, and such was the law until the amendment of 1935. Thus, from 1925 until the amendment of 1935, the employment of the teacher in question here would have been legal during all of such time, even though related to a member of the County Board of Education as stated in the inquiry. Did the 1935 Act make such employment illegal after the approval of such Act, in view of the provision above? We think it did. We think the import of the proviso was to prevent the application of the 1935 law to all who were employed according to the provisions of the 1925 Act, as amended by the 1927 Act, and who were related within the prohibited degree to a member or members of the board or boards employing them, during the term of employment in existence at the time of the enactment and approval of the 1935 Act, and that all so employed were protected by the proviso until the expiration of such term of employment, but that upon the entering into and execution of another contract of employment thereafter, even though such contract related to the same employment as the preceding contract and with the same board, such contract was a new contract and separate and apart from the preceding contract and, we think, not within the protection of the proviso. Particularly is this true as regards teachers' contracts of employment. Such contracts are made annually and cover one school year only. Section 5998, Nevada Compiled Laws 1929.

The Legislature, in the 1935 Act, most clearly evidenced its intent that no person within the prohibited degree of relationship to a member of a school board should be employed by such board. To say that the proviso in question shall operate to destroy the intended effect of the law is to impute an absurdity to the Legislature. To construe the proviso as permitting the continued employment of persons within the prohibited degree of relationship, who were first employed according to the law as it stood in 1925 and 1927, after the expiration of their contracts of employment in existence at the time of the approval of the 1935 Act would be to sanction a practice tending to if not entirely nullifying the law. When the Legislature struck from the prior law the words "*provided, however*, the foregoing shall not apply to school districts when the teacher so related is not related to more than one of the trustees, and shall receive an unanimous vote of all members of the Board of Trustees or County Board of Education" (section 4851, Nevada Compiled Laws, 1929), it certainly evidenced its intent that that provision should no longer govern the employment of school teachers, and the very language of the proviso in the

1935 Act, hereinabove quoted, clearly shows that the Act of 1925 as amended by the Act of 1927 was to govern only so long as any teacher had been elected and employed during the time that law was in effect. The 1935 Act repealed such law, and in view of section 5998, Nevada Compiled Laws 1929, relative to the annual contracts of employment, it is now impossible for a teacher to be employed "in accordance with the Nepotism Act of March 16, 1925, as amended February 18, 1927." Query No. 2 is answered in the negative.

NOTE—The foregoing opinion does not relate to schools where one teacher only is employed, as such schools are permitted to employ a teacher related to one member of the Board of Trustees, Chapter 76, Statutes 1935.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

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

HON. MERWYN BROWN, *District Attorney, Winnemucca, Nevada*.

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SYLLABUS

**OPINION NO. 1937-233 Minimum Wage Law for Women.**

1. Females, having served probationary period, may contract to work less than eight hours per day or less number of days than a full week of six days; employer only required to pay for time actually worked by such employee.
2. Aprons or smocks of no particular design, material or pattern, purchased at discretion of female employee not a uniform within meaning of the term as set forth in the law.
3. Female employees who have been employed three months and more in the business prior to effective date of the law not required to serve the probationary period after law becomes effective.
4. No special form signed by employer showing female employee has served probationary period required by the law.

INQUIRIES

CARSON CITY, May 19, 1937

1. A female employee who has served her probationary period under the minimum wage law for women, works part time during rush periods, or during the holiday season but is not employed the full eight hours in any one day, or the full six days per week. How is such employee paid? Are her wages to be (1) for a full eight-hour day for a part of the day employed, (2) for a full week of six days if employed only part of the week if wages are computed weekly?
2. If an employer request that female employees wear aprons or smocks of no particular design, pattern or material, does such apron or smock come within section 7 of the minimum wage law for women?
3. An employer, upon the effective date of the minimum wage law for women, will have in his employ female employees who will have been employed by him for more than three consecutive months on that date. Can such employees be required to serve the probationary period after the effective date of the law before obtaining its benefits?
4. Does such law require a special form for employers to sign, showing that female employees have served their probationary period?
5. An industry employs female workers by the week, some at an hourly rate, and others at piece work which results in a higher rate of pay than that fixed in the law as a minimum. Such employees work eight hours per day four days of the week, but on Friday and Saturday the work is such that such employees are not needed and are not required to work the full eight hours on those days. Will such industry be required to pay such employees the full time of eight hours for Friday and Saturday when they are employed only part of those days?

## OPINION

The above queries present questions dealing with the application of the minimum wage law for women, enacted by the last Legislature, and which is now chapter 207, Statutes of Nevada 1937. The questions presented require construction of the statute. Rules of statutory construction, have been from time to time laid down by our Supreme Court and, inasmuch as the statute in question is a new Act and enters a field not heretofore covered by law in this State, we think it pertinent here to point out some of such rules as aids to the interpretation of the statute.

The legislative intent in enacting a statute must control. Such intention controls the court in the construction of a statute, and such intention must be gathered from the language used and from the mischiefs intended to be suppressed or benefits to be attained. (State v. Boerlin, 38 Nev. 39; State v. Dueker, 35 Nev. 214; Ex Parte Smith, 33 Nev. 466; State v. Hamilton, 33 Nev. 418; Eseele v. Mark, 43 Nev. 172.) And a court in interpreting a statute will so construe it 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. 373.

In construction of a statute, a court may consider the purpose of the change sought to be effected as it may be deduced from a consideration of the whole subject matter. State v. Brodigan, 37 Nev. 245. And, the purpose or object of the statute should ever be kept in mind, and a construction avoided which sacrifices substance to a mere matter of form. Ferro v. Bargo Min. & M. Co., 37 Nev. 139.

A statute should be construed so as to give effect and not to nullify it. Heywood v. Nye County, 36 Nev. 568; Ex Parte Smith, supra. And, a statute is to be given a fair and reasonable construction with a view of effecting its purpose and object, and a statute designed to furnish protection to employees should be liberally construed. Ex Parte Douglass, 53 Nev. 188.

The major purpose and object of the minimum wage law for women is two-fold, *i.e.*, to prohibit the employment of women for excessively long hours, and to provide a living wage for them. We think this should always be kept in mind in applying the provisions of the statute to cases and controversies arising under the Act, and that other provisions of the Act are means provided to attain the end sought in the law. With the foregoing rules of statutory construction in mind, we answer the queries propounded.

Answering Query No. 1. There is nothing in the Act in question that prohibits any employer or female employee from contracting with each other with respect to work, labor or services of such employee so long as the provisions of the Act with respect to the maximum number of hours such employee may be employed and the minimum wage she may receive therefor are not violated. Such employee may legally contract to work a lesser number of hours per day, or a lesser number of days per week, and contract to be paid therefor for the amount of wages earned for the actual time employed; provided, the rate of wage paid for such employment shall in no event be computed at a lesser rate per hour, per day or per week than the minimum rate therefor provided in the law. The Act is to be reasonably construed. It would undoubtedly be unreasonable to construe such Act to require the employee to be paid for a full eight-hour day when in fact she contracted to work a lesser number of hours in a given day, or to require her to be paid for a full week when she contracted to work for a period of less than one week. The literal language of the Act relating to the number of hours such employee can be permitted to work and the minimum wage she may receive therefor relates, we think, to those employed full time, and the language of the first proviso of section 3 of the Act reading as follows:

\* \* \* *provided*, all females employed to work, labor or serve a lesser number of hours than eight in any one day or a lesser number of days than six in any one week, if the wages are computed upon a weekly basis, shall be paid therefor her wages computed upon the full daily or weekly rate then and there paid for such work, labor or service, and in no event shall such computation be so made as to cause any reduction of such daily or weekly rate or any reduction of a minimum

daily or weekly wage fixed in this Act as applied to such lesser number of hours or days so employed; \* \* \*

simply means that no employer may, by reason of the female employee contracting to work, labor or serve a lesser number of hours per day or a lesser number of days per week, compute the wages of such employee for the actual number of hours or days worked at a lesser rate per hour or per day than she would have received had she worked the full eight hours or the full six days per week. In brief, such proviso is a prohibition against the cutting of the wage rate when the employee contracts to work, labor or serve for a period of time less than the commonly known full time per day or week as fixed by the statute. Therefore, a female employed as set forth in the query, who contracts to be employed for less than eight hours in any one day, shall receive wages for the number of hours actually employed, computed upon an eight-hour basis of not less than three dollars for eight hours or not less than 37 1/2 ¢ for each hour actually worked; if she contracts to be employed for less than a week of six days of eight hours each, computed on a weekly wage rate, she shall receive wages for the actual number of days worked, computed upon such six-day week at not less than eighteen dollars per week or not less than three dollars for each day actually worked.

Answering Query No. 2. Section 7 of the Act provides, "All special uniforms required shall be furnished by the employer and laundered by the employer, without cost to the employee." We think the use of the word "special" is of peculiar significance, and that in so using the word the Legislature intended that where an employer required his female employees to wear a distinctive and uniform dress, designed and made in a particular manner of certain cloth or material, that then the employer was to provide and maintain such uniform. The word "special" means "particular," "peculiar," "different from others," "extraordinary," "uncommon." Webster, Unab. Dict. The word "uniform" is defined as "A dress of particular style or fashion worn by persons in the same service, order, or the like, by means of which they have a distinctive appearance." 65 Cor. Jur. 1238.

In construing a statute, words shall be given their plain meaning, unless to do so would clearly violate the evident spirit of the Act. Ex Parte Zwissig, 42 Nev. 360. The plain meaning of the words "special uniform" is made clear by the above-quoted definitions, and, we think, the words so defined do not include aprons or smocks of no particular design, pattern or material. If these articles of women's wear are left to the discretion of the employee, then they do not come within the provisions of section 7 quoted above.

Answering Query No. 3. This query is directed to the provision in section 3 of the Act relating to a probationary period of not to exceed three months, the language being "*provided*, that during a probationary period of not to exceed three consecutive months the employer, and his or her employee or employees, may stipulate that the provision of this section shall not apply," the provisions of the section referred to being those provisions fixing the minimum wage. It is first to be noted that by use of the word "stipulate" the Legislature intended that the employee's consent or agreement is to be obtained before such probationary period can be enforced; in brief, the employer and employee must agree together that a probationary period shall be served by the employee. It would seem that employees who, at the time the Act becomes effective, have then served such probationary period would not agree to serve a further probationary period after the Act becomes effective.

We think it clear that by use of the word "probationary" the Legislature had in mind the common meaning of the word, *i.e.*, "serving for trial" (Web. Unab. Dict.), and that in so using the word Legislature also had in mind that those employees who might stipulate that a probationary period be served would be such employees known as beginners or probationers. Again, the Legislature, having provided that the probationary period shall not exceed three consecutive months, clearly evidenced its intent to be that those employees who have served more than three months are not to be classed as probationers. We answer the query in the negative.

Answering Query No. 4. The Act does not provide for any special form for employers to sign showing that female employees have served their probationary period. Any form in writing showing the facts as to service signed by the employer will suffice.



Answering Query No. 5. From the query, as propounded, we think the female employees of the industry have contracted with their employer with full knowledge of the part-time work on Fridays and Saturdays; if so, the query is answered by our answer to Query No. 1, *i.e.*, in the negative.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

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

JAMES FITZGERALD, *Labor Commissioner, Carson City, Nevada*.

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SYLLABUS

**OPINION NO. 1937-234 Unemployment Compensation Law—Power and Authority of Labor Commissioner and Director, Respectively.**

1. Director under supervision and direction of the Labor Commissioner in performing duties relative to personnel.
2. Unemployment Compensation Administration Fund expendable only under supervision of Labor Commissioner.

INQUIRIES

CARSON CITY, May 25, 1937

1. What are the powers and duties of the Labor Commissioner of the State of Nevada and the Director of the Unemployment Compensation Division under the unemployment compensation law of the State of Nevada relative to the employment of personnel in the Unemployment Compensation Division?
2. Who has the authority to expend and authorize the expenditure of moneys from the Unemployment Compensation Administration Fund under the employment compensation law of the State of Nevada?

OPINION

1. The word “commissioner” as used in the unemployment compensation law of the State of Nevada means the Labor Commissioner of the State of Nevada. (Subsection F of section 2, chapter 129, 1937 Statutes of Nevada.) The same word will be used in the same sense in this opinion.

The word “director” as used in the unemployment compensation law of the State of Nevada means the Director of the Unemployment Compensation Division. (Subsection Q of section 2, chapter 129, 1937 Statutes of Nevada.) The same word will be used in the same sense in this opinion.

Chapter 129 of the 1937 Statutes of Nevada provides that it shall be the duty of the commissioner to administer the unemployment compensation law of the State of Nevada. (Subsection A of section 11, chapter 129, 1937 Statutes of Nevada.)

The Director, while appointed by the Governor of the State of Nevada, is subject to supervision and direction of the Commissioner who may also prescribe the duties of the Director. (Subsection A of section 11, chapter 129, 1937 Statutes of Nevada.)

Subsection A of section 11, chapter 129, 1937 Statutes of Nevada, provides in part as follows:

It shall be the duty of the Commissioner to administer this Act and he shall have power and authority \* \* \* to employ (in accordance with subsection D of this section) such persons \* \* \* as he deems necessary or suitable to that end.

Subsection D of section 11 of chapter 129, 1937 Statutes of Nevada, sets up a method for the impartial selection of personnel on the basis of merit.

Subdivision 3 of subsection D of section 11 of chapter 129, 1937 Statutes of Nevada, provides in part:

\* \* \* except for temporary appointments not to exceed six months in duration the director shall select all personnel from eligible lists, \* \* \* furnished by the Merit Examination Board.

The Director shall classify positions under the unemployment compensation law and shall establish salary schedules and minimum personnel standards for the positions so classified. (Subdivision 3 of subsection D of section 11, chapter 129, 1937 Statutes of Nevada.)

The Director is authorized to fix the compensation and prescribe the duties and powers of such personnel, including such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of the duties under the unemployment compensation law of the State of Nevada. (Subdivision 3 of subsection D of section 11, chapter 129, 1937 Statutes of Nevada.)

It would appear at the first reading that the provisions of the statute referred to above create a conflict of authority between the Commissioner and the Director. It is evident that to hold that either the Director or the Commissioner has the exclusive power to employ personnel of the department subject to the provisions of subsection D of section 11 would be in effect a repealing of one or the other of the provisions of the statute referred to above.

It is a primary rule of statutory construction that conflicting provisions of a statute should be, if possible, harmonized and reconciled so that all parts of the statute may have effect. All parts and portions of the Act should be read together to find the legislative intent.

With these principles in mind, and reading the Act in its entirety, it is evident that it was the legislative intent that the Unemployment Compensation Division in chapter 129, of the 1937 Statutes of Nevada, was created and set up under the Labor Commissioner of the State of Nevada. (Subsection A of section 10, chapter 129, 1937 Statutes of Nevada.) The following language of the statute is very significant:

The Unemployment Compensation Division shall be administered by a full-time salaried Director who shall be appointed and whose salary shall be fixed by the Governor, but who shall be subject to the supervision and direction of the Commissioner. (Subsection A of section 10, chapter 129, 1937 Statutes of Nevada.)

It seems clear then that although the Director was to administer the Unemployment Compensation Division, such administration should be subject to the supervision and direction of the Commissioner, and it must necessarily follow that whenever the Director is authorized by the statute to do or perform any statutory duty in which there is any exercise of discretion it must be done and performed under the supervision and direction of the Commissioner; otherwise, the last portion of the section of the statute last referred to would be nullified.

Again, the Commissioner is, by subsection A of section 11, made the administrative officer of the entire Act known as the unemployment compensation law. (Subsection A of section 11, chapter 129, 1937 Statutes of Nevada, which includes two divisions, namely, the Unemployment Compensation Division and the Nevada State Unemployment Service Division. The significance of this language lies in this: that it is evident that it was the intention of the Legislature that there should be one officer in charge—one final fountainhead of authority.

This office is, therefore, of the opinion that when the Director is authorized and directed to classify the positions under the Act referred to, to establish salary schedules, fix minimum personnel standards, fix compensation, duties and powers of such personnel, all of such acts must be done under and subject to the supervision and direction of the Commission. In the choice of personnel the Director is under the supervision and direction of the Commissioner,

who, however, must employ such personnel in accordance with the provisions of subsection D of section 11, chapter 129, 1937 Statutes of Nevada.

2. Answering inquiry No. 2, attention is directed to subsection A of section 13, of chapter 129, of the 1937 Statutes of Nevada, which subsection creates and sets up a special fund to be known as the Unemployment Compensation Administration Fund. Said subsection and section read in part as follows:

There is hereby created in the State Treasury a special fund to be known as the Unemployment Compensation Administration Fund. All moneys which are deposited or paid into this fund are hereby appropriated and made available to the Commissioner. All moneys in this fund shall be expended solely for the purpose of deferring the cost of the administration of this Act, and for no other purpose whatsoever \* \* \*.”

Subsection A of section 11 also provides in part that the commissioner “shall have power and authority \* \* \* to make such expenditures \* \* \* as he deems necessary or suitable \* \* \*.”

We are unable to find in chapter 129 of the 1937 Statutes of Nevada any statutory authorization for anyone other than the Commissioner to expend any funds from the Unemployment Compensation Administration Fund other than the authority given the Director to fix the salaries and compensation of personnel, which has heretofore been found in this opinion, to be subject to the supervision and control of the Commissioner.

This office is of the opinion, therefore, that the Commissioner alone has authority to make expenditures of funds from the Unemployment Compensation Administration Fund, and that all expenditures must be made under his supervision and control. It necessarily follows, then, that all evidence of expenditures and all budgets for expenditures should and must bear his approval.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

By: W. HOWARD GRAY, *Deputy Attorney-General*

JAMES FITZGERALD, *Labor Commissioner, Carson City, Nevada.*

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**OPINION NO. 1937-B**

CARSON CITY, June 16, 1937

JOHN E. WORDEN, M.D., *State Health Officer, Nevada State Board of Health, Industrial Insurance Building, Carson City, Nevada*

Re: Nevada Uniform Narcotic Drug Act—Data and Records

DEAR DR. WORDEN: This acknowledges receipt from you of your letter of 14th inst., together with considerable correspondence between you and the health officers of the various States of the Union, and data and blanks enclosed therewith. You desire to know whether the forms enclosed, said forms being limited only to the form of licenses and the form of application therefor, are sufficient to comply with the Nevada Uniform Narcotic Drug Act; also, who must secure a license from the Nevada State Board of Health under that Act, and whether manufacturers and wholesalers of other States holding Federal narcotic licenses and engaged in interstate traffic will be required to obtain a Nevada license.

Your question No. 1 is quite a good deal broader than the forms you enclosed to me and about which you ask whether they constitute a record sufficient to meet the requirements of the law. Your question No. 1 is in the following form:

Will the enclosed forms prescribed by the State Board of Health for keeping the records under subsection 5 of section 9 of the Uniform Narcotic Drug Act constitute a record sufficient to meet the requirements of the law?

You will note that your question speaks of the "keeping of records," and that you ask whether the forms you enclosed to me "constitute a *record* sufficient to meet the requirements of the law." As stated above, the form you enclosed to me was simply the form of license and the form of application for the license. Certainly, these do not constitute any record at all of the narcotic drugs actually received, manufactured, produced, removed from process of manufacture, or of narcotic drugs actually sold, administered, dispensed, or otherwise disposed of by any such contemplated licensee. The "record" which the law requires the licensee to keep is not the mere license or the mere application for the license; but the law requires that the record the licensee shall keep is the record of all the narcotic drugs actually received, manufactured, produced, removed from process of manufacture, and of those actually sold, administered, dispensed, or otherwise disposed of. The law requires that this record shall be kept in all the details specified in section 9 (5) of the Nevada Uniform Narcotic Drug Act. I could not advise that you may legally dispense with these mandatory requirements of this Act by relying upon the "*record*" required by or under the Federal narcotic laws, in view of the fact and for the reason that the Nevada Uniform Narcotic Drug Act requires a record to be kept by such licensees of all narcotic drugs "lost, destroyed, or stolen," and also "the kind and quantity of such drugs and the date of the discovery of such loss, destruction or theft," and in view of the further fact that the Nevada Act requires that all licensees under that Act keep a detailed record of all cannabis and products and derivatives thereof handled by such licensees in the very exacting and detailed particulars specified in the Act, neither of which mandatory requirement is included in the Federal Narcotic Drug Act or the *records* required by the Federal Government to be kept.

It must be kept in mind that one at least of the chief purposes of the enactment of the Nevada law was to so limit and restrict the handling of narcotic drugs as to prevent, insofar as possible, the "peddling" of narcotic drugs, to the end that the traffic in such drugs should be so restricted, if possible, as to prevent the spread of the drug habit or addiction to the use of narcotic drugs. Certainly, the purpose is a wholesome one and should be encouraged in every way possible, and, to that end, the policy should be to close up every loophole possible, insofar as the law will permit, rather than to loosen up in the construction of the law.

With this policy in mind, it is my opinion that we should not rely too much upon the records required to be kept by the Federal law, especially since we are not informed as to how easily available these records may be for inspection by State enforcement officers, or, if available now, how soon this availability might be eliminated by Federal law. This danger point is particularly emphasized by reason of the fact that the Federal law does not require to be kept, and the records prescribed by the Federal authorities probably do not provide any space for keeping, the record of the handling of cannabis and its products, compounds, salts, derivatives, mixtures, or other preparations, or of the narcotic drugs lost, destroyed or stolen as required by the Nevada Uniform Narcotic Drug Act. It would be too easy for a licensee to claim upon any prosecution lack of information or mere forgetfulness if he should fail to keep these additional records required by the Nevada law, in such a way as to be available at all times for inspection by law enforcement officers. It is my opinion, therefore, that the necessity for keeping these records in every detail required by the Nevada Uniform Narcotic Drug Act should be kept constantly in the mind of and before the eyes of every licensee handling such drugs; and that this policy can be more efficiently served by requiring in some way that these additional records be kept and by keeping this requirement constantly before the licensees by some kind of a proper form to be filled out and kept by all such licensees. Your knowledge and experience as a physician familiar with the dangers incident to the traffic in such narcotic drugs, and your experience as health officer of this State, put you in a much better position to judge of what is necessary in this regard than I, as a lawyer, could possibly be. If you are sure that the Federal records required to be kept under the Federal narcotic drug law are constantly and easily available to you and the other law enforcement officers of this State for the purpose of inspection, and that the records so required

by the Federal law are sufficient insofar as they go, and can devise some means by which you are sure that licensees would keep the above-mentioned records as to the handling of cannabis, etc., and as to the narcotic drugs lost, destroyed or stolen, and have these records always available for your inspection and the inspection of the other law enforcement officers, it is my opinion that you would be justified in using these Federal records insofar as they go in conjunction with the additional records required to be kept by the Nevada Uniform Narcotic Drug Act. Permit me to warn you, however, that, in my opinion, this difference in the record required to be kept by the Federal law and the record required to be kept by the Nevada law presents a danger point which it is quite probable will defeat the chief purpose of our Nevada law on the point. The records required to be kept by the Federal law are not sufficient, insofar as disclosed by the blanks and correspondence shown me are concerned or reveal, to satisfy the exacting requirements of our Nevada law on the subject.

Yours truly,  
GRAY MASHBURN, *Attorney-General*.

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SYLLABUS

**OPINION NO. 1937-235 Unemployment Compensation Law—Re Status of Certain Employments Under the Unemployment Compensation Law.**

1. Rancher engaged solely in livestock raising on public domain not engaged in employment covered by the law.
2. Rancher owning property upon which he keeps his livestock part of the year, but upon which he raises no feed, and livestock grazed on public domain part of the year, is not engaged in employment covered by the law.
3. Farmer operating general merchandise store and service station on farm is engaged in employment covered by the law with respect to employees working in such store or station.

QUERY NO. I.

CARSON CITY, June 25, 1937

“Mr. A is a rancher. He owns no property within the State but grazes his livestock on the public domains. During the year he employs one or more men to care for his livestock. During the shearing season for sheep he employs one or more workers. When shipments to market are to be made he again employs workers to handle his livestock. Mr. A raises no crops nor has he any stable property holdings. Would he then be considered exempt from the Nevada law under sections 2(i)(6)(1)?”

OPINION

Unemployment compensation laws are of such recent enactment that it is not possible to find decided cases thereon, and such laws entering a field heretofore not covered by such legislation in this country necessarily requires considerable pioneering in the determination of questions raised under such laws. The query propounded requires the construction of the term “agricultural labor” which is contained in section 2(i)(6)(1) of the Nevada statute and which said labor is one of the exempted employments. If rancher A is engaged in an industry where his employees are employed in agricultural pursuits, *i.e.*, as agricultural laborers, then rancher A is exempted from the operation of the law as to such industry.

We have found no precedents dealing with this question under our unemployment compensation law; however, such laws are analogous and similar to workmen’s compensation laws, and, in effect, serve the same purpose.

We have examined many cases dealing with exemptions found in workmen's compensation laws, particularly exemptions of "agricultural labor" and find that without exception this term has been given a broad and comprehensive definition, and that labor connected with stockraising on the public domain has been included therein. A leading case on the question is *Davis v. Industrial Commission of Utah Et Al.*, 206 P. 267, and this case has been cited with approval in cases in other States where the precise question has been raised. In this case it appears that Davis, a sheep herder, was herding sheep on the public domain some fifteen miles from his employer's ranch at the time of his injury. The Utah Industrial Commission denied compensation to Davis upon the ground that he was within the exempted class of "agricultural labor" as provided in the Utah compensation law, *i.e.*, that his employer was an employer of "agricultural labor" and not subject to the compensation law.

The court in reviewing the finding of the commission held that Davis, even while herding sheep on the public domain, was engaged in agricultural labor and quoted with approval the following definitions of "agriculture":

Agriculture has been defined as the art of raising plants and animals for food for man. In *The Americana* it is said that in its accepted meaning agriculture—

"\* \* \* not only includes the tillage of the soil and the cultivation of crops, but also the rearing and feeding of all kinds of farm livestock, and in some instances the manufacture of the products of the farm into such forms as may be more convenient or more valuable for use or for sale. The manufacture of butter and that of cheese constitute recognized branches of the art of agriculture. The distinction between arable agriculture, which includes the cultivation of the ground and the growth of crops, and pastoral agriculture, which comprises merely the feeding and management of the flocks and herds of the farm, has been observed since the earliest times; 'Abel was a keeper of sheep, but Cain was a tiller of the ground.' In modern times, and probably in some degree at all times within the historical period, the practice of arable agriculture has been commonly associated in greater or less degree with the keeping and tending of livestock; but over immense tracts of the world's surface that are unfitted for arable cultivation the practice of pastoral agriculture still prevails, as in ancient days, wholly unmixed with the plodding labors of the husbandman."

Webster defines "agriculture" as:

The art or science of cultivating the ground, including the harvesting of crops and rearing and management of livestock \* \* \* tillage \* \* \* husbandry \* \* \* farming.

In 2 C.J. sec. 1, p. 988, it is said:

The term "agriculture" has been defined to be the "art or science of cultivating the ground, especially in fields or large quantities, including the preparation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding, and management of livestock; tillage, husbandry, and farming." In its general sense the word also includes gardening or horticulture.

The court then said: "Every standard authority that defines the word "agriculture" includes in the definition the rearing and care of livestock."

The United States Court of Customs Appeals in *Tower and Sons v. United States*, 9 Ct. Cust. App, 307, said: "That the raising, feeding and caring for animals, such as sheep and cattle, fall within the term 'agriculture' cannot be doubted."

Again in DeFontenay v. Childs Et Al. (Montana), 19 P. (2d) 650, the court held that lands used for grazing horses were lands used for agricultural purposes, although the horses were not used in the tilling of soil or other agricultural pursuits.

And, in Hight v. Industrial Commission, Et Al. (Arizona), 34 P. (2d) 404, the court held that an employee engaged in taking care of cattle on unirrigated, uncultivated lands, whose duties included pumping of water for cattle, and who was injured while roping an animal, was an agricultural laborer and not employed in the use of machinery, since the term agriculture included the rearing and care of livestock.

In Finger v. Northwest Properties (South Dakota), 257 N.W. 121, the court held that a sheep herder injured while herding sheep on the range was an agricultural laborer within exemption as to such labor in the South Dakota compensation law.

And, in Anderson v. Last Chance Ranch Co. (Utah), 228 P. 184, it was held that a man employed as a carpenter's helper by a ranch company to assist in building a house on a ranch, and requested by some one in authority to assist farm laborers in carrying groceries into the basement of the house, during which he was injured, was engaged at the time of his injury in agricultural labor and not entitled to compensation under a law exempting agricultural laborers from its provisions.

To the same effect are Jones v. Industrial Comm., 187 P. 833; Hill v. Georgia Casualty Co., 45 S.W. (2d) 566; and Miller and Lux Inc. v. Industrial Accident Commission of California, 178 P. 960. And see Cook v. Massey, 35 A.L.R. 200, and note at pages 208-214.

We think rancher A is engaged in an industry that employs labor that under the cases above cited cannot be denominated other than "agricultural labor," and being so denominated it follows that such employment is exempt from the provisions of the unemployment compensation law, and this exemption extends not only to the men employed in caring for the livestock but also to those employed in shearing the sheep and in the handling of the livestock when shipments thereof to market are made, as these employments are but incidental to the main industry, *i.e.*, the rearing of livestock, and become a necessary part thereof in the furtherance of the agricultural pursuit.

#### QUERY NO. II.

"Mr. B is a rancher who owns property on which he quarters his stock at various times during the year. During the remainder of the year he uses the public domains. Mr. B. raises no crops but he does employ workers to care for his livestock. Would he then be considered exempt from the Nevada law under section 2(i)(6)(1)?"

#### OPINION

Query No. II is answered in the affirmative for the reasons and upon the authorities contained in the answer to query No. I.

#### QUERY NO. III.

"Mr. C is a farmer who owns property and in conjunction with his agricultural business conducts a small mercantile business. He has on his farm a service station and a general merchandise store, and at times requires his employees to work in either or both of these establishments. Would Mr. C then be exempt from the Nevada law or would he be subject to the law for that part of his business which is nonagricultural in nature?"

#### OPINION

It is common knowledge that a general merchandise store and a service station are not necessary adjuncts to a farm; neither are they incident to agriculture, *i.e.*, operated as necessary parts or departments to facilitate the agriculture pursuits of the farm. Employees of farmer C

while working on his farm in agricultural pursuits would be “agricultural labors,” exempt from the operation of the law, but the same employees while working in the general merchandise store or in the service station would then be engaged in an industry, an employment not exempted in the law, and farmer C would be subject to the provisions of the law covering contributions for such employees while so engaged. Under the facts disclosed in queries I and II the employees of A and B are engaged in work which is a most necessary incident to the main industry, *i.e.*, “agriculture.” Here the employees of C while engaged in work in the store or service station are engaged in employment not a necessary incident to the agricultural pursuits of C. They are engaged in a commercial undertaking separate and apart from agriculture.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

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

WM. KELLY KLAUS, *Director of Unemployment Compensation Division of Nevada, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1937-236 Minimum Wage Law for Women.**

Graduate nurses not controlled by that law as authorities hold that graduate nurses are independent contractors rather than employees.

INQUIRY

CARSON CITY, June 30, 1937

Does the minimum wage law for women govern the working hours and compensation of graduate nurses?

OPINION

Section 1 of chapter 207, 1937 Statutes of Nevada, page 467, provides in part as follows:

That with respect to the employment of females in private employment in this State it is the sense of the Legislature that the health and welfare of female persons required to earn their livings by their own endeavors require certain safeguards as to hours of service and compensation therefor. \* \* \*

Section 2 of the same Act provides in part as follows:

It shall be unlawful for any person, firm, association or corporation, or any agent, servant, employee or officer of any such firm, association, or corporation employing females in any kind of work, labor or service in this State, except as hereinafter provided, to employ, cause to be employed, or permit to be employed any female for a longer period of time than eight hours in any twenty-four-hour period, or more than forty-eight hours in any one week of seven days; \* \* \*.

The Legislature defined the word “employer” as used in the Act as follows:

Whenever used in this Act “employer” includes every person, firm, corporation, partnership, stock association, agent, manager, representative, or foreman, or other person having control or custody of any employment, place of employment or of any employee.



The title of the Act uses only the words "employees" and "employment" to describe the relationship and the individuals which the Legislature sought to regulate.

The language of the foregoing excerpts of the statute indicates that the Legislature had in mind when it enacted the minimum wage law for women the regulation of the relationship between employer and female employee.

The definition of "employer" as used in the statute in effect limits the statute to the regulation of the hours of work prescribed and the compensation to be paid to female employees by such employers having control of any female employee.

The authorities passing upon the question as to whether or not "trained" or "graduate" nurses are employees or independent contractors have held that they are independent contractors. *Parkes v. Seasingood*, 152 Fed. 583; *Moody v. Industrial Accident Commission*, California, 269 P. 42, 60 A.L.R. 299; *In Re Renouf*, 254 New York 349, 173 N.E. 218. See annotation 60 A.L.R. 303.

The statute in question being for the purpose, as we construe it, of regulating the hours of work and the wages to be paid female employees by their employers, and graduate nurses not being an employee as that term is used in law, this office is of the opinion that compensation paid to and the hours of work of graduate nurses are not controlled by the minimum wage law for women, and that the inquiry should be answered in the negative.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

By: W. HOWARD GRAY, *Deputy Attorney-General*

MR. JAMES FITZGERALD, *Labor Commissioner, Carson City, Nevada*.

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SYLLABUS

**OPINION NO. 1937-237 Minimum Wage Law for Women.**

The District Attorney in each of the various counties of the State must prosecute violations of the minimum wage law for women upon receipt of data and information from either the Labor Commissioner or aggrieved person sufficient to substantiate a criminal complaint. The District Attorney would not violate the law after having received the necessary data and information to commence a prosecution unless he failed to do so after 20 days had elapsed.

INQUIRY

CARSON CITY, June 30, 1937

Is it the duty of the District Attorney of each of the various counties of the State to take action when a complaint is made to him by the aggrieved person to prosecute every violation of the minimum wage law for women (chapter 207, 1937 Statutes of Nevada, page 467) occurring in his county?

OPINION

Section 8 of chapter 207, 1937 Statutes of Nevada, provides in part as follows:

It is hereby made the mandatory duty of every District Attorney when complaint is made to him by the Labor Commissioner or by any aggrieved person to prosecute every violation of this Act occurring in his county, \* \* \* and should any such District Attorney fail, neglect or refuse for a period of 20 days to commence the prosecution for the violation of this Act, after having been furnished data and information concerning such violation, and to diligently prosecute the same to conclusion \* \* \*.

The language of the section above quoted is very clear, and as we view it is not open to any construction other than its very plain and obvious meaning. It is the duty of the District Attorney to prosecute complaints made to him by the Labor Commissioner or by any aggrieved person. However, the section very clearly indicates that a failure on the part of the District Attorney to prosecute every violation of the Act occurring in his county would not constitute a breach of his duty unless the failure to prosecute extended for a period of 20 days after having been furnished data and information concerning such violation.

In other words, it is the opinion of this office that the District Attorney is called upon to prosecute alleged violations of the minimum wage law for women only when he is furnished the necessary data and information concerning such violations by either the Labor Commissioner or an aggrieved person. Undoubtedly the Legislature meant by the terms "data" and "information" such material as would constitute evidence of a violation of the minimum wage law for women. A mere complaint would not, in our view of the statute, constitute sufficient data and information upon which to base a prosecution, for the District Attorney must of necessity be furnished with evidence to substantiate the allegations of the criminal complaint.

Your inquiry is answered in the affirmative.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

By: W. HOWARD GRAY, *Deputy Attorney-General*

MR. JAMES FITZGERALD, *Labor Commissioner, Carson City, Nevada.*

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## **OPINION NO. 1937-C**

CARSON CITY, July 6, 1937

HON. ERNEST S. BROWN, *District Attorney, Washoe County, Reno, Nevada*

Re: Highway Right of Way—Whether Duty of State or of County to Furnish

DEAR ERNEST: I have your letter of 29th ult. to which was attached a copy of your opinion to the Board of County Commissioners of Washoe County, dated June 28, 1937, with reference to the above-mentioned matter, and note that, in your letter, you ask that this office approve your opinion if we deem it correct, or write a new opinion if we deem it incorrect. In view of the fact that we approve it insofar as it relates to the participation of the State and State Highway Department in providing a right of way, but do not agree with it insofar as it seems to indicate that it would be illegal for the county to furnish the right of way at county expense, I am writing you this letter immediately to express the views of this office in the matter, especially as your letter indicates that you desire to present this matter to your Board of County Commissioners at its meeting today, reserving the right to furnish a formal written opinion later if it is found advisable to do so. Since my return from Washington, D.C., this office has been exceedingly busy in making the final arrangements, preparing the necessary papers, and obtaining the necessary orders settling the Western Pacific tax suits, and in the several water suits involving the distribution of the waters of the entire Humboldt River System and particularly those in Lovelock Valley; and my time has been largely taken up with Colorado River Commission matters involving the electrical energy being generated and to be generated at Boulder Canyon Power Plant, and in protecting the rights of the State of Nevada in the disposition of that electrical energy, to the end that this State may be able to obtain some substantial benefit from that power and that the burden of taxation of our taxpayers may thereby be made lighter. In addition to this, there is a meeting today of all of the State Highway Patrolmen and also of the Colorado River Commission, at both of which I must be present. For the foregoing reasons this letter will be limited to a mere hurried expression of my present views concerning the general question of whether the county may participate in furnishing or may furnish the rights of way to

the State and the Highway Department thereof to be used for public highways of this State or whether the State alone must furnish such rights of way.

In considering this matter, I am taking into consideration the provisions of Nevada Compiled Laws 1929, section 5344, cited by you in your opinion to your Board of County Commissioners. There is absolutely no question but that the Highway Department of the State may purchase such rights of way unless the same are obtained "by donation," or "by agreement," or "through the exercise \* \* \* of the power of eminent domain." Neither is there any question but that "the cost of such right of way," if there be any, may be paid out of the State Highway Fund, or that any damages sustained by the owners of the land may also be paid out of the State Highway Fund. It is the view of this office, however, that this section of the law is not a limitation imposed on the State or Highway Department thereof as to the manner in which such rights of way may be obtained. The mere provision of this section of the law to the effect that such rights of way may be obtained "by donation," or "by agreement," indicates to our mind that such donations of rights of way, or such agreements for rights of way, may be had as between the county and State or State Highway Department. In our view, it was the intention of the Legislature in enacting this section of the law merely to confer upon the State and the Highway Department of the State the *authority* to obtain rights of way. It is universally held that the State of Nevada cannot obtain any property without express legislative authorization therefor. It has been held over and over again that the State cannot purchase or obtain in any other manner even one foot of land without express authorization of the Legislature for it to do so. It was clearly the intention of the Legislature, in our view of the matter, to confer in this way the general authority for the State and Highway Department thereof to obtain such rights of way as may be needed for the construction of the public highways of this State. It is simply a legislative delegation of power, generally, to obtain rights of way for such public highways, either by purchase, or by donation, or by condemnation. It is not, in our view, a limitation, in any sense, which would prohibit the State from accepting rights of way by donation or by agreement with counties. Neither is it any limitation against counties, prohibiting them from furnishing such rights of way to the State or Department of Highways.

As to that portion of your opinion quoted in the following language near the bottom of page 2 thereof: "\* \* \* and the entire cost of such right of way shall be paid out of the State Highway Fund," it is our unqualified opinion that this is a mere authorization rather than a mandatory provision requiring that all rights of way must be paid for out of the Highway Fund. It must be kept in mind, in considering this language, that there is absolutely no power in any State officer or officers, not even in all of them combined, to draw even one cent out of the State Treasury without express authorization providing in detail the manner of and purposes for which payment may be made. If there were a hundred million dollars in the State Treasury, it would simply be impossible for any or all of the State officers combined legally to draw even enough out of the State Treasury to buy a lead pencil without express authorization of the Legislature permitting it. Other laws of the State provide that all moneys collected as gasoline tax and fees for license plates shall be deposited in the State Treasury in a fund to be known as the Highway Fund and such moneys are so deposited. It was necessary, therefore, to have some legislative authorization to withdraw or pay out this money for the purposes for which it was to be used if the State and Highway Department were to have the benefit of it in the maintenance of highways. This above-quoted language is that authorization; and, in our opinion, that is the sole purpose of the above-quoted language from said section 5344. It was certainly not the intention of the Legislature to make it mandatory that, regardless of the manner by which rights of way are obtained, they must be paid for out of the State Highway Fund. It is not, in any sense, a prohibition against the State's obtaining rights of way or accepting rights of way by donation or agreement without any compensation at all, either from owners of land or from the counties of the State. Nor is it any limitation on the powers of the county to make such donations or agreements.

For the foregoing reasons, we cannot agree with that expression of your opinion contained in the last sentence, on page 2, in the following language: "It would, therefore, seem that the purchase of these rights of way can *only* (italics ours) be paid for from the State Highway Fund which is replenished every biennium by the State Legislature." In this connection, I may call

your attention to the fact that the State Highway Fund, out of which such expenditures are made, is not "replenished" every biennium by the State Legislature. There is no direct appropriation to the State Highway Fund by the State Legislature at present for such purposes. An examination of the General Appropriation Act for the current year will not disclose any appropriation to the State Highway Fund for the purpose of paying for rights of way. The only money going into the State Highway Fund in the State Treasurer's office is the money derived from gasoline tax and sale of motor vehicle plates; and the entire support of the Highway Department, including the maintenance of highways, must therefore be paid out of the funds so derived.

Now, as to the right of the county to furnish or participate in furnishing rights of way for public highways constructed, improved and maintained by the State Department of Highways, may I call your attention to the fact that, for many years and up until the situation of unemployment became so acute throughout the United States, the counties of the State usually furnished the rights of way for such highways on the so-called "State Highway System." When the situation as to unemployment became so pronounced, the Federal Government became more liberal in its appropriations for highway purposes in an effort to assist in furnishing employment to our people who were out of employment. In this effort to relieve the situation of unemployment, the Federal Government became more liberal in assisting in the clearing at least of rights of way. For the past few years, therefore, the Federal Government, through the Federal Bureau of Public Roads, has assisted in clearing rights of way by permitting the use of Federal money for removing buildings, fences, and other obstructions from rights of way, and probably to some extent in fencing rights of way. The Federal Bureau of Roads has changed its attitude in this regard quite recently, and now refuses to participate in any manner whatsoever in either obtaining or clearing rights of way. On this point I quote as follows from a letter from Mr. C. H. Sweetser, District Engineer of the Federal Bureau of Public Roads for the States of Arizona, California, and Nevada, dated April 20, 1937, to Mr. Robert A. Allen:

The bureau's policy concerning participation in the cost of moving buildings and other structures off newly acquired right of way has been subject to reexamination. It has been decided that there is no instance which could arise in which the moving and reconditioning of a building would not be a right of way expense, and, as such, ineligible for Federal participation. This applies to the reerection or reestablishing of any building or any structure whose removal is for the purpose of permitting the occupation of the property by a street or highway. So long as a building or other structure is preserved and restored to the same condition on another location, it is a right of way consideration. Only such items as clearing the property by demolition may be accepted for reimbursement, provided such clearing can be shown not to be in anyway connected with right of way costs or damages.

*The rule to be applied in all cases is that Federal funds are not available for right of way and that it is the duty of the State to provide the right of way in fact without participation of Federal funds.*

It will be observed from the above-quoted language that the Federal Government through its Federal Bureau of Public Roads has recently changed its attitude toward the removal of buildings and other structures from rights of way for public roads in the construction of which the Federal Government participates. It has probably been called to your attention that a large portion of the right of way expense incident to the reconstruction of the highway through the town of Verdi, and in that vicinity, is caused by and is incident to the removal of a number of buildings and other structures from the enlarged right of way through the town of Verdi. From the last above-quoted language from Mr. Sweetser's letter you will note that the Federal Government now refuses to participate in expenses of this nature. At the same time the Federal Government absolutely refuses to participate in the reconstruction of the highway included in the reconstruction project which extends from a point several miles east of Verdi to a point some distance west of Verdi unless and until a much wider right of way is provided for this public

highway. We have our choice, therefore, between providing in some way this widened right of way to meet the demands of the Federal Government or getting along without the Federal money which has been allocated to this project upon the condition that the widened right of way will be furnished without any expense at all to the Federal Government. In other words, the Federal Government simply refuses to spend anything at all for the reconstruction of this portion of the public highway unless and until the widened right of way demanded by it is furnished without expense to the Federal Government. It is estimated that this reconstruction project, exclusive of the securing of the right of way, will involve the expenditure of about \$400,000 in Washoe County, practically all of which is Federal money. This attitude of the Federal Government through its Bureau of Public Roads toward the straightening and widening of public highways and the rights of way therefor is not a new attitude. In all of these State-Federal reconstruction programs for several years, the Federal Government has demanded not only the straightening but the widening of the highways and of the rights of way incident thereto. I know of no exception to this rule during the past six years insofar as the reconstruction of portions of the main transcontinental highways is concerned. The Highway Department of this State has brought all of the pressure it knows how to bring upon the Federal Bureau of Public Roads in an endeavor to induce it to make an exception in this case and to participate in the reconstruction of this portion of the public highway system without the securing of the widened right of way through the town of Verdi to meet its usual requirements. It is my understanding, however, that the decision of the Federal Bureau of Public Roads is final and absolute to the effect that it will not participate in the reconstruction of this portion of the highway unless and until the proposed widened right of way is obtained without any expense at all to the Federal Government. It seems, therefore, that there is no chance at all of getting this Federal money in the amount of practically \$400,000 for expenditure of Washoe County unless and until the widened right of way demanded by the Federal Bureau of Public Roads is furnished either by Washoe County or the State of Nevada.

The situation insofar as the State of Nevada is concerned and its purchase of the additional right of way and the clearing of it from buildings and other obstructions is that it is greatly handicapped in making this expenditure out of the State Highway Fund because of the fact that there is a definite express agreement between the State and the Federal Government that the State will maintain the highways in the State constructed by State-Federal funds and also by Federal funds alone in compliance with the standards required by the Federal Government, and the funds of the State are somewhat inadequate for this purpose. The State is so large and the highway mileage within the State so great that it has always been difficult for the State to even maintain, upon the standards prescribed by the Federal Government, the highways within the State which have already been constructed. In addition to these difficulties, the traffic over the Victory Highway has recently become so great and the traffic units so heavy that the culverts and bridges and even the roadbed are rapidly giving way. These highways were not constructed with the idea of carrying such heavy traffic units as have been passing over the Victory Highway, in particular since Congress placed the regulation of such traffic under the Federal Interstate Commerce Commission. The unfortunate part of the situation is that the State of Nevada has little or no control over the weight of these traffic units since regulation in this particular has been placed by Congress under the Interstate Commerce Commission; and interstate transportation concerns are enlarging their traffic units and the weight thereof both as to passenger traffic and freight traffic. Most of the money for reconstruction purposes along with Victory Highway is furnished by the Federal Government; and since it is willing to engage in this reconstruction program to meet the above-mentioned changed condition with reference to the weight of traffic units and to furnish practically all of the money therefor; provided, the widened rights of way demanded by it be furnished without expense to the Federal Government, rather than require a reduction in the weight of the traffic units, it seems that the State has little recourse other than to go along with the Federal Government in this program or have the Victory Highway in particular so broken up and destroyed as to be of little use even for the accommodation of our own people.

There is absolutely no question, as hereinbefore stated, as to whether the highway involved in this particular case is on what has been designated as part of the State Highway System and is a

so-called State highway, as stated in the first paragraph on page 3 of your opinion. Nobody has ever questioned that fact. In our opinion, however, this does not mean that the State may not accept and that the county may not furnish the right of way in question. The records in the Highway Department show conclusively, however, that Washoe County furnished the original right of way over which this particular portion of the Victory Highway extends. While the deeds came directly to the State from the owners of the land over which the right of way extends, the records of the State Highway Department show that Washoe County actually paid for the right of way and, in this direct way, caused the right of way to be deeded to the State or State Highway Department. In fact, that same situation exists with reference to practically the entire right of way for the Victory Highway and for the rights of way for the other so-called State-Federal highways of this State.

I have just talked to Mr. Houston Mills, now First Assistant State Highway Engineer, who was the right of way engineer for the Highway Department at the time the right of way for this particular portion of the Victory Highway through Verdi and vicinity was obtained. He has informed me that he personally handled this entire matter of securing the right of way; that one or more of the members of the Board of County Commissioners of Washoe County went with him to contact the various property owners over whose lands the right of way extended, and informed such owners that the county was paying for the right of way; and that Washoe County did actually purchase and pay for the entire right of way, although the deeds were made by the property owners directly to the Highway Department because of the fact that the Federal Government insisted that its money could be expended in the construction of highways only on rights of way the title of which was in the State, and probably other reasons. The minutes of the State Highway Board meetings show conclusively that Washoe County actually paid for the entire right of way involved. Mr. Mills also informs me that the payments for the right of way were handled by regular claims in the usual forms presented to and allowed by the Board of County Commissioners of Washoe County, in the usual manner; that this all occurred in the years of 1923 and 1924. The deeds I have examined were all made in the summer and fall of the year 1924. If you will refer to the records of your county and the minutes of the meetings of the Board of County Commissioners thereof you will no doubt find that this matter was handled in the manner stated by Mr. Mills, the entire purchase price of the right of way in each instance being paid by the county. As an illustration of the extent to which Washoe County went in procuring and paying for the right of way for the Victory Highway, Mr. Mills informs me that in about the year 1925 Washoe County purchased and paid for the right of way through the Humphreys Estate over a portion of the distance between Sparks and Vista the sum of more than \$10,000 to the one concern, *i.e.*, Humphreys Estate. I believe you will find that the records of your county corroborate the statement of Mr. Mills in this regard.

I realize, of course, that two mistakes do not make a right, but I cite this situation merely to show what has been done by Washoe County and the other counties in the past in obtaining and paying for the rights of way for such highways. While the action of the other counties in the State in this regard would certainly not be controlling upon the Board of County Commissioners of your county, it may be of interest to you and your Board of County Commissioners to know that all of the other counties of the State are doing and have consented to do exactly what Washoe County was asked to do in paying for this right of way.

As to the position taken by the Federal Government through its Bureau of Public Roads to the effect that it will not participate in either the actual payment for rights of way or in clearing them of buildings and other structures, may I call your attention to the fact that a very large portion of the money which the Highway Department asked Washoe County to furnish for obtaining and clearing the right of way involved is to pay the expense of the removal of buildings and portions of buildings and other structures in the town of Verdi which occupy the space necessary for the widening of the right of way. So far as I know there has never been a time when the Federal Government would contribute anything at all toward the actual purchase of the right of way, although it has for several years last past contributed all or a considerable portion of the expense incident to clearing rights of way of buildings, fences and other structures. From the language

quoted from Mr. Sweetser's letter, it is evident that the Federal Government has withdrawn its participation in any matter relating to rights of way.

The \$20,000-plus of money necessary to obtain the right of way in question would go a long way in matching by the State of Federal funds allocated to the construction or reconstruction of Federal aid highways in this State upon the basis of 87% by the Federal Government and 13% by the State and political subdivisions of the State. The fact of the matter is that most of the highway construction and reconstruction in this State for the past three or four years has been paid for entirely by the Federal Government in its effort to relieve the unemployment situation. May I call your attention to the fact that Washoe County has been the chief recipient of the benefits of this liberal attitude of the Federal Government. You have but to remember that the underpass, the overpass, and the Alameda Street Bridge in Reno were constructed without expense to Washoe County, unless it were a small amount devoted to securing rights of way. May I also call your attention to the liberality of the Federal and State governments in the construction of the two new bridges, one on Sierra Street and the other on Lake Street in Reno, without expense to Washoe County? The records will also show that practically \$3,000,000 of State and Federal funds were expended on construction and reconstruction of highways in Washoe County during the past three years, from which expenditure Washoe County and its people obtained the chief benefit. It would certainly be unfortunate indeed if, under the circumstances, the failure of Washoe County to furnish the money necessary to obtain the right of way in question should result in the loss of practically \$400,000 of State and Federal funds which has been allocated to this project and which will be expended in Washoe County if some arrangement can be made for the additional width of the right of way. The Highway Department is sufficiently interested in this matter to be glad, I am sure, to furnish the money necessary to obtain this additional right of way width, if the money in the Highway Fund were sufficient to do so. However, one of the western States quite recently lost a considerable portion of the Federal funds allocated to it merely because it did not or could not maintain its public highways sufficiently to comply with the requirements and standards of the Federal Bureau of Public Roads as provided for in the agreement between the State and the Federal Government requiring the State to maintain its Federal-State highways up to the standard provided for in the agreement. My information is that several of the other States of the Union also lost considerable portions of their Federal funds in this same way. I am sure that no one in Washoe County desires to see Nevada suffer a like penalty.

I am sure that no one would expect the State Highway Department to make an exception as to Washoe County by requiring the other counties of the State to pay for rights of way of this kind while exempting Washoe County from such a requirement. While the amount involved as to this particular right of way is not very large, the total which the State would have to pay for rights of way in the entire State, if it released Washoe County from this obligation or assumed obligation and applied the same policy to the other counties in the State, would be quite large, and, as hereinbefore stated, would match an exceedingly large sum of Federal moneys for highway construction and reconstruction in this State upon the basis of even 13% of State moneys to match 87% of Federal moneys. From this, you can very readily see how exceedingly important it is to the people of the entire State for the Highway Department to save this money if possible to devote to highway construction and reconstruction in the entire State as well as in Washoe County; and it is absolutely essential that the Highway Department reconstruct large sections of the Victory Highway as soon as possible, to the end that the State and Federal moneys already used in the construction of this important national highway may be preserved and the road kept in first-class condition for the use of those using it.

The State Highway Department would, I am sure, be glad to pay for this additional width of the right of way in Washoe County, and thereby secure to the working men and business men of your county the advantages which would inevitably come to them from the expenditure of this sum of about \$400,000 for highway reconstruction in Washoe County if it had money sufficient in the State Highway Fund to do so, and, at the same time, to perform the other obligations resting upon the fund pursuant to pledges already made. It is not a question of what the Highway Department is willing to do or would like to do, but simply a question of what it is financially

able to do. The entire Highway Department and Board would, I am sure, be glad if you and your Board of County Commissioners could see your way clear to pay for this additional right of way width and the clearing of it of the buildings and other structures to the extent heretofore requested by the Highway Department, which, I am informed, amounts to only about \$20,000, not only to the end that this needed improvement to the highway may be made immediately for the benefit of the traveling public and the business men in Washoe County, but also to the end that the business men and working men may have the benefits which would inevitably flow to them and the people of your county generally from the expenditure of this sum of about \$400,000 in their midst for highway work. Certainly, the expenditure of practically \$400,000, principally for the benefit of the county and people in it, ought to justify the furnishing of the \$20,000 requested, if it can be legally done. It is the opinion of this office that there is no legal impediment against the Board of County Commissioners making this expenditure and donating the right of way to the State, since the budget of your county shows that an item for the "State Highway Department" and one for "Roads and Bridges" have been budgeted in the Washoe County Budget for the current year and the year 1938, in quite a large sum for each year, the budgeted amount for the "State Highway Department" for 1937 being \$13,500 and for 1938 being \$13,000, and for "Roads and Bridges" for 1937, \$78,000, and for 1938, \$78,000.

I refer to the Washoe County Budget and the items contained therein for "State Highway Department" and "Roads and Bridges" because of the fact that your reference to and quotation of Nevada Compiled Laws 1929, section 3013, indicate that you base your opinion that it would be illegal for the county to pay for the right of way in question upon the ground that this item of expenditure is not included in the Washoe County Budget. The section 3013 referred to by you is a part of the budget law of this State, and I assume, therefore, that the unlawfulness of the contribution for this purpose by your Board of County Commissioners is based upon the fact that, in your opinion, the money for this expenditure is not "specifically set aside for such payment." If that be the basis of your views that such an expenditure would be illegal, and the items of your county budget are not sufficiently broad to include this item of expenditure, then there can be no difference of opinion between us. This office will certainly not contend that the Board of County Commissioners of your county, or of any other county for that matter, may indulge in expenditures of money not covered in some way by the county budget. In other words, if the county budget be not broad enough in its language to include this expenditure, then the expenditure cannot legally be made by your Board of County Commissioners. It will be noted, however, that the above-quoted items taken from the Washoe County Budget, *i.e.*, "State Highway Department" and "Roads and Bridges" are expressed in quite general terms. Insofar as the above-quoted designations are concerned, they are certainly broad enough to cover this expenditure. In considering this matter, I am sure you will realize that it is practically impossible and certainly unreasonable to expect every small item of expenditure shall be expressly included in the budget in the exact language of each particular item. The law does not require that each small item of expenditure be expressly designated in the budget, and, so far as I have observed, it is not customary to include each small item in express terms in the budget. It has been customary, and, in my view, is in full accord with the budget law, to express the items in the budget in such general terms as will include a great many small items of expenditure which it is contemplated to make and which are actually made out of the items of the budget so expressed in general terms. In other words, it has never been customary to break down the items of the budget which are expressed in general terms into items in detail. I know that it is customary to adopt such general and broad terms in the preparation of budgets as to make the items of the budgets as few as possible and so as to include in each of the general terms used in the budgets as many smaller items of the same nature as possible. In our view of the matter, that is all the budget law requires; and it is certainly in the interests of economy to adopt such a policy, for the very simple reason that the margin to cover the difference between what is deemed to be absolutely necessary under ordinary circumstances and what would actually be necessary in the event of any emergency incident to each item would, in the aggregate, necessarily be larger than if many of these small items were included in one general designation. This is due to the very simple reason that it is practically an absolute certainty that an emergency will not arise as to each of the



smaller items included in the more general terms. It is our view that the expressions in your budget—"State Highway Department" and "Roads and Bridges"—are broad enough in their terms to include this expenditure and that, therefore, this expenditure may be legally made by your Board of County Commissioners out of either or both of these items combined. If it be said that when these items were placed in the budget it was not contemplated that this very expenditure would be made out of the moneys so budgeted under those items, the same objection could be made to a great many of the unexpected expenditures made by both the State and county governments. One of the very purposes of adopting such general designations in budgets is to enable the governing body to meet unexpected items of expense which may very easily fall within the general terms adopted, although not expected to arise at the time of the adoption of the budget.

It is our opinion that Nevada Compiled Laws 1929, section 1942, as amended in 1931 Statutes of Nevada, page 52, et seq., is sufficiently broad to confer the power and authority upon Boards of County Commissioners to expend county moneys for the purpose of paying for such rights of way. In this connection, I refer particularly to the following language quoted from subdivision 4 of said section 1942 (1931 Statutes of Nevada, page 52):

Fourth—To lay out, control, and manage public roads, turnpikes, ferries, and bridges within the county, *in all cases where the law does not prohibit such jurisdiction*, and to make such orders as may be necessary and requisite to carry its control and management into effect.

We know of no law of the State which *prohibits* such jurisdiction to the county or prohibits the Board of County Commissioners from expending the county's money for this purpose.

May I also refer you to the general powers granted in subdivision 13 of said section 1942 (1931 Statutes of Nevada page 54) which confer upon Boards of County Commissioners quite broad powers in the following language:

Thirteenth—To do and perform all such other acts and things as may be lawful and strictly necessary to the full discharge of the powers and jurisdiction conferred on the board.

Entirely outside of these expressions of the law, there are other provisions of the public highway law and general expressions of the law which, in our opinion, confer upon Boards of County Commissioners sufficient powers to conduct the affairs of their respective counties, as the fiscal and managing agents thereof, in whatever way, not inconsistent with law, they may deem for the best interests of their respective counties and the people thereof, and within the general terms of their budgets.

So much publicity has been given in the newspapers and otherwise to the fact that the Federal Government's allocation of Federal funds to the State of Nevada for highway construction and reconstruction for the current year is very much less than the annual allotments for these purposes which have been made each year for the past four or five years, I hardly think it necessary to call your attention to the fact that the Federal Government has allocated about \$1,000,000 less this year to the State of Nevada for these purposes than has been so allocated for each of the past several years. This situation simply adds to the difficulties of the State in financing as extensive a program of construction this year as it has in each of the past several years. This letter is intended more for a mere discussion of the situation and difficulties in which the State Highway Department finds itself, the desirability of doing as much highway construction and reconstruction in the State as possible during the current year, and the means by which the Highway Department is trying to overcome these difficulties and accomplish this purpose, than as an official opinion of this office. It is the hope of the Highway Department that, from this general discussion and discussions of this nature, we may arrive at some policy on the point involved which will benefit not only the people of Washoe County but of the entire State.

It must be understood, however, that neither the State nor the Highway Department has any power to compel Washoe County to purchase, pay for out of county funds, or donate to the State, the additional width of right of way involved. The action of the State Highway Department in this regard must be considered as a mere request for cooperation on the part of Washoe County to the end that the beneficial results above mentioned may be realized. It is my understanding that the State Highway Engineer has not made any demand that Washoe County participate with the State and Federal governments in this way, but has merely requested it, and that he has not stated that either the Federal Government or the Federal Bureau of Public Roads has taken the position that State moneys could not legally be used for the purchase of such a right of way, but has merely called attention to the fact that the Federal Government through its Bureau of Public Roads has refused further to participate in the clearing of highway rights of way of buildings, fences and other structures and thereby deprived the State Highway Department of some of the revenue it has been able heretofore to devote to right of way purposes.

In conclusion and by way of summation, may I say that, in the opinion of this office, the State is authorized by law to purchase rights of way for State highway purposes and pay for the same out of the State Highway Fund, as provided for in said section 5344, Nevada Compiled Laws 1929, but that it is not limited to that method of acquiring such rights of way, but may also legally acquire them by donation, either from the county or otherwise, or by agreement with the county or otherwise, without compensation, or to legally acquire them by condemnation, as provided for in that section; also, that such a donation may be legally made by the county and accepted by the State, and such an agreement may be legally made between the county and State; and that the county may legally purchase such a right of way and pay for the same out of county funds if and when the county budget includes such expenditures or the terms thereof are sufficiently broad to cover such expenditures, and then donate such rights of way to the State, without compensation, by deed directly from the owner to the State through the Highway Department or otherwise. In this connection, may I call your attention to the fact that the authorities hold that counties are but arms of the State and integral parts of the State, created by the State for the more economical and convenient exercise of governmental powers, and instituted mainly as a means of government, and that such counties and the officers thereof are but parts of the machinery that constitutes the public system, the State, and are designated to assist in the administration of the civil government of the State and as a part of the State. *State v. Gracey*, 11 Nev. 223, at page 228; *Pershing County v. Humboldt County*, 43 Nev. 78; *State v. Hobart*, 12 Nev. 408; *Rogers Loco. Wks. V. Emigrant Co.*, 164 U.S. 559.

Very truly yours,  
GRAY MASHBURN, *Attorney-General*.

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SYLLABUS

**OPINION NO. 1937-238 Minimum Wage Law for Women.**

Beauty operator employed on percentage basis, but working in a shop for eight hours a day, some days earning \$3 or more and other days earning less than \$3, is not an independent contractor and therefore comes within the provisions of section 6 of chapter 207, 1937 Statutes of Nevada, page 467. A colored woman employed as a cook and housekeeper is classed as a domestic and is not subject to the provisions of section 6 of the above law.

INQUIRIES

CARSON CITY, August 10, 1937

First: A young lady has been employed in a beauty shop upon a percentage basis; that is, she receives a certain percentage of the amount taken in in connection with work which she does. She is in the beauty shop for eight hours each day, but only actually works when women come

into the beauty shop for beauty work. Some days the young lady makes more than \$3 a day; other days, when not so many customers are in the beauty shop, she makes less. If she receives less than \$3 a day, each day, is such employment or contractual relationship with the employer in violation of the above-mentioned law?

Second: A colored lady is employed as a cook and housekeeper in a house in the red-light district. Is the employment of the colored lady classed as domestic service and, therefore, the provisions of the above-mentioned law would not apply?

OPINION

Answering inquiry No. 1, this office is of the opinion that the employee referred to therein is an employee who comes within and under control of chapter 207, 1937 Statutes of Nevada, page 467. The said employee does not come within the exceptions contained in section 6 of the Act, which section contains the only specifically designated employees who are excluded from the benefit of the Act. The only question then left to be determined is whether or not the relationship existing between the employer and employee is that of master and servant or that of independent contractor. The fact contained in the inquiry that the legal relationship of independent contractor might exist is the method of determining the amount of remuneration the employee is to receive for her labors. Mode of payment is an important, but not controlling, element in determining whether or not the relationship of independent contractor exists, and we could not hold upon that fact alone that the employee was in fact an independent contractor. Since, from the facts submitted in the inquiry, we are of the opinion that the employee is not an independent contractor, inquiry No. 1 is answered in the affirmative.

Inquiry No. 2 is answered in the affirmative. In our opinion the employee comes clearly within the scope of those who are excepted from the force and effect of the Act by section 6 as a domestic servant.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

By: W. HOWARD GRAY, *Deputy Attorney-General*

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

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SYLLABUS

**OPINION NO. 1937-239 Unemployment Compensation Law.**

Officers and employees of fraternal organizations. Officers of such organizations not engaged in employment covered by such law, even though receiving compensation for services as officers. Employees, on the other hand, are engaged in employment covered by such law.

INQUIRY

CARSON CITY, August 13, 1937

Are officers and employees of fraternal organizations which operate under the lodge system in this State employees within the provisions of the unemployment compensation law?

OPINION

Section 2(i)1 of the Nevada Unemployment Compensation Law, *i.e.*, chapter 129, Statutes 1937, defines employment:

“Employment,” subject to the other provisions of this subsection, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

Section 2(6)(7) of the law provides that:

The term “employment” shall not include: Service performed in the employ of a corporation, community chest fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

It appears from the foregoing subsection 2(i)1 of the law that employment means service performed for wages under a contract of hire. We think it is common knowledge that officers of a fraternal organization, which operates under the lodge system, are not employed under contracts of hire. Such officers may receive compensation for their services as such officers, but this compensation is usually, if not in all cases, only a nominal sum. Such officers are, in practically every instance, engaged in some trade or profession or work whereby they gain their livelihood. Their official duties in such fraternal organization are provided for in the laws thereof, and there is in fact no intention of creating an employment for hire contained therein, and such officers must be members of the organization in order to be eligible to hold office. It is, on the other hand, a duty which such officers are bound to perform under such laws for their own benefit as well as the other members of such organizations. They are elected or appointed as a rule, for certain definite terms and may or may not be reelected or reappointed thereto, yet such failure of reelection or reappointment could not be said to end their membership in such organization and thereby cause unemployment for which compensation under the unemployment compensation law would be payable. We think the ruling of the Rhode Island Unemployment Compensation Board on this question is correct. Such board ruled, under a law similar to the Nevada law, that where members of fraternal organizations receive remuneration for attending meetings or for certain official duties, but make their living in some trade, occupation or business, that the remuneration received in connection with such fraternal duties is not wages as contemplated in the unemployment compensation law. See 447, Rhode Island, State Interpretative Rulings. The same rule applies here, and we hold that officers of fraternal organizations, which operate under the lodge system, even though such officers receive compensation, are not employees within the provisions of the unemployment compensation law, and the services performed by such officers for such organizations is not employment within the meaning of such law, even though such organization does not fall within the terms of subsection 2(6)(7) of such law, quoted above.

With respect to employees of a fraternal organization, however, the rule is different. We are speaking of employees in the sense that they occupy a different status in such organization. As a rule fraternal organizations, in many instances maintain lodge rooms, buildings and perhaps other kinds of property which require the services of caretakers, janitors, or housemen, waiters and such like. Some fraternal organizations maintain cemeteries for the use of members of the organization and others that are not members and provide caretakers and other employees therein. In all of these situations and kindred situations the employees are employed under contracts of hire and depending thereon in some measure for their livelihood. They may be members of the organization employing them or they may not, but in either event we think they are employees employed under contracts of hire, and unless the organization can clearly show that it is such an organization as falls within the terms of subsection 2(6)(7), quoted above, then its employees are clearly within the provisions of the law and engaged in employment covered by such law, and their employer is bound to make contributions according to such law.

Respectfully submitted,  
GRAY MASHBURN, *Attorney-General*.

By: W. T. MATHEWS, *Deputy Attorney-General.*  
HON. GEORGE FRIEDHOFF, *Director, Unemployment Compensation, Nevada Division, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1937-240 Unemployment Compensation Law.**

Officers of an irrigation district who pursue a special trade not connected with agriculture are deemed to not come under this law. Although bookkeepers and stenographers and typists working for the irrigation district do come under the provisions of the law.

INQUIRY

CARSON CITY, August 21, 1937

A land and livestock company, incorporated in Nevada, is extensively engaged in agriculture in this State. Officers of the corporation are also employed by it in managing its farming activities and as foremen in direct control of its employees who are engaged in agricultural pursuits. The corporation employs a bookkeeper, a stenographer, and typist, who take care of the office work of the corporation. Advice is requested: (1) Whether the officers of the corporation, employed as above stated are employees within the meaning of the Nevada unemployment compensation law; and (2) Whether the bookkeeper, stenographer and typist mentioned above are employees within the meaning of such law?

OPINION

In our opinion No. 235, dated June 25, 1937, we point out that any employment that was a necessary incident to the main industry, *i.e.*, agriculture, was deemed agricultural employment or "agricultural labor." Agricultural labor is an exempted labor or employment under the Nevada unemployment compensation law. Any person engaged in agricultural labor, whether an officer of a corporation or otherwise, would, as to such labor, be exempted from the provisions of such law.

The corporation mentioned in the inquiry, is, as we are advised, engaged in agricultural pursuits, that apparently is its business. Its officers are actively engaged in superintending, directing and controlling its employees actually engaged in agricultural work. The employment engaged in by such officers is, we think, a most necessary incident to the agricultural industry. We are of the opinion and so hold that such officers are engaged in agricultural labor and that the unemployment compensation law does not apply as to them. See Opinion No. 235, *Davis v. Industrial Comm. of Utah*, 206 P. 267.

A different question is presented with respect to the bookkeeper, stenographer and typist employed by the corporation. While so employed they are not actually engaged in agricultural pursuits. Agriculture can be and is carried on without the services of such employees. Such employment is not a necessary incident to agriculture, although it may be most convenient and helpful to the corporation and facilitate its business to a certain extent. These employees, and each of them, are pursuing a special trade or calling not closely connected with agriculture. We think the service performed by them is not agricultural even though pertaining somewhat to agriculture. See 127 S. S. T. 125, *Bureau of Internal Revenue Rulings*; also Opinion 235, No. III.

The bookkeeper, stenographer and typist in question are to be deemed employees within the meaning of the law.

Respectfully submitted,  
GRAY MASHBURN, *Attorney-General.*  
By: W. T. MATHEWS, *Deputy Attorney-General.*

HON. GEORGE FRIEDHOFF, *Director, Nevada Division of Unemployment Compensation, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1937-241 Minimum Wage Law for Women.**

A female employee is entitled to written statement at the end of her probationary period showing that she has completed such probationary period, irrespective of the amount of wages paid during such period. Probationary period cannot be extended beyond three consecutive months by employing the probationer part-time during such period.

INQUIRIES

CARSON CITY, September 3, 1937

1. An employer of female employees employed them through their probationary periods at the rate of three (\$3) dollars per day, the minimum wage provided in chapter 207, Statutes of Nevada 1937. Is such employer required to furnish such employees statements in writing certifying that they have completed such probationary periods in view of the fact the minimum wage had been paid during such periods?

2. The statute provides for a probationary period of not to exceed three consecutive months. May a female be employed as a probationer part time for a period of six months and comply with such statutory provision?

OPINION

Answering query No. 1:

The language found in section 3 of the minimum wage law for women, *i.e.*, chapter 207, Statutes of 1937, governing the furnishing of a written statement certifying that a female employee has served a probationary period is clear, explicit and mandatory. Such language is:

\* \* \* that at the end of such probationary period the employer *shall* deliver to such employee a statement in writing certifying to such probationary service, and no employee having served such probationary period shall ever be required to serve any other probationary period, regardless of the nature or place of employment thereafter.

The amount of wages paid a female probationer has no bearing on the question. That phase of the employment during the probationary period is a matter of contract between the employer and employee and does not add to nor detract from the employee's right to a written statement certifying that she has served her probationary period at the end of such period. In all cases when a female employee has been employed as a probationer she is entitled under the law to the written statement showing such fact at the end of the period, irrespective of the amount or rate of wages paid her during such period.

Answering query No. 2:

The provision of section 3 of the law in question with respect to the length of the probationary period is most clear. The period specified in the law is not to exceed three months. We think such provision requires no construction. Nothing is said therein relative to part-time service, but it is most clear that the entire period shall not exceed three consecutive months, and any period extending beyond that time would undoubtedly be beyond the purview of the law and the employer would not be protected by it. Your inquiry is answered in the negative.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.  
By: W. T. MATHEWS, *Deputy Attorney-General*.  
MR. JAMES FITZGERALD, *Labor Commissioner, Carson City, Nevada*.

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SYLLABUS

**OPINION NO. 1937-242 Salaries of Instructors of Schools of Mines.**

Salaries of instructors of schools of mines are fixed by the District Boards of School Trustees or the County Board of Education in cooperation with the State Board of Vocational Education.

INQUIRY

CARSON CITY, September 13, 1937

Who fixes the salary of and appoints the instructors in the Schools of Mines created under sections 6850-6856, Nevada Compiled Laws 1929?

OPINION

Section 6851, Nevada Compiled Laws 1929, specifically places the School of Mines for Virginia City, Tonopah and Goldfield under the direction of the district Boards of School Trustees and the Ely School of Mines is placed under the direction of a County Board of Education of White Pine County.

These governing boards are to cooperate with the State Board of Vocational Education.

It is the opinion of this office that inasmuch as the mining schools are to be conducted under the direction of the District Boards of School Trustees or the County Board of Education the power is lodged by statute in these boards to fix the salary of and appoint the instructors. However, the statute requires these governing boards to cooperate with the Vocational Education Department.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

By: W. HOWARD GRAY, *Deputy Attorney-General*

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

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SYLLABUS

**OPINION NO. 1937-243 Teachers' Retirement Salary Act of 1915.**

Application for partial retirement salary under the Teachers' Retirement Salary Act of this State made prior to July 2, 1937, comes under the provisions of the 1915 Teachers' Retirement Salary Act. The effective date of the 1937 Act being July 2, 1937.

STATEMENT OF FACTS

CARSON CITY, September 25, 1937

A teacher who has a record of sixteen years of service has applied for a partial retirement salary because of disability. Her application is dated June 26, 1937, and was received in this office on July 2, 1937. The application was accompanied by a doctor's report of a medical examination, certifying that the teacher is incapacitated for school service and that the incapacity is probably permanent.

## INQUIRY

1. In determining whether or not the teacher referred to in the above statement is entitled to a teacher's retirement salary, is the 1915 Teachers' Retirement Salary Act applicable?
2. In the event that the 1915 Teachers' Retirement Salary Act is not applicable to the above situation, would the 1937 Teachers' Retirement Salary Act be applicable?

## OPINION

The 1937 Teachers' Retirement Salary Act, chapter 209, 1937 Statutes of Nevada, page 473, although approved on March 29, 1937, did not go into effect and become a law until from and after the 1st day of July 1937 (section 36 of chapter 209, 1937 Statutes, page 488).

Language similar to that contained in said section 36 has been construed to the effect that the day named, that is, July 1, 1937, would be excluded from the operation of the Act, and hence the 1937 Act would be law for the first time on July 2, 1937. 59 C.J., paragraph 687, page 1156, note 93; *Hunter v. Savage Mining Company*, 4 Nev. 153; *State v. Manhattan Verda Company*, 32 Nev. 474, 109 P. 424.

Our Supreme Court has held that it is within the power of the Legislature to fix a date in the future at which time an Act may take effect. *Ex Parte Ah Pah*, 34 Nev. 283, 119 P. 770.

Such a statute must be construed as if passed on the day which it took effect. *Rice v. Ruddiman*, 10 Michigan, 125; *State v. Northern Pacific R.*, 53 Washington, 673, 102 P. 876, 17 Ann. Cas. 1013; *Brunjes v. Bockelman*, (Missouri), 240 S.W. 209-211.

The repeal clause goes into effect upon the same date that all other sections of the Act becomes effective. *Ex Parte Ah Pah*, 34 Nev. 283, 119 P. 770.

In view of the foregoing rules of law, it is evident that the Teachers' Retirement Salary Act of 1915 (sections 6003-6021, Nevada Compiled Laws 1929, as amended) was in full force and effect on the day upon which the teacher who is referred to in the above statement of facts made her application for partial retirement salary, but had been effectively repealed and was no longer in effect on the day it was received through the mail, that is on the 2d day of July 1937.

The repeal of a statute does not operate to impair or otherwise affect rights that have been vested or accrued while the statute was in force. 59 C.J., paragraph 723, page 1187, note 36.

Under the provisions of the 1915 Teachers' Retirement Salary Act the retirement salary is payable from the date of retirement. Sections 6014, 6015, Nevada Compiled Laws 1929, as amended, 1935 Statutes, page 38.

The application made by the teacher for a retirement salary is the first statutory step taken to indicate the fact of retirement and the desire to acquire a retirement salary, and the date of the application has long been accepted by the teachers' retirement salary fund board as the time from which such retirement salary should be paid and as the date of retirement.

Since the retirement salary is payable under the statute from the date of retirement and the date of the application is deemed the date of retirement it would appear that, providing the teacher who made application had complied with the statutory requirements and was in fact entitled to retire, he or she had initiated a right to a retirement salary prior to the repeal of the 1915 Teachers' Retirement Salary Act. Section 13 of the 1937 Teachers' Retirement Salary Act which was in effect upon the date of receipt of the application above referred to provides expressly that teachers who were receiving on the date that Act became effective a retirement salary should continue to receive such salary, notwithstanding the repeal of the 1915 Act. This section clearly indicates that it was the intention of the Legislature that those teachers who were receiving benefits under the Act should not be cut off and deprived of those benefits by virtue of the repeal of the 1915 Teachers' Retirement Salary Act.

The statement of facts hereinabove set out produces a situation where the teacher was entitled to receive her retirement salary on the date she made her application, though she was not actually receiving the same on that date, and which date was in fact prior to the repeal of the 1915 Teachers' Retirement Salary Act.



Laws of the nature of the ones here involved are construed liberally towards applicants. 56 C.J., paragraph 397, page 431, note 15.

Since, as we view the law, the teacher was entitled to receive and had in fact made an application for a retirement salary on a date prior to the repeal of the 1915 Teachers' Retirement Salary Act, we are of the opinion that her rights should be determined by and under the provisions of the statutory law in effect on the date of her application, that is, the 1915 Teachers' Retirement Salary Act.

Inquiry No. 1 is therefore answered in the affirmative, and inquiry No. 2 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.*

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SYLLABUS

**OPINION NO. 1937-244 Prevailing Wage Scales.**

Prevailing wage scales required by public contracts determined by prevailing wages of locality in which contract is to be performed.

INQUIRY

CARSON CITY, September 27, 1937

From what locality shall the evidence be taken for the purpose of fixing a prevailing wage scale to be used by the State of Nevada or any of its political subdivisions, as required by chapter 139, 1937 Statutes of Nevada, page 305?

OPINION

Answering your inquiry, your attention is directed to section 1 of chapter 139, 1937 Statutes of Nevada, page 305.

Every contract to which the State of Nevada or any of its political subdivisions is a party, requiring the employment of skilled mechanics, in the construction, alteration, or repair of any public buildings, or other improvements, shall contain the provision that the rate of per diem wages shall not be less than the prevailing rate of wages of the county, city, town, village, or other political subdivision of the State in which the work covered in said contract is located.

Your attention is also directed to section 2 of said Act hereinabove referred to, which provides, in part, as follows: that "the public body awarding any contract for public work or otherwise undertaking any public work shall ascertain the general prevailing wage in the *locality in which the public work is to be performed*, for each craft or type of workman from the State Labor Commissioner." \* \* \* This section also provides that the Labor Commissioner when in doubt as to the general prevailing rate of per diem wage, shall hold hearings in the *locality in which the work is to be executed*, after advertising for the period of once each week for two weeks in a newspaper nearest to the "*locality of the work*," at which hearings representatives of labor and contractors "*of the locality*" shall be heard.

The clarity of the statute in question leaves no room for construction. The language adopted and used by the Legislature expresses as clearly as language can express the legislative intent that the State of Nevada or any of its political subdivisions shall require by contract that the wages paid to skilled mechanics in the construction, alteration or repair of any public building or

other improvement *shall not be less than the prevailing rate of wages of the county, city, town, village or other political subdivision of the state in which the work covered in said contract is located.*

It is also clearly evident that when the prevailing wage scale is in doubt for the locality in which the work is to be performed, the hearing provided for by section 2 shall be held in the locality in which the work is to be done, and there shall be present at that hearing, for the purpose of giving evidence, representatives of labor and of the contractors chosen from the same locality.

It is the opinion of this office that under chapter 139 the State of Nevada, and its political subdivisions, is to require by contract the payment of the prevailing scale of wages of the locality in which the work is to be done and not the prevailing scale of wages of any other locality, and that when such a scale of wages is in doubt it is the duty of the Labor Commissioner, in the manner provided for by statute, to determine the scale of wages that is being paid in that particular locality. The statute clearly contemplates that a different scale of wages may constitute the prevailing wage scale in different localities within the state, and we cannot see the materiality of what the prevailing wage may be in one locality when determining the prevailing wage for some other and different locality.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

By: W. HOWARD GRAY, *Deputy Attorney-General*

MR. JAMES FITZGERALD, *Labor Commissioner of Nevada, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1937-245 Teachers' Retirement Salary Act Of 1937.**

Teacher who retired in 1933, but returned to teaching in 1935 and is teaching in 1937, must accept the provisions of the 1937 Act, and is entitled to a refund of all except \$60 of the moneys paid by her on her retirement salary under the 1915 Act.

STATEMENT OF FACTS

CARSON CITY, September 29, 1937

A teacher was granted full retirement on August 1, 1933. She returned to teaching in September 1935, and is teaching this year. She has more than 30 years of certified service before August 1, 1933, and has contributed \$360 to the Public School Teacher's Permanent Fund, part of this amount having been deducted from her retirement salary.

INQUIRY

Must this teacher accept the 1937 Teachers' Pension Act in order to be eligible to a pension at some future date or is no action on her part necessary?

OPINION

It is the opinion of this office that the teacher referred to in the above statement of facts and inquiry must accept the 1937 Teachers' Pension Act in order to be eligible for a pension at some future date. The 1915 Teachers' Retirement Salary Act stands repealed, and there is no provision in the 1937 Act for the payment of a pension to a teacher who has been fully retired under the 1915 Act, but has returned to teaching school and was so engaged at the time of the passage and effective date of the 1937 Teachers' Pension Act. It must follow then that if this teacher desires to be eligible for a pension in the future she must accept the 1937 Act. On the other hand, should

she reject the 1937 Act, it is the opinion of this office that she would be entitled to a refund of all payments made under the provisions of the 1915 Act with the exception of \$60.

Respectfully submitted,  
GRAY MASHBURN, *Attorney-General*.  
By: W. HOWARD GRAY, *Deputy Attorney-General*  
CHAUNCEY W. SMITH, *Superintendent of Public Instruction, Carson City, Nevada*.

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SYLLABUS

**OPINION NO. 1937-246 Teachers' Retirement Salary Act.**

Teachers who accept the 1937 Act are entitled to a refund of all except \$60 of the moneys paid in under the 1915 Retirement Salary Act.

STATEMENT OF FACTS

CARSON CITY, September 29, 1937

Several teachers who have been contributing to the Public School Teachers' Permanent Fund under the 1915 Act have stated in writing to this office that they were rejecting the 1937 Teachers' Pension Act and have asked that their payments in excess of \$60 be refunded.

INQUIRY

What refund are teachers who have contributed to the Public School Teachers' Permanent Fund under the 1915 Act and who now reject the 1937 Act entitled to receive?

OPINION

It is the opinion of this office that section 19 of the 1937 Teachers' Retirement Salary Fund Act (chapter 209, 1937 Statutes of Nevada, page 473) clearly indicates the intention of the Legislature that should a teacher who was employed as such at the time of the approval and effective date of the 1937 Act desire to reject the provisions of the 1937 Act that he or she should be entitled to withdraw and have refunded to him or her all contributions made to the Public School Teacher's Permanent Fund in excess of a sum equal to five years' payment at the rate of \$12 for each year of service, that is, \$60 in all.

While the exact situation as presented by the above statement of facts is not specifically taken care of by the statutes, we believe the foregoing opinion is in accord with the legislative intent as expressed in section 19 which applies to a slightly different situation. However, since the statute has not specifically dealt with the subject presented by the above inquiry, we are of the opinion that the Public School Teachers' Retirement Salary Fund Board, as established by the 1937 Act, is granted sufficient powers to make rules and regulations which could be made applicable to the specific situation hereinabove presented. This office understands that the Public School Teachers' Retirement Salary Fund Board has already adopted a rule which is in agreement with the opinion herein expressed, and we are of the opinion that such a rule is within the powers of the board.

Respectfully submitted,  
GRAY MASHBURN, *Attorney-General*.  
By: W. HOWARD GRAY, *Deputy Attorney-General*  
CHAUNCEY W. SMITH, *Superintendent of Public Instruction, Carson City, Nevada*.

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SYLLABUS

**OPINION NO. 1937-247 Teachers' Retirement Salary Act.**

Teachers must have taught 20 years under the 1915 Act before July 1, 1937, to retire at the end of 30 years of service and before reaching the age of 60 years.

STATEMENT OF FACTS

CARSON CITY, September 29, 1937

A teacher in the public schools of the State of Nevada has a certified record of three years of teaching service outside this State and 16 years in this State before July 1, 1936. During the 1936-1937 school year this teacher was under contract for the entire school year, but was prevented from teaching on account of sickness until April 5, 1937, at which time she resumed teaching and taught until the end of the term, which was June 11, 1937. During that portion of the school year that the teacher was under contract but did not teach she made no contribution under the 1915 Act to the Public School Teachers' Retirement Fund.

INQUIRY

Does the teacher who is referred to in the above statement of facts come within the provisions contained in section 12 of the 1937 Teachers' Pension Act, which allows original members who have completed 20 years of service before July 1, 1937, to retire at the end of 30 years of service and before reaching the age of 60 years?

OPINION

Section 12 of chapter 209, 1937 Statutes of Nevada, page 480, provides in part as follows:

The foregoing minimum requirement age of 60 shall not be a requirement for retirement in the case of original members who have completed on or before the effective date of this Act at least 20 school years of the total 30 years of teaching service required under section 12 hereof; \* \* \*

It was evidently the intention of the Legislature that teachers who had completed at least 20 school years of teaching service prior to the effective date of the 1937 Act could be retired before they reached the age of 60 years upon meeting and fulfilling all other requirements for retirement as stated in the 1937 Act.

Subdivision (d) of section 1 of chapter 209, defines the terms "school year," "years of service," and "year of teaching service." This section provides in part as follows:

Any legally qualified teacher \* \* \* employed in a public school for one or more months of the statutory school year, but less than the full school year, shall be considered as having taught such fraction of the school year thereof as the number of months thus taught is of the entire number of school months that such school was maintained that year; \* \* \* *and provided further*, that in no case shall leaves of absence amounting to school years or half school years be counted as service; \* \* \*

Since the statute defines the term "school years" as used in that portion of section 12 of the Act herein quoted, we are bound by such definition. The fact that the teacher in question did not in fact teach for the greater portion of the school year amounts in effect to a leave of absence, and such leave of absence, as provided for in the statute, cannot be counted as service. Attention is also drawn to the fact that during this leave of absence the teacher in question made no

contribution to the Public School Teachers' Retirement Fund as provided for under the 1915 Statutes then in force and effect.

Since the teacher in question taught only two months of the school year of 1936-1937, she did not complete the full 20 years of service prior to the effective date of the 1937 Act.

For the foregoing reasons 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.*

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SYLLABUS

**OPINION NO. 1937-248 Teachers' Retirement Salary Act.**

Any teacher who taught in the public schools on March 29, 1937, and is now employed in the teaching service, does not have the privilege of giving notification of acceptance of the 1937 Teachers' Retirement Salary Act, and has no right to reject the Act.

STATEMENT OF FACTS

CARSON CITY, October 4, 1937

A teacher who taught from the beginning of the school term to the last of October, a total of 39 days, and resigned because of illness, and did not teach any more during the 1936-1937 school year, now wishes to reject the 1937 Teachers' Retirement Salary Act. Her contract for the 1937-1938 school year is dated June 1, 1937.

INQUIRY

Does this teacher have the right to reject the 1937 Teachers' Retirement Salary Act?

OPINION

The answer to the foregoing inquiry involves the construction of sections 28 and 29 of chapter 209, 1937 Statutes of Nevada, pages 473-487.

Section 28 reads as follows:

SEC. 28. This Act shall be binding upon all such teachers employed in the public schools of this State at the time of the effective date of this Act who shall, on or before October 1, 1937, sign and deliver to the Superintendent of Public Instruction and the Deputy Superintendent of Public Instruction of the supervision district in which said teachers are in service, a notification that said teachers agree to be bound by and to avail themselves of the benefits of this Act. The Public School Teachers' Retirement Salary Fund Board is hereby authorized and empowered to extend the time limit within which such notification may be made to a date not later than October 1, 1938.

Section 29 reads as follows:

SEC. 29. This Act shall be binding upon all teachers elected or appointed to teach in the public schools of this State after the effective date of this Act, who, not being in the service of the public schools at the time of the approval of said Act,

were not competent to sign or deliver the notification specified hereinabove in section 28.

These two sections dealing with the same subject matter should be construed together in pari material if possible, but if there is a conflict between them, then the latter, that is, section 29, must prevail.

As this office reads section 29 it appears to have been the intention of the Legislature that the 1937 Teachers' Retirement Salary Act should be binding upon all teachers in the public schools of this State who were elected or appointed to teach after the effective date of the Act, that is, July 2, 1937, unless such teacher by being in the service of the public schools on the date of approval of the Act (*i.e.*, March 29, 1937) would have the privilege of accepting of Act. It would appear that the date of election or appointment of a teacher is not material, but that the determining point is whether or not the teaching period for which the teacher was employed would or would not begin subsequent to the effective date of the Act. In the event that the school year for which a teacher was employed began after the effective date of the Act the statute would be binding unless such teacher was in the service of the public schools at the time of the approval of the Act.

Section 28, or the next preceding section of the one considered, purports to make the statute binding upon such teachers who were employed in the public schools at the time of the effective date of the Act, and who on or before a certain date gave notification of their acceptance of the Act.

There would appear to be a conflict between this section and the latter part of section 29, in that section 28 gives the privilege of acceptance to those employed in the public schools on the effective date of the Act, while section 29 makes the Act binding on all teachers except those in the service of the public schools at the time of the approval of the Act. There would be no question if the date of approval and the effective date of the Act were one and the same.

In view of the conflict between sections 28 and 29, we are forced to apply the rule of statutory construction heretofore referred to, which is that where a conflict exists between two sections of the same Act the latter section prevails on the theory that the latest expression of the Legislature upon a subject expresses its legislative intent. We, therefore, read section 28 as though there were inserted in lieu of the words "effective date of this Act" the language of section 29, which provides in effect that the teacher who has the privilege of accepting the benefits of the Act is one who was in the service of the public schools at the time of the approval of said Act.

The teacher referred to in the statement of facts who resigned after 39 days of teaching in the school year 1936-1937, was not employed in or engaged in the service of the public schools on the date of the approval of the 1937 Teachers' Retirement Salary Act, which date was March 29, 1937. Although her contract for the school year 1937-1938 was dated June 1, 1937, she was by that contract elected to teach after the effective date of the Act, that is, to teach for the school year beginning on the 7th day of September 1937. Since the teacher in question was not in the service of the public schools on March 29, 1937, and since she was employed for a period of teaching service subsequent to the effective date of the Act, this office is of the opinion that she does not have the privilege of giving the notification of acceptance provided for in section 28 of the Act, and that the Act is binding upon her.

For the foregoing reasons the above 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.*

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SYLLABUS

**OPINION NO. 1937-249 Minimum Wage for Unskilled Labor.**

This statute is applicable to incorporated towns and cities.

INQUIRY

CARSON CITY, October 4, 1937

Does chapter 7, Statutes of Nevada 1935, providing a minimum wage rate for unskilled labor on public works carried on by the State or its political subdivisions, apply to a municipal corporation organized and existing under the laws of Nevada?

OPINION

A municipal corporation is a public corporation created by the State for political purposes having such subordinate and local powers as may be granted it by the Legislature. It is a mere instrumentality of the State for the convenient administration of government, and its powers may be qualified, enlarged or withdrawn at the pleasure of the Legislature without the consent of such corporation or the inhabitants thereof. *City of Reno v. Stoddard*, 40 Nev. 537; *Tonopah Sewer & D. Co. v. Nye County*, 50 Nev. 173, 19 R.C.L. 697, sec. 9, 730, sec. 361; *Atkin v. Kansas*, 191 U.S. 207.

Chapter 7, Statutes of Nevada 1935, is an expression of the legislative will that the minimum wage rate for all unskilled labor employed in the carrying on of all public work by the State and its political subdivisions or by the governing board or commission thereof shall be the minimum rate fixed by such statute. This it undoubtedly had the right to do. That it had the power to provide the same minimum wage rate for public works carried on by one of its municipal corporations cannot well be denied in view of the foregoing authorities. It was held by the Supreme Court of the United States in *Atkin v. Kansas* (cited above) that it is within the power of a State, as guardian and trustee for its people and having full control of its affairs, to prescribe the conditions upon which it will permit public work to be done on behalf of itself or its municipalities, and that in the exercise of these powers it may by statute provide that eight hours shall constitute a day's work for all laborers employed by or on behalf of the State or any of its municipalities, and making it unlawful for anyone thereafter contracting to do any public work to require or permit any laborer to work longer than eight hours per day except under certain specified conditions and requiring such contractors to pay the current rate of daily wages. And one who after the enactment of such a statute contracts for such public work is not by reason of its provisions deprived of his liberty or his property without due process of law nor denied the equal protection of the laws within the meaning of the fourteenth amendment, even though it appear that the current rate of wages is based on private work, where ten hours constitute a day's work, or that the work in excess of eight hours per day is not dangerous to the health of the laborers.

Further, in view of the recent decision of the United States Supreme Court in *West Coast Hotel Co. v. Parrish*, 81 L. Ed. 455, sustaining a State minimum wage statute pertaining to minimum wages paid female employees in private employment, it certainly cannot be said that the State may not regulate the wages paid by it or any of its political subdivisions, including municipal corporations, to the unskilled laborers engaged in the carrying on of public works thereby.

The inquiry is answered in the affirmative.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

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

JAMES FITZGERALD, *Labor Commissioner, Carson City, Nevada*.

**OPINION NO. 1937-250 Minimum Wage for Women.**

Females employed as cooks in fraternity and sorority houses at the University, or such other educational institutions as may have such houses, come under the provisions of the minimum wage law for women.

INQUIRY

CARSON CITY, October 5, 1937

Does the Nevada Minimum Wage Law for Women apply to female cooks employed by fraternity and sorority houses used by students of the State University or other public educational institutions?

OPINION

We are advised that fraternity and sorority houses are maintained by the students attending the University or high school, where such houses are in existence; that each student pays a certain amount toward the maintenance of the house in question and receives board and lodging thereat; that a cook is employed and receives wages for cooking services. We are also advised that such houses are not maintained by the educational institution as a part of its educational facilities, but is, as stated above, maintained by the students, and is not provided for by law.

The only exemption contained in the law in question applies to female employees of the State, or any county, city or town therein, or to females engaged in domestic service. (Section 6 of said law.)

We think it clear that fraternity and sorority houses are not such departments of the State or its political subdivisions, or such agencies thereof as to come within the exemption provided in the law. To the contrary, we think they are private institutions existing for the benefit of students who are required to pay for the services they there receive.

We are also of the opinion that female employees employed at such houses are not engaged in such domestic service as is meant by the term contained in the exemption clause, but are engaged in service comparable to that of hotel service, which we have heretofore held not to be exempted under the minimum wage law. We think that the term "domestic service" contained in the section of the law providing the exempted employments relates to services performed in private homes and not to services performed in institutions where a charge is made for services rendered the guest thereof.

It may be that the houses in question do not return a profit and that the amount paid by each student covers no more than the actual cost to such student for his or her share in the maintenance of the house, but we think this immaterial as it does not appear in the law that nonprofit institutions are exempt. Exemption statutes or clauses must be strictly construed. *Erie Ry. Co. v. Pennsylvania*, 21 Wall. 492; *Railway Co. v. Philadelphia*, 101 U.S. 528; *Camas Stage Co. v. Kozer*, 209 P. at page 99.

It is our opinion that female cooks employed in fraternity and sorority houses are covered by the terms of the law in question.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

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

JAMES FITZGERALD, *Labor Commissioner, Carson City, Nevada.*

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SYLLABUS

**OPINION NO. 1937-251 Construction of Chapter 148, 1937 Statutes of Nevada.**

Does chapter 148, 1937 Statutes of Nevada, page 324, conflict with chapter 2, 1935 Statutes of Nevada, page 4? And, would payment of claims presented under



chapter 148, 1937 Statutes of Nevada, page 324, be illegal? Query No. 1 is answered in the negative, and Query No. 2 is answered in the negative.

#### INQUIRIES

CARSON CITY, October 5, 1937

1. Does chapter 148, 1937 Statutes of Nevada, page 324, conflict in any manner with chapter 2, 1935 Statutes of Nevada, page 4?
2. Would payment of claims presented under chapter 148, 1937 Statutes of Nevada, page 324, be illegal?

#### OPINION

Chapter 148, Statutes of Nevada, page 324, provides an appropriation for the protection of livestock, game birds, and animals, farm and range crops, for the control of rodents and other animal pests, and for the control of diseases common to rodents and other animal pests that may be transmissible to other animals or birds or human beings. The Act places the control of the expenditure of the appropriation under the supervision of the State Board of Stock Commissioners and authorizes that commission to cooperate with the Federal Government.

Chapter 2 of the 1935 Statutes of Nevada, page 4, the same being an initiative measure enacted pursuant to the direct vote of the people at the general election November 6, 1934, provides for the payment of bounties for the destruction and eradication of predatory animals. The Act prescribes the manner of payment of bounties and provides for cooperation between the State of Nevada and the Federal Government in such eradication by means of bounty payments. The Act, however, prohibits the State of Nevada from being a party to an agreement whereby salaries instead of bounties are paid for the destruction and eradication of predatory animals, or whereby less than the full skin of the animal is accepted as verification of any claim for bounty. Section 1 of chapter 2, 1935 Statutes of Nevada, fixes the bounties to be paid for the destruction and eradication of predatory animals within the State of Nevada as follows: Mountain lions, \$20 each; coyotes, \$2.50 each; and for bobcats, \$2 each. No other animals are mentioned.

Chapter 2 of the 1935 Statutes of Nevada, being an initiative measure, cannot be annulled, set aside or repealed by the Legislature within three years from the date the said Act took effect. Section 3, article XIX, Constitution of the State of Nevada.

Chapter 148, 1937 Statutes of Nevada, does not attempt by express language to repeal, annul or set aside chapter 2 of the 1935 Statutes of Nevada, or any other legislative Act.

The courts have uniformly adopted the rule that amendment and repeal of preexisting laws by implication are not favored. 59 C.J., paragraph 434, page 857; 59 C.J., paragraph 510, page 905.

A repeal by implication takes effect only when the conflict, repugnancy, or inconsistency is clear, plain, manifest, and irreconcilable, or as sometimes stated where it is absolutely invincible and material and the two Acts cannot be harmonized, or both cannot stand, operate, or be given effect at the same time. 59 C.J., paragraph 516, page 193, et seq.

Looking at the two Acts we find that chapter 2, 1935 Statutes, was enacted for the purpose of paying bounties for the destruction and eradication of predatory animals. However, the statute lists only three such animals, *i.e.*, mountain lions, coyotes and bobcats. By section 6 of the Act the State of Nevada is prohibited from entering into any contract or agreement whereby salaries in place of bounties are paid for the destruction of predatory animals. Since the only predatory animals mentioned in the Act are the three, *viz*, mountain lions, coyotes and bobcats, the prohibitions relative to the right of contract cannot by implication be extended to refer to other predatory animals, insects, pests or rodents.

On the other hand, chapter 148 of the 1937 Statutes of Nevada makes an appropriation to be expended "for the control of rodents and other animal pests, injurious to livestock, game birds and animals, or farm and range crops, and for the control of diseases harbored by such animal pests, that are, or may be, transmissible to animals, birds, and human beings, within the State of Nevada."

It seems clear to this office that there is no clear, irreconcilable or manifest conflict or repugnancy between the purposes and objectives of the two Acts. On the other hand, the later statute seems to begin where the first left off, and merely extends the field within which the State of Nevada may cooperate with the Federal Government in the protection of livestock, game birds, range crops, and bird, animal and human life.

Section 2 of chapter 148, 1937 Statutes of Nevada authorizes the State of Nevada to enter into a definite agreement with the Federal Government, prescribing the manner, terms and conditions of cooperation between the State and Federal Government in attempting to achieve the ends, aims, and objectives of the 1937 Act. It seems quite plain that the agreement authorized by the Legislature in the section of the statute last referred to would not be in conflict with any other statute, and specifically would not violate the provisions of section 6 of chapter 2 of the 1935 Statutes of Nevada so long as its ends, aims and objectives were those set forth in section 1 of chapter 148 of the 1937 Statutes.

In other words, this office is of the opinion that the two Acts are separate and distinct; that one does not limit the other, and that the later Act does not attempt to amend, annul, repeal, or set aside the initiative Act, and that the later Act is fully operative in the sphere as set forth in section 1 of the Act.

It will be noted that chapter 2 of the 1935 Statutes of Nevada, when enacted into law, failed to provide the necessary appropriation for the purchase of the perforating machines by which the skins of the predatory animals could be marked. In Opinion No. 153, Attorney-General's Opinions, 1934-1936, this office held that chapter 2 of the 1935 Statutes could not be administered for the reason that it failed to provide the appropriation for the purchase of such perforating machines. The Legislature or the people through initiative measure have never supplied such an appropriation.

Where a law is so imperfect as to make it utterly impossible to execute it, the courts will declare it void. *Ex Parte Anderson*, 49 Nev. 208-213.

Applying the foregoing rule, there is grave doubt that chapter 2 of the 1935 Statutes ever became an operating, effective, or existing law of the State of Nevada.

For the foregoing reasons inquiry No. 1 is answered in the negative, and inquiry No. 2 is answered in the negative.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

By: W. HOWARD GRAY, *Deputy Attorney-General*

HON. HENRY C. SCHMIDT, *State Controller, Carson City, Nevada*.

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SYLLABUS

**OPINION NO. 1937-252 Unemployment Compensation Law.**

Directors of corporation serving as such, are not employees within the meaning of the law. Directors' fees do not constitute wages and are not subject to the law. Directors employed in other services for corporation are employees and remuneration therefor constitutes wages subject to the law.

INQUIRY

CARSON CITY, November 29, 1937

A director of a corporation performs services for the corporation that are in addition to his directorial duties for which he receives compensation, which compensation is in addition to the director fees paid him for attending directors' meetings. Are contributions to the Unemployment Compensation Fund due on both the compensation paid for the additional services of such director and his director's fees, or on the additional compensation alone?

OPINION

It has been uniformly held in opinions and rulings of various unemployment compensation divisions in the United States, wherever the question has been raised, that fees paid directors of corporations for attending directors' meetings do not constitute wages within the meaning of unemployment compensation laws. 456-Texas; 420-Calif.; 641-Utah; 494-Pa.; 737-Calif. A. G.; 678-Utah A. G.; 79 S.S.T. 82. Therefore no contributions to the Unemployment Compensation Fund were required in those States. It has also been ruled that directors of a corporation are not employees thereof when serving as directors only. 641-Utah; 678-Utah A. G.; 737-Calif. A. G. An examination of corporation law and cases pertaining thereto convinces us that the foregoing rulings are correct when applied to a similar question arising under the Nevada law.

It is our opinion that directors serving as such are not employees within the meaning of the Nevada law, and that directors' fees paid for such services do not constitute wages within the meaning of such law, and are not to be regarded as any part of the basis for unemployment contributions. On the other hand, where a director is employed by a corporation in a service other than that of a director, such director would then be deemed an employee and the remuneration therefor subject to being reported as wages and contributions made thereon to the Unemployment Compensation Fund.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

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

HON. GEORGE FRIEDHOFF, *Director, Unemployment Compensation Division of Nevada, Carson City, Nevada.*

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**OPINION NO. 1937-D**

CARSON CITY, November 30, 1937

JOHN E. WORDEN, M.D., *State Health Officer, State Capitol Building, Carson City, Nevada*

DEAR DR. WORDEN: This is in answer to your letter to me of 29th instant, which I have just received and to which you attached a carbon copy of your letter of 29th instant to Mr. Wm. C. Brechi, c/o Pacific Tel. & Tel. Company, Woodland, California, and also a copy of his letter to you of 23d instant in which he says he has "a permit of removal (covering ashes of a deceased person) in the State of California" and in which he asks your advice as to the law and procedure in Nevada covering "the scattering of human ashes."

I note that your letter informs him that the Nevada rules and regulations refer only to the corpse, no mention being made of the ashes. You make no reference to the law on the point or as to whether there is a law covering the point, apparently leaving this question of the law to be covered by me in my advice or opinion to you.

In view of your statement to the effect that Nevada has no "rules and regulations" covering this matter (which I assume to be a fact, although I have no copy of the Rules and Regulations of the State Board of Health or Health Officer), may I suggest that you or the State Board of Health (the body authorized to make rules and regulations covering this matter) consider this matter and adopt some rule or regulation covering it, as it seems that cremation is becoming somewhat more prevalent than it was a few years ago and that the scattering of ashes of human bodies is also becoming more prevalent than formerly; and it may be, therefore, that there will be more occasion in the future for some rule or regulation covering this matter than formerly. In making such a rule or regulation, may I suggest that it would be well to provide for the securing of the consent of the owner of the property where the human ashes are to be scattered; otherwise the person scattering the ashes might be prosecuted as a trespasser, especially if he persisted in scattering the ashes over the objection of the owner. I suggest that, if I, as Attorney-General, am

to advise the State Health Officer or State Board of Health on matters of this kind, or to furnish official opinions with reference to these matters, we would be in a better position to give proper and more dependable advice if we had a complete copy of your rules and regulations as they exist at present. We have never had a copy of your rules and regulations.

For the present, I believe the suggestions made by you to Mr. Brechi in your letter to him of 29th instant are sufficient and proper, unless you desire to add to your advice to Mr. Brechi the above-mentioned proviso requiring the consent of the owner of the property where the ashes are to be scattered, if the request for the scattering of the ashes relates to any particular privately owned piece of property in this State as the place where the ashes are to be scattered.

I find no State law covering the matter about which you make inquiry.

In view of the fact that county health officers and county boards of health, as well as city health officers and city boards of health and probably city councils, are also authorized to make rules and regulations, it might be well for Mr. Brechi to investigate the matter in the particular city or county where the ashes are to be scattered, to the end that he may be sure he is not violating any such city or county rule or regulation.

Sincerely yours,  
GRAY MASHBURN, *Attorney-General*.

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