

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1938

SYLLABUS

**260. Old-Age Assistance Law.**

Inmates of institutions may not receive or be paid old-age assistance while such inmates.

INQUIRY

CARSON CITY, July 8, 1938.

May inmates of Nevada Hospital for Mental Diseases legally be paid and receive old-age assistance while such inmates?

OPINION

Both the Federal and State laws relating to old-age assistance definitely provide that inmates of such "institutions" may not be paid or receive old-age assistance while such inmates. It is, therefore, the opinion of this office that such inmates may not legally receive or be paid old-age assistance while such inmates.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

DR. J.C. FERREL, *Superintendent, Nevada Hospital for Mental Diseases*.

SYLLABUS

**261. Nevada Hospital for Mental Diseases.**

A patient may not be legally admitted without a court hearing, taking of evidence, and examination of physicians and due commitment by such court.

INQUIRY

CARSON CITY, July 12, 1938.

May a patient be legally admitted to Nevada Hospital for Mental Diseases without a court hearing in the courts of this State, the taking of evidence and examination of physicians, and a due commitment by such a court, the patient to be accompanied by a transcript of the proceedings of the court and the original, or certified copy, of the court commitment?

OPINION

This question must be answered in the negative. The law absolutely limits the admission of insane persons to Nevada Hospital for Mental Diseases to persons who have been duly committed by courts of this State having jurisdiction after formal hearings by such courts, or, in the absence of the judges of such courts, then by the clerks of such courts, at which the sworn testimony of witnesses is to be taken and the certification under oath of at least two licensed,

practicing physicians has been had to the fact of insanity and the other formal facts required in such certifications, except in the single instance provided for in chapter 205, 1937 Statutes of Nevada, section 7, page 462, covering the situations where there is only one physician residing at the county seat of the county where such court is held, or within 50 miles for a temporary commitment of such certificate of one physician is sufficient for a temporary commitment of such insane person to your hospital requires that you cause an examination to be made by another reputable, licensed practicing physicians.

Since the question of the number of physicians whose certification under oath must be had is not involved in this inquiry, the provisions of the Act requiring such certification is not involved here. The sole question presented by the inquiry is whether you may ever admit a patient to your hospital unless and until he shall first have been duly committed by a court of this State having jurisdiction of the person. It is the unqualified opinion of this office that such a formal commitment by such a court, or, in the absence of the judge, by the clerk thereof, is a prerequisite to the admission of any person to Nevada Hospital for Mental Diseases; and that you are absolutely prohibited by law from admitting anyone to your hospital without such a solemn commitment, and the other prerequisites required by said section 7.

Respectfully submitted,

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DR. J.C. FERREL, *Superintendent, Nevada Hospital for Mental Diseases.*

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#### SYLLABUS

#### **262. Vacancy in Office of State Senator.**

Section 12, article IV, Constitution, provides mode of filling vacancy by appointment by Board of County Commissioners only of person of same political party as person elected whose unexpired term is to be filled. No appointment necessary where general election, i.e., an election at which that particular senatorial office would be filled had no vacancy occurred, will intervene between time of vacancy and the next succeeding session of the Legislature. Person appointed to fill vacancy in office of State Senator holds such office to the expiration of the term. The words "general election" as used in section 12, article IV, Constitution, mean the general election at which a State Senator would have been elected had no vacancy occurred.

#### STATEMENT

CARSON CITY, July 15, 1938.

M, a resident of N County, was elected State Senator at a regular election in November of 1936 for the regular term of four years, which term will expire on the day succeeding the November election day in the year 1940. M served as State Senator at the regular session of the 1937 Legislature, and, after the adjournment of such session and in the year 1938, died while still filling the office of the State Senator pursuant to his said election, thus causing a vacancy in said office. No special session of the Legislature up to this time has been called by the Governor. A general election is to be held on November 7, 1938, at which State and county officers required by law to be elected are to be chosen, who will have been nominated thereto at the primary election on September 6, 1938.

## INQUIRY

1. In view of the language contained in section 12 of article IV, Constitution of Nevada, and in view of the foregoing statement of facts, does the Board of County Commissioners of N County have the power to now appoint a suitable person to fill the vacancy caused by the death of M, or is such vacancy to be filled at the November election of 1938 by the vote of the people of the County of N?

2. If the said vacancy is now filled by appointment by the Board of County Commissioners, how long does the person so appointed hold office?

## OPINION

It appears from the above statement of facts that a State Senator, duly elected in 1936 for the term of four years died early in 1938. The question presented is how and in what manner is the vacancy to be now filled; *i.e.*, by appointment by the Board of County Commissioners or by an election by the people, in view of the language contained in the proviso in the above constitutional provision. The appointment or election being for the purpose of filling the unexpired term of the deceased Senator.

Section 12 of article IV of the Constitution was placed therein by the vote of the people at the general election of 1922. This fact, we think, is a pertinent fact, in that such section most materially amended the section 12 of article IV of the Constitution adopted in 1864, which said section read as follows:

When vacancies occur in either house, the Governor shall issue writs of election to fill such vacancy.

An examination of the Constitution discloses that the framers thereof treated the offices of Assemblymen and Senators as distinct and separate from all other State and county offices with respect to the filling of vacancies therein, and certainly the amendment of section 12 of article IV in 1922 continues such treatment. It is to be noted the original section 12 of article IV directed the Governor to issue writs of election to fill vacancies occurring in either house of the Legislature. Under such a constitutional provision, we think, no other method existed or could or could be provided by the Legislature or any other body or person for the filling of vacancies in the office of Assemblyman or Senator except by election by the people, and no doubt the Legislature in 1866 took the same view in the matter, because in that year it enacted a general Act relating to officers, the same now being sections 4765-4847 Nevada Compiled Laws 1929, and provide in section 33 of the Act; *i.e.*, section 4797 Nevada Compiled Laws 1929, that

When any vacancy shall occur in the office of a member of the Senate or Assembly, by death, resignation, or otherwise, and a session of the Legislature is to take place before the next general election, the Governor shall issue a writ of election, directed to the Board of County Commissioners of the county in which such vacancy shall occur, commanding such board to notify the several inspectors in their county or district to hold a special election to fill such vacancy or vacancies, at a time appointed by the Governor.

And in section 36; *i.e.*, section 4800 Nevada Compiled Laws 1929, it was provided that

When a vacancy shall occur in the office of a member of the Legislature during the session thereof, such vacancy shall be notified to the Governor, by the presiding officer of the house in which such vacancy shall occur.

Neither of these sections has been amended since their adoption in 1866, and were no doubt adopted for the very purpose of facilitating action by the Governor under said section 12 of article IV as it then stood. The above sections of the law 1866 now have no force or effect because they have been repealed by the most evident implication by the amendment to said section 12, article IV, *Wren v. Dixon*, [40 Nev. 170](#).

With the exception of the office of Governor, the Governor being succeeded by the Lieutenant Governor, the Constitution in 1864 and now provides how vacancies in the office of any justice of the Supreme Court, District Judge or other State officer may be filled; *i.e.*, by appointment by the Governor until it shall be supplied at the next general election, when it shall be filled for the residue of the unexpired term. Section 22, article XVII, Constitution.

But this section in our opinion had in 1864, and has now, no application to Assemblymen and Senators. It related and relates to Justices of the Supreme Court, District Judges and State officers other than the offices of Assemblymen and Senators with respect to vacancies as a separate matter. If the framers of the Constitution intended that a vacancy in the office of an Assemblyman or Senator was to be filled in the manner provided in section 22 of article XVII, certainly they would not have placed section 12 in article IV and provided exclusively for an election to fill the vacancy, there would have been no need of such section. That they intended to fill vacancies in the office of Assemblymen and Senators in a special manner, is we think, beyond question. Further, in the amendment to section 12, article IV, adopted in 1922, the people of the State have undoubtedly signified their intention that the filling of vacancies in the office of Assemblymen or Senators shall continue to be treated specially and not in accordance with section 22, article XVII, for it is most logical to assume that the Legislature in adopting the resolution amending the Constitution and the people voting thereon had knowledge of the constitutional provision relative to filling vacancies in office of State officers, and if they had desired the same method to be followed with respect to their representatives in the Legislature they would have said so and not set up a different method with respect to those representatives. It may be thought that section 8 of article V of the Constitution may have some bearing on the question, but a reading of such section will disclose it has no application whatsoever, as that section simply empowers the Governor to fill a vacancy in office when no other mode is provided by the Constitution and laws for filling such vacancy. In *State v. Irwin*, [5 Nev. 127](#), the Supreme Court said of this provision of the Constitution, that:

Two things must concur: There must be a vacancy, and no provision made by the Constitution or no existent law for filling the same, before the Governor can exercise the appointing power.

Section 12 of article IV, provides the mode for filling a vacancy in the office of an Assemblyman or Senator.

We are not unmindful of the rule of constitutional construction requiring the construction of the constitution as a whole and effect given to all its parts, but, there is another rule that is also

applied in the construing of constitutional provisions. Amendments to constitutions are adopted for the express purpose of making changes in the existing system, and a conflict may arise between an amendment and portions of a constitution adopted at an earlier time. The rule is that an amendment adopted to a constitutional provision is a part of the constitution and construed accordingly. Such amendment cannot be questioned on the ground that it conflicts with preexisting constitutional provisions. "If there is a real inconsistency, the amendment must prevail because it is the latest expression of the people. In such a case there is no room for the application of the rule as to harmonizing inconsistent provisions." 11 Am. Jur. 663, sec. 54, and cases there cited.

We think the latter rule above stated is to be applied to the question here because:

1. The intent of the framers of the Constitution was that the filling of vacancies in the office of Assemblyman or Senator was to be had in a manner separate and distinct from that provided for the filling of vacancies in other State offices and offices of judges; *i.e.*, section 12 of article IV as it originally existed being clearly inconsistent with section 8 of article V and section 22 of article XVII, as we have heretofore shown.

2. The Legislature in adopting the resolution amending section 12 of article IV and the people voting thereon in adopting such resolution clearly intended that the manner of filling vacancies in the office of Assemblyman or Senator was still to be treated as separate and distinct from the manner of filling vacancies in other State offices and offices of judges.

3. Section 12 of article IV as it now appears is inconsistent with section 8 of article V and section 22 of article XVII, when the official duties of Assemblyman or Senator are taken into consideration and compared with the duties of other State officers and judges, and the language of said Section 12 is carefully examined.

We have discussed propositions number 1 and 2 hereinbefore. We will not discuss proposition 3.

The Constitution provides with respect to Assemblymen and Senators, as follows:

The members of the assembly shall be chosen biennially by the qualified electors of their respective districts, on the Tuesday after the first Monday in November, and their term of office shall be two years from the day next after their election. Sec. 3, art. IV, Const.

Senators shall be chosen at the same time and places as members of the assembly, by the qualified electors of their respective districts, and their term of office shall be four years from the day next after their election. Sec. 4, art. IV, Const.

At the general election in A.D. eighteen hundred and sixty-six, and thereafter the term of Senators shall be four years from the day next after their election, and members of the Assembly for two years from the day succeeding such general election, and the terms of Senators shall be allotted by the Legislature in long and short terms, as hereinbefore provided, so that one-half the number, as nearly as may be, shall be elected every two years. Sec. 10, art XVII, Const.

Thus the term of a State Senator was and is definitely fixed by the Constitution at four years from the day succeeding his election to such office at a general election.

What does the term "general election" as so used mean? Does it mean the commonly called

“biennial election” held in this State every two years on the first Tuesday of November of those years? We think that it is most clear that it does not with respect to State Senators. The term “general election” as applied to the election of State Senators means the regular election once every four years when a State Senator is to be elected. That this is so has been definitely decided by our Supreme Court. In *State v. Collins*, [2 Nev. 351](#), in passing upon the election of a County Superintendent of Schools at a time other than at a regular election to that office (there being a vacancy in such office that had been filled by appointment) the court said:

We think, then, to carry out the spirit and intention of the law makers, we must interpret the phrase “until the next general election” to mean until the next general election at which a superintendent can be elected.

In *Ex rel. Bridges v. Jepsen*, [48 Nev. 64](#), the court had before it the question of whether an appointee to the office of County Clerk and Treasurer, who had been appointed by the Board of County Commissioners to fill a vacancy in such office caused by the death of the incumbent who had just entered upon a four-year term, should hold office until the expiration of such four-year term or whether there should be an election to fill such vacancy for the unexpired term by the people at the next ensuing election. The court held that the phrase “until the next general election” means the next general election for county officers who hold office for four years, and not the biennial general election held every two years, if occurring before the four-year term expires. As the term “general election” has been defined and construed by our Supreme Court, it necessarily follows that as applied to the election of a State Senator it means the election at which such Senator is to be elected; *i.e.*, an election held once every four years.

Senator M was elected at the regular election in November 1936, and under the above constitutional provisions his term of office extends to the day succeeding the November election day in 1940, which said election day in 1940 would be the day of the “general election” for that particular office. How then is the present vacancy to be filled under our Constitution?

Section 12, article IV, of the Constitution provides:

In case of the death or resignation of any member of the legislature, either senator or assemblyman, the county commissioners of the county from which such member was elected shall appoint a person of the same political party as the party which elected such senator or assemblyman to fill such vacancy; *provided*, that this section shall apply only in cases where no general election takes place between the time of such death or resignation and the next succeeding session of the legislature.

We think this constitutional provision is self-executing. It specifically provides how and when the vacancy in the office of either an Assemblyman or Senator shall be filled. It sets up the appointing power, and directs what person shall be appointed; *i.e.*, “a person or Assemblyman,” whose office is then vacant. No other person, board or body possesses the appointing power with respect to Senators and Assemblymen and any other provision of the Constitution earlier in time or statute lodging such appointing power elsewhere is most certainly nullified by this later constitutional provision.

But it will be said that the proviso contained in such constitutional provision so operates that,

where any regular or any general election is to take place between the time a vacancy in the office of an Assemblyman or Senator occurs and the next succeeding session of the Legislature, that the appointing power of the Board of County Commissioners is stayed and an election to fill such vacancy at any such regular or general election, irrespective of whether it is an election whereat the Assemblyman or Senator is to be regularly elected, must be had. We do not agree that the proviso so operates.

The language providing for the appointment of “a person of the same political party” is significant. Under the original section 12 of article IV and the statutes enacted thereunder (hereinbefore quoted) whenever there was a vacancy in the office of Assemblyman or Senator it was mandatory, before such vacancy could be filled, that an election be held. Certainly in such situation there was no assurance, and there could be none, that a person would be elected of the same political faith as that of the person originally elected. This no doubt accounts for the amendment to said section 12 in this respect. Such language perhaps does not have a particular significance with respect to the filling of a vacancy in the office of Assemblyman because his term of office is for two years only and ordinarily he only serves at the one session of the Legislature next succeeding his election. (The legislative sessions being biennial and follow after the regular election of Assemblymen. Sec. 2, art. IV, and sec. 12, art. XVII, Const.)

With respect to the office of State Senator, however, a different situation arises. He is elected under the Constitution for a term of four years; *i.e.*, for a term extending two years beyond that of an Assemblyman. When elected he certainly represents the political faith of the party electing him. Such party has the right, by reason of such election, to expect representation in the State Senate for at least two regular sessions of the Legislature following such election. Under the old section 12 of article IV, in the event of a vacancy in this office during the senatorial term, this representation by a person of the same political faith as the person originally elected could be and probably was taken away. It seems to us that the amendment to this section of article IV was adopted for the very purpose of providing for a continuance of the elected representation of a political faith during that particular term in the Senate. To hold, in the event of a vacancy in the office of State Senator, that the same must be filled at the very next regular election, irrespective of whether such election is the election at which a State Senator is due to be elected, would, in our opinion, destroy the intended effect of this particular constitutional provision and relegate the matter of the filling of the vacancy back to practically the same status that it was in prior to the amendment of the constitutional provision.

It is axiomatic that the policy of the State is determined by the Legislature, except of course where the people themselves have adopted a certain policy and incorporated the same in their Constitution. The Legislature is composed of the elected representatives of the people of their respective counties who bring to the Legislature the policies of a majority of their people. Under our scheme of government, these policies and their differences are formulated and presented by political parties. The elected representatives are supposed, if possible, to carry out the will of the party electing them. The people having provided four-year terms for State Senators in their Constitution, and, having so definitely changed the manner in which vacancies in such offices were to be filled from election in all cases to appointment of a person of the same political faith, certainly evidences the intent of the people to continue representation in the State Senate for the full four-year term of the same political party.

Further, it is to be noted that members of the Legislature, both Assemblymen and Senators, have no official duties to perform during the interim between sessions of the Legislature

excepting on rare occasions the President pro tempore of the Senate might be called upon to act as Governor. Their duties are legislative duties solely, and are to be performed at the time and place provided in the Constitution; *i.e.*, at the regular biennial session of the Legislature convened at the seat of government on the third Monday in January next ensuing the election of government on the third Monday in January next ensuing the election of members of the Assembly, and at such special sessions as may be called by the Governor. Secs. 1 and 2, art. IV; sec. 9, art. V, Const.

All other State officers and judges, with the exception perhaps of a few appointive boards and officers and the Regents of the University, are required to devote their entire time to the duties of their respective offices. Thus good reasons exist requiring the immediate filling of vacancies in such offices and this, we think, prompted the framers of the Constitution to provide in section 22 of article XVII for the filling of vacancies in any such offices by appointment by the Governor, until the same could be filled by an election, and the framers, having incorporated in such provision the language “until it shall be supplied at the next general election, *when it shall be filled by election for the residue of the unexpired term,*” (italics ours) intended that as to the vacancies in the offices of judges and elective State officers, other than by election at general or regular elections, irrespective of whether such officers were or are to be regularly elected thereat. Thus the Legislature in 1866 provided a statute substantially the same as the above constitutional provision and thereby, as to such officers, provided for an election to fill vacancies in such offices for the unexpired term. See section 4812 Nevada Compiled Laws 1929. We think this is an important fact to bear in mind. This particular section was enacted in 1866 at the same time as sections 4797 and 4800 Nevada Compiled Laws 1919, relating to the filling of vacancies in the offices of Assemblymen and Senators, hereinbefore at pages 2 and 3 quoted and discussed. In section 4812 the Legislature, following the mandate relative to the filling of vacancies in the offices of judges and other State officers contained in said section 22, article XVII, of the Constitution, by an election to fill such vacancies “for the residue of the expired term,: provided by law for an election to fill such vacancies at a time other than at the general or regular election for such offices. Thus we have both a constitutional and a statutory authorization to hold an election to fill vacancies in the offices of judges and State officers, other than in the offices of members of the Legislature, for the unexpired terms thereof, adopted and enacted at the same time as the constitutional provision and statutes relative to the filling of vacancies in the offices of Assemblymen and Senators hereinbefore discussed. As pointed out hereinbefore, it is clear that the framers of the Constitution intended that the matter of filling vacancies in the offices of Assemblymen and Senators was to keep separate and apart from matter of filling vacancies in the offices of judges and other State officers because of the special treatment accorded the Assemblymen and Senators in section 12 of article IV of the Constitution, and also the specific legislation thereunder incorporated in the law of 1866; *i.e.*, sections 4797 and 4800 Nevada Compiled Laws 1929. That the people intended to continue to treat the filling of vacancies in the offices of Assemblymen and Senators separate and apart from vacancies in the offices of judges and other State officers is conclusively evidenced by their adoption of the amended section 12 of said article IV. That part of section 4797 Nevada Compiled Laws 1929, dealing with the election to fill a vacancy in the office of Assemblyman or Senator is so inconsistent with the amended section 12 of said article IV of the Constitution as to stand repealed thereby is beyond question, while section 4800 Nevada Compiled Laws 1929, is we think, now ineffective for any purpose other than to provide that notice be given the Governor that a vacancy in office of a member of



the Legislature has occurred during a session of the Legislature—such section can have no effect on section 12 of said article IV. So that as the Constitution and law of this State stands today there is no constitutional or statutory authorization for the holding of a special election to fill a vacancy in any elective office. An election can be held only by virtue of some constitutional provision or legal enactment, either expressed or by direct implication, authorizing that particular election. *Sawyer v. Haydon*, [1 Nev. 75](#); *Ex rel. Bridges v. Jepsen*, [48 Nev. 64](#); *State ex rel. McGee v. Gardner*, 54 N.W. 606; *State v. Simon*, 26 Pac. 170.

And, we think, the foregoing rule of law when construed in conjunction with section 12 of article IV of the Constitution, as it now stands, does not authorize, even by implication, the election by the people to fill a vacancy in the office of a State senator at any time other than at the general election at which an election according to law for that particular office could be held in the regular course of events had there had been no vacancy.

We have heretofore pointed out what the term “general election” means, as construed by our Supreme Court; *i.e.*, that it means, as applied to the question here, the regular election once every four years when a State Senator is to be elected. *State v. Collins*, [2 Nev. 351](#); *Ex rel. Bridges v. Jepsen*, [48 Nev. 64](#).

That the term “general election” as used in the proviso contained in said section 12, article IV, Constitution, means the general election held once every four years for the office of State Senator is not only sustained by our Supreme Court, but also by the weight of authority. Witness the following cases:

In *the People of North Carolina v. Wilson*, 72 N.C. 155, it was held that the words “until the next regular election” in section 31, article IV, Constitution, mean until the next regular election for the office in which the vacancy occurred.

In *State ex rel. McGee v. Gardner (S.D.)*, 54 N.W. 606, the Constitution of South Dakota provides in section 37, article 5 thereof, that vacancies in the elective offices provided for therein (judges) shall be filled by appointment until the next general election. Held, that the expression “next general election” means the next election at which it is provided by law the officer may be elected whose office has become vacant. The court also said:

There is no inherent reserved power in the people to hold an election to fill a vacancy in an elective office; citing *Sawyer v. Haydon*, [1 Nev. 75](#).

In *re Supreme Court Vacancy (S.D.)*, 57 N.W. 495, the court held that, under an Act of 1893 providing for the election of Judges of the Supreme Court in November 1893, and every six years thereafter, an appointee to a vacancy in that court will hold office until the election in 1899, as article 5, section 37, constitution, providing that a vacancy in an elective office shall be filled by appointment “until the next general election” does not, as to Supreme Judges, refer to the general election of State and county officers provided by the constitution.

Such is the case here, section 12, article IV of our Constitution refers to Assemblymen and Senators only—not to judges and other State officers; they are referred to by section 22 of article XVII of the Constitution.

In *McIntyre v. Iliff (Kans.)*, 68 Pac. 633, it was held that the phrase “until the next regular election,” as used in article 3, section 11 of the Constitution providing for appointments to fill vacancies in judicial offices, means until the next regular election held at the time fixed by law for the filling of the particular class of judicial officers to which the appointment was made.

To like effect is *Wendorff v. Dill* (Kans.), 112 Pac. 588.

In *People v. Col* (Calif.), 64 Pac. 477, the court held that the words “next general election” means the next general election for the particular office so filled by appointment, and one appointed by the Board of Supervisors to fill a vacancy in the office of County Auditor is entitled to that office till the next general gubernatorial election. Compare this case with *Ex rel. Bridges v. Jepsen*, [48 Nev. 64](#).

In *State v. Clausen* (Iowa), 250 N.W. 195, the court said:

The next general election means the next general election at which, in pursuance of law, a vacancy may legally be filled. Under all of the authorities called to our attention dealing with the subject, it is held that this does not necessarily mean the next ensuing general election, but the election at which the vacancy can be legally filled. *Sate v. Superior Court*, 1440 Wash. 636, 250 P. 66; *State v. Simon*, 20 Or. 365, 26 P. 170; *Sawyer v. Haydon*, [1 Nev. 75](#); *State v. Jepsen*, [48 Nev. 64](#), 227 P. 588; *State v. Minor*, 105 Neb. 228, 180 N.W. 84.

From the foregoing authorities we think the proper construction of, and in fact the construction intended by the people, the term “general election” as used in section 12, article IV, Constitution, is, that it means the general election at which a Senator is to be regularly elected to the office, and that the phrase containing such term reading “that this section shall apply only in cases where no general election takes place between the time of such death or resignation and the next succeeding session of the Legislature” means that where the general election at which a Senator is to be regularly elected to office will intervene between the time the vacancy therein occurred in the next succeeding session of the Legislature, whether such session be a special session or a regular session thereof, no appointment need be made by the Board of County Commissioners for the reason, as we have hereinbefore pointed out, there would be no official duties for the Senator to perform and the term of the Senator expiring on the day succeeding such general election the office would be filled in the regular way. To hold otherwise as to State Senators would, as hereinbefore pointed out, destroy the real intent of section 12 of said article IV; *i.e.*, the continuance of representation by a person of the same political faith as that of the person originally elected.

We apprehend that it may be said that the Supreme Court in the case of *Ex rel. Penrose v. Greathouse*, [48 Nev. 419](#), has overruled *Ex rel. Bridges v. Jepsen*, [48 Nev. 64](#), or that the *Penrose* case holds that an election must be held to fill vacancies in the offices of Assemblymen and Senators. We do not agree that this is so. A careful examination of the *Penrose* case will disclose that the court confined its opinion and decision to the question presented in such case and the application to it of section 22 of article XVII of the Constitution, and section 2812 Revised Laws 1912, now section 4812 Nevada Compiled Laws 1929, which said sections of the Constitution and law we have hereinbefore pointed out have no relation to Assemblymen and Senators. The *Penrose* case concerned the vacancy in the office of a district Judge caused by the death of the incumbent about two years after his election but before the November election of that year. The real question involved was whether there was such a vacancy in the office that could be filled for the unexpired term by election at the ensuing November election because the primary election was held prior to the death of the incumbent, and at that time there was no vacancy in such office. An appointment to fill the vacancy having been made by the Governor,

pursuant to section 22, article XVII of the Constitution, and section 2812 Revised Laws 1912. The contention was made that as to judicial offices no provision was made in the primary election law for the filling of vacancies occurring after the primary election, and therefore there could be no legal election to fill the unexpired term of such district judge at the ensuing November election. The court held to the contrary, holding that article XVII, section 22, Constitution, and section 2812 Revised Laws, relating to the filling of vacancies in *certain offices*, manifest a legislative policy of the State to fill the vacancy in the *office of District Judge* by election, as soon as practicable after the vacancy occurs; and that where, by reason of death, a vacancy in such office occurred shortly before a general election at which some one to fill the office for the unexpired term was required to be chosen, and no one had been nominated to said office, there was a vacancy in the nomination within the meaning of the primary election law, when considered with section 22, article XVII of the Constitution and section 2812 Revised Laws, and such vacancy might be supplied at any time prior to election by a nomination petition authenticated in the mode provided by law.

It is most clear that in the Penrose case the court followed and applied section 22, article XVII of the Constitution. This section specifically provides, as we have heretofore shown, that vacancies in judicial and State offices may be filled by appointment by the Governor, until such vacancy shall be supplied at the next general election, *when it shall be filled by election for the residue of the unexpired term.* (Italics ours.)

No such question as presented here was presented to or considered by the court in the Penrose case. No question arising under section 12 of article IV of the Constitution, a section much later in time than said section 22 of article XVII, was considered by the court in the Penrose case. The Penrose case, so far as it is an authority on elections to fill vacancies in office is concerned, must be read in the light of the fact that the constitutional provision governing it absolutely required election by the people to fill such vacancies for the unexpired term, and that a different constitutional provision governs as to vacancies in the offices of Assemblymen and Senators.

The case of *Ex rel. Bridges v. Jepsen*, [48 Nev. 64](#), on the other hand dealt with a situation identical with the case here, expecting that a statute was construed instead of a constitutional provision. The office involved was a county office and no constitutional provision relative to the filling of vacancies in such office having been provided such matter was left to the Legislature. The Legislature in the same 1866 statute we have hereinbefore discussed provided in section 49 of the statute; *i.e.*, 2813 Revised Laws 1912, as follows:

When any vacancy shall exist or occur in the office of county clerk, or any other county or township office, except the office of district judge, the board of county commissioners shall appoint some suitable person to fill such vacancy *until the next general election.* (Italics ours.)

A County clerk was elected at the general election in November 1922, for a four-year term beginning on the first Monday in January 1923. The Clerk took office on such day and died shortly after. A successor was appointed according to law. In 1924 a general biennial election was held and it was thought that an election by the people of the county of a person to fill the unexpired term in such office should be held. Mandamus was brought to compel the incumbent County Clerk to include in the published notice of offices for which candidates were to be nominated in that county the office of County Clerk. The question required the construction of

the phrase “until the next general election.” The court passed upon the question and held as follows:

1. Rev. Laws, sec. 2813, providing for appointment by county commissioners to fill vacancies in the county clerk’s office “until the next general election,” means the next general election for county officers who, under Stats. 1920-21, c. 56, hold for four years, not the biennial general election, held every two years, if occurring before four-year term expires.

2. The policy of the government and theory of the law is that election to office should be by the people when it can conveniently be done, and appointment to fill vacancies be effective only until the people may elect.

3. An election to fill a vacancy in an elective office can only be held by virtue of constitutional provision or legal enactment, either expressed, or by direct implication authorizing that particular election; there being no inherent right in the people to hold an election to fill such vacancy.

In the instant case, we reiterate, that the people in section 12 of article IV of the Constitution have not provided for an election to fill a vacancy in the office of State Senator or Assemblyman, but to the contrary have signified their will be that such vacancy shall be filled by appointment. Neither has the Legislature provided by a law based upon said section 12, article IV, if such law could be constitutionally enacted, providing for such an election. Surely the question here has been definitely decided in the above case.

Therefore, it is our opinion, and we so hold, that the Board of County Commissioners of Nye County are empowered and directed to now appoint a person of the same political party as that of the late Senator M to fill the vacancy caused by his death, and that such appointment be for the unexpired term for which Senator M was elected. We are further of the opinion that the person so appointed is entitled to hold such office until the day succeeding the general election to be held in November 1940.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

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

HONORABLE LOWELL DANIELS, *District Attorney, Nye County*.

## SYLLABUS

### **263. Ex-Service Men—Preference as to Positions in Unemployment Compensation Division.**

Ex service men, citizens of Nevada, entitled to preference in filling such positions provided they comply with all requirements of such law and have as high a rating, after examination, as nonservice men.

## INQUIRY

CARSON CITY, July 22, 1938.

Are ex-service men, *i.e.*, honorably discharged soldiers, sailors and marines of the United States, entitled to preference in the selection of applicants to positions in the Unemployment

Compensation Division of Nevada?

#### OPINION

The law governing the giving of preference to ex-service men with respect to employment by the State is contained in section 6173 Nevada Compiled Laws 1929, and, so far as pertinent here, reads as follows:

Only citizens or wards of the United States or persons who have been honorably discharged from the military service of the United States shall be employed by any officer of the State of Nevada, or by any contractor with the State of Nevada, or political subdivision of the state, and in all cases where persons are so employed, preference shall be given, qualifications of the applicants being equal, first, to honorably discharged soldiers, sailors and marines of the United States who are citizens of the State of Nevada; second, to other citizens of the State of Nevada \* \* \*.

The unemployment compensation law of this State provides for the selection of personnel by merit examination conducted by a merit examination board provided for that purpose. Section 11 of such law. When such examinations are had it is the duty of such board with the lists of eligible candidates for classified positions in the division, together with the ratings of such candidates as determined by the examinations. The law further provides in section 11 that the director shall select all personnel from such eligible list and provides that:

Such selection shall be made either from the first three candidates on the eligible list or from the highest rating candidate within a radius of sixty miles of the place in which the duties of this position will be performed.

The ex-service men's Act was enacted in 1919 and the latest amendment thereto adopted in 1929. The unemployment compensation law was enacted in 1937, thus it is the later law and, if there is an irreconcilable conflict between the two Acts as to the question involved, the later Act must prevail. *State v. Esser*, [35 Nev. 429](#).

But statutes relating to the same subject matter will, if possible, be so construed as to give effect to both. *State v. Eggers*, [36 Nev. 373](#).

The provisions of general and special Acts must be harmonized when reasonable possible, and a general law will not be held to be repealed or modified by implication by a subsequent special law, unless the subsequent special Act is so clearly in conflict with the existing general law that both cannot stand. *Ronnow v. City of Las Vegas*, [57 Nev. 332](#).

It is most obvious that the Legislature intended that ex-service men should have preference in employment in any office or department of the State when it enacted said section 6173, provided of course such ex-service men were qualified for the position sought equally with nonservice men. Did the Legislature in the enactment of the unemployment compensating law take away this preference? We think not. Section 6173 Nevada Compiled Laws 1929, is a general law and relates, so far as pertinent here, to the filling of positions in State offices and departments. The unemployment compensation law, while it is a special law relating to a particular department of the State government and the selection of personnel to operate such department, still, in our

opinion, the section thereof relating to the selection of such personnel is not in irreconcilable conflict with said section 6173. Section 6173 and section 11 of the unemployment compensation law are to be construed in pari materia and effect given to both sections. Ex parte Ah Pah, [34 Nev. 283; State v. Esser](#), supra.

An examination of section 11 of the unemployment compensation law fails to disclose any inconsistency with said section 6173, provided said section 11 is applied to ex-service men as well as all others, *i.e.*, that ex-service men take the same examinations and otherwise comply with the requirements of the unemployment compensation law and the rules and regulations promulgated thereunder, and that the provision in said section 6173, “qualifications of the applicants being equal,” be strictly complied with, then, we think, said section 6173 would become effective and the Director of the Unemployment Compensation Division would be required, in selecting an applicant for a position in said division, to give preference, in making such qualifications for the position sought are in all respects equal to those of a nonservice man and his rating, after examination, is in all respects equal to and as high as that of a nonserviceman, then the ex-service man is entitled to a preference when selections are made, otherwise he is not entitled to such preference.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

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

HONORABLE GEORGE FRIEDHOFF, *Director, Unemployment Compensation Division*.

MR. HARRY Z. GUERIN, *Veterans Placement Representative*.

## SYLLABUS

### **264. Fish and Game Law.**

Board of County Commissioners have no power to create deer hunting districts within their counties; no power to fix different periods of time for hunting of deer in different districts.

## INQUIRY

CARSON CITY, August 9, 1938.

Can the Board of County Commissioners segregate the county into various districts and provide different periods of time for the hunting of deer in different districts?

## OPINION

CARSON CITY, August 9, 1938.

In your letter propounding the above query we note that you have advised your Board of County Commissioners that in your opinion “the provisions of sections 3100 and 3101 N.C.L. 1929, do not confer authority upon them to divide the county into districts, and to provide different periods of time for deer hunting in the different districts.”

We concur in your opinion. Boards of County Commissioners acting under the fish and game law have no greater powers than those granted in such law. No power is granted in such law in sections 3100, 3101, or any other section, to such boards to create districts within their counties with reference to hunting, and provide different periods of time for hunting in such different districts.

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

HONORABLE HOWARD E. BROWNS, *District Attorney, Lander County, Austin, Nevada*.

**265. Motor Vehicle Registration Act–Nonresidents.**

Full reciprocity for current year granted nonresidents in section 17(a), upon compliance with the provisions thereof. Nonresidents may lose their status as such during current year and be required to register their motor vehicles under Nevada law. Question of residence mainly one of intention; mere securing of employment within the State during current year by nonresident does not of itself constitute such person a resident within the meaning of the Act.

INQUIRY

CARSON CITY, August 17, 1938.

1. Is a bona fide registration under section 17(a) of the Motor Vehicle Registration Act of 1931, as amended, affected during the current year by a change from nonresident to resident status subsequent to nonresident registration, so as to obligate the registrant to take out a resident registration?

2. If the answer to the above query is in the affirmative, then under what facts and circumstances, or conditions, does a nonresident become a resident of this State and thus subject to the resident registration provisions of the motor vehicle registration law?

OPINION

A brief résumé of the motor vehicle registration Acts of this State will serve to show the trend of legislation with respect to the registration of nonresident-owned vehicles.

In 1913 the Legislature enacted the first motor vehicle registration Act of any consequence in this State. It was provided therein, with respect to nonresidents, that such nonresidents were exempt from the provisions of the Act for a period of thirty days; *provided*, such nonresidents had complied with any law in force in the State or county of their residence requiring registration of owners of motor vehicles, and displayed on such vehicles while in this State the registration number and initials or abbreviation of the State or county of their residence. Section 7, chapter 206, Statutes of Nevada 1913. This provision was continued in the law until 1921, when the Legislature enacted a new registration Act. In the 1921 Act the provision of the law with respect to nonresidents was changed, and, while the nonresidents were still exempt from the provisions of the law, the period of exemption was extended to a period of three months upon complying with the requirements of the law with respect to applying for nonresident registration and the displaying of the registration plates of the State or county of residence. The 1921 Act also contained a provision denying exemption to a nonresident where his motor vehicle was used for business purposes in this State. Section 9, chapter 243, Statutes of Nevada 1921.

In 1923 section 9 of the 1921 Act was amended in some respects, giving the nonresident ten days after coming into the State within which to apply for nonresident registration. the period of exemption was left at three months while the provision denying exemption when the motor vehicle was used for business purposes in the State was left out. Section 1, chapter 212, Statutes

of Nevada 1923.

In 1925 a new motor vehicle registration law was enacted. the provision of this law with respect to nonresidents was substantially the same as the 1923 amendment to the 1921 law. The period of exemption being left at three months. A provision denying the nonresident exemption when the motor vehicle was used in the State in the transportation of passengers for hire or business purposes was inserted. Section 4395 Nevada Compiled Laws 1929. In the 1925 Act the Legislature defined for the first time the term nonresident as follows:

Nonresidents shall mean residents of states or countries other than the State of Nevada and of countries other than the United States whose sojourn in this state, or whose occupation, or their regular place of abode or business in this state, if any, covers a total period of less than three months in the calendar year. Section 4374 Nevada Compiled Laws 1929.

In 1931 the present motor vehicle registration Act was enacted. Chapter 202, Statutes of Nevada 1931. Section 17(a) dealing with nonresidents was then enacted in substantially the same form as it is in today, except t hat it did not then contain the prohibition against the use of dealer's license plates by a nonresident, this provision being added in 1937. Also minor changes were made by inserting the words "motor vehicle" in the first and third lines of such section and striking out the word "foreign" in the second line thereof. See 1937 Statutes, page 332. It is noted that section 17(a) contained in 1931 and contains now the legislative will that, with the exceptions contained in section 17(b) hereinafter discussed, no time limit with respect to the nonresident exemption during the current year was or is intended. The trend of legislation, so far as time limitations in this matter is concerned, has been a lengthening of the period of exemption.

The 1931 Act also defines the term "nonresident" as meaning "ever person who is not a resident of this State, and *who* does not use his motor vehicle for a gainful purpose." (Italics ours.) This definition of course supersedes the definition of the term nonresident contained in the 1925 Act. We think this later definition of the term nonresident is one of some significance, as it was made compatible with the lengthening of the period of exemption contained in section 17(a). The qualification placed upon the nonresident in the 1931 definition was, that he was not to use his motor vehicle for a gainful purpose, while the period of time limiting his sojourn in the State, as provided in the 1925 definition was stricken out.

In 1933 the Legislature amended section 17 of the 1931 Act (see 1933 Statutes, page 250) by amending section 17(b) in order to make the registration Act fit in more closely with the motor carrier licensing Act, which was enacted that year and which may be found at chapter 165, Statutes 1933. This amendment, however, did not affect section 17(a), but related only to the carriers for hire that were governed by the motor carrier licensing Act.

In 1937, as we have shown, section 17(a) was amended to its present condition. Also section 17(b) was amended so as to bring all motor vehicles used in carrier services within the exemption clause of the registration Act and thus remove the qualification contained in the definition of the term "nonresident," *i.e.*, that motor vehicles were not to be used for gainful purposes, from nonresidents operating motor vehicles in carrier services upon compliance with the conditions prescribed in sections 17(a) and 17(b).

We think the intent of the Legislature, with respect to the registration of motor vehicles of nonresidents, is that during the current year such nonresidents are to be permitted to operate their



motor vehicles in this State without obtaining Nevada registration and paying the fees therefor, so long as such nonresidents maintain their status as nonresidents. This legislation, no doubt, was brought about by the demands for reciprocity between States in order that nonresidents might travel from State to State and spend a reasonable time in a State, other than the State of their residence, without registering their motor vehicles except in their home State. The reciprocity concerning registration extended to nonresidents operating in motor carrier services in this State is limited. It is confined to those nonresidents whose home State extends the same privilege to Nevada operators in like services, and nothing in the Nevada law exempts such nonresident operators from securing the licenses and paying the fees therefor required by the motor carrier licensing Act. Section 17(a) relates to nonresidents operating motor vehicles in this State that are used for purposes other than in motor carrier service. That it provides a full measure of reciprocity cannot well be doubted. Whether such a provision is the wisest legislation on the subject is for the Legislature to determine, as it is the province of the Legislature to establish policy of the State in the laws enacted by it. With the wisdom of a law we have nothing to do. *State v. Parkinson*, [5 Nev. 15](#); *State v. McClear*, [11 Nev. 39](#).

However, with respect to section 17(a), we think the Legislature was guided and prompted in the enactment thereof by the proposition that by extending a full measure of reciprocity in such section that other States would extend the same measure of reciprocity to Nevada residents, if, in fact, such other States had not already done so.

Answering Query No. 1. There is no question but what a nonresident after coming into the State may so change his status during the current year as to obligate himself to obtain Nevada registration of his motor vehicle, but as hereinafter shown, each case must be decided on its own particular set of facts.

Answering Query No. 2. It is impossible in the absence of the facts in each particular case, to detail under what set of facts and circumstances, or conditions, a nonresident loses the status of a nonresident and becomes a resident of the State.

We think there is no definition of the term resident to be found in the books that will cover every set of facts and be determinative of the question. The same is true of the term nonresident. In fact, an examination of the cases will show that, in the final analysis, the intention of the person is the controlling factor. For the purpose of showing many of the variations of the term resident we quote the following:

RESIDENT. A. In General. Although there are many definitions to be found in the books, it is not easy to give a satisfactory definition of this term, for it is a flexible, somewhat ambiguous word, used in many and various senses, with the sense in which it should be used controlled by reference to the object, thus having different meanings according to the context or the subject matter under discussion. It has a great variety of meanings. It is difficult to give an exact definition for, although often construed by the courts, the term has no technical meaning, but is differently construed in courts of justice, according to the purposes for which inquiry is made into the meaning of the term. The construction is generally governed by the connection in which the word is used, and the meaning is to be determined from the facts and circumstances taken together in each particular case.

B. As Noun. A dweller, or one who dwells or resides permanently in a place,

or who has a fixed residence, as distinguished from an occasional lodger or visitor; an inhabitant; one dwelling or having his abode in any place; one who dwells, abides, or lies in a place; one who has a seat or settlement in a place.

In the legal sense, a person coming into a place with intent to establish a domicile or permanent residence, and who in consequence actually remains there; one who has a residence in a legal sense. 54 C.J. 712, 713, Sections 1,2.

Again it is said:

A person may live at a place and still not be a resident thereof in the legal sense of the term. O'Brien v. O'Brien, 116 Pac. 692.

He is a resident who, though absent in person, has here his home and permanent abiding place. Griffin v. Woolford, 41 S.E. 949.

A resident of a place in one whose place of abode is there, and who has no present intention of removing therefrom. Dorsey v. Bringham, 52 N.E. 303.

Literally a resident is one who sits, abides, inhabits, or dwells in a certain place. Collinson v. Teal, 6 Fed. Cas. No. 3020.

Likewise the term nonresident has a variety of definitions.

**NONRESIDENT.** A person who is not a resident of a particular place; one who does not reside in, or is not a resident of, a particular place; one who has his abode in another state; one who resides out of the state. "nonresident" has different meanings according to the subject under consideration. The term may be used indiscriminately to describe one who does not reside in a particular country, or state, or county, or any of the smaller subdivisions of territory made for governmental purposes. The word may as well refer to one who does not reside in a particular country, or state, or county, or any of the smaller subdivisions of territory made for governmental purposes. The word may as well refer to one not residing in a county as to one who resides beyond the boundaries of the state. 46 Cor. Jur. 493.

It is also said of the term nonresident:

In the broad sense, it is applicable to every one who does not reside at a particular place named. Pacific R. Co. v. Perkins, 54 N.W. 845.

A nonresident of the state must be defined to be one who ceases to be domiciled in the state, or who never was a resident of the state, or who having been domiciled in the state, thereafter has acquired a permanent residence in another state. Cleveland First Nat. Bank v. Coates, 161 Pac. 1095.

Where the word nonresident appears in a statute without qualifications or limitations, it means one not domiciled within the state, the sovereignty. Sheridan County v. Hand, 210 N.W. 273.

From the foregoing authorities it is clear that the term "nonresident" means one who is not a resident of the State, whatever other qualifications may be annexed thereto. The statutory

definition of the term written into the present motor vehicle registration law in 1931, *i.e.*, that nonresident means “every person who is not a resident of this State, and who does not use his motor vehicle for a gainful purpose,” is certainly evidence that the Legislature intended that the term “nonresident” was to be thus construed, except in those cases where he used his motor vehicle for a gainful purpose. In construing a statute, words shall be given their plain meaning. Ex parte Zwissig, [42 Nev. 360](#).

but, as shown hereinbefore, the Legislature has in effect taken away the qualification contained in its definition of the term nonresident by the enactment of the amendment to section 17(b) in 1937, in providing reciprocity in registration of nonresident motor vehicles used in carrier services in this State, because such carrier services include practically every use to which a motor vehicle could be used for a gainful purpose. See 1937 States, page 332.

We think, then, the Legislature having first stricken out the time limitation with respect to nonresident registration, as hereinbefore shown, and then having in effect removed the remaining qualifications placed upon a nonresident with respect to the use of his motor vehicle, that the term nonresident is to be construed in its most generally accepted meaning, *i.e.*, one whose residence within the State does not indicate such permanency as meant by section 2365 Nevada Compiled Laws 1929, which provides:

If a man have a family residing in one place and he does business in another, the former must be considered his place of residence, unless his family be located there for temporary purposes only; but if his family reside without the state, *and he be permanently located within the same, with no intention of removing therefrom, he shall be deemed a resident.* (Italics ours.)

We reiterate that in the final analysis the main factor in determining the question of residence is the intention of the person. All other factors are but circumstances tending to prove or disprove residence. It is well said in *Fleming v. Fleming*, 36 Nev. at page 140:

Legal residence consist of fact and intention combined; both must concur, and, when one’s legal residence is fixed, it requires both fact and intention to change it.

It must be clear that no general opinion on the question presented can specify just what set of facts will in every case prove or disprove residence, or who is a resident or nonresident, however, the facts and circumstances in a given case may indicate very conclusively that a man is a resident of the State or that his intentions are that he intends to become a resident. For example, he may register to vote. He may purchase property and live thereon. He may enter into employment of a nature that requires continued residence within the State for an indefinite period of time beyond the current year. As to the matter of employment, however, we desire to point out that mere employment of a nonresident within the State during and within the current year does not of itself, so far as the motor vehicle registration law is concerned, constitute such person a resident of the State within the meaning of such law. this office has so ruled in prior opinions on the same question. See Report Attorney-General, 1925-1926. Opinion No. 232; Report Attorney-General, 1931-1932, Opinion No. 16. But the fact that the nonresident secures employment in this State coupled with other facts and circumstances would be competent evidence tending to show that he was a resident of this State. However, the fact remains that the

intent of the person is the main factor to be considered in the proving of residence. This fact is often difficult of proof and in many cases the proof lies in the declarations of the person himself.

We think, with respect to the proving of residence, the rule is that a residence once acquired is presumed to continue until it is shown to have been changed. Where a change of residence is alleged the burden of proving such change rests upon the person making the allegation. *Mitchell v. United States*, 22 L. Ed. 584.

Thus in a prosecution of a nonresident for a violation of the motor vehicle registration law, where the question of his residence is involved, the burden of proving that the nonresident was in fact not a nonresident within the meaning of such law, would be upon the State. Consequently, considerable discretion and caution must be exercised in cases involving nonresidents and the application of section 17(a) thereto, and, except in clear cases, the nonresident should be given the benefit of the doubt to the end that the intent of the Legislature that full reciprocity is to be extended to nonresidents will be furthered and not curtailed.

In conclusion, we think it clear that each case dealing with the question of the application of the motor vehicle registration law to a nonresident must be determined upon the facts in each particular case.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

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

HONORABLE MALCOLM MCEACHIN, *Secretary of State, Carson City, Nevada*.

SYLLABUS

## **266. Powers and Duties of Board of School Trustees.**

A board of School Trustees of a school district may not enter into a contract with Department of the Interior in regard to the management of a local school district whereby money which would come from regular State and county apportionments could be turned over to the Department of the Interior to be used in the management of the school district.

### STATEMENT

CARSON CITY, August 17, 1938.

In a certain school district there are 141 Indian children in A.D.A. for the past school year. There are also seven white children. The school has been operating on funds received from regular county and State apportionments plus tuition received from the Federal Government for the Indian children. It has been requested by official sin the Indian Service of the Department of the Interior that, in order to secure additional funds from the Federal Government, that the school be brought under the supervision of the Federal Government and continue to receive the county and State apportionments. It was suggested that t his be done by having the board of trustees of said district enter into a contract whereby the local board of trustees would continue but would turn the funds received from local and county sources over to the Department of the Interior to be used by them in the fiscal management of the school district. A principal and five teachers have already been employed by the public school board for the coming school year.

It is proposed that the existing board of school trustees shall still exist, but the supervision of the school shall be under the appropriate officers of the Federal Government.

It is proposed that the course of study be expanded to include vocational work of a nature suited to the needs of the Indian children in the district. The present course of study for

elementary school does not include vocational work of the type desired by the representatives of the Indian Service.

#### INQUIRY

Can a board of school trustees of a school district enter into a contract with the Department of the Interior in regard to the management of a local school district whereby money which would come from regular State and county apportionments could be turned over to the Department of the Interior to be used in the management of the school district?

#### OPINION

It is the opinion of this office that the above inquiry must be answered in the negative.

It has been repeatedly held that boards of school trustees and boards of education, under the laws of this State, possess only such powers as are granted in and by the Acts of the Legislature pertaining to the public school system of the State.

The rule has also been constantly upheld by our Supreme Court under similar situations in ruling that the county commissioners can only exercise such powers as are specially granted, or as may be necessarily incidental for the purpose of carrying such powers into effect; and when the law prescribes a mode which they must pursue in the exercise of these powers, it excludes all other modes of procedure. *Sadler v. Eureka County*, [15 Nev. 39](#); *Godehaux v. Carpenter*, [19 Nev. 415](#); *Lyon County v. Ross*, [24 Nev. 102](#).

The powers and duties of the board of school trustees are specifically set forth in section 5715 Nevada Compiled Laws 1929. Nowhere therein is the board of school trustees empowered to contract with a Federal agency, turn over State money for Federal management, or in any way surrender the control of their school district.

Nor are we aided in this proposition by section 5722 Nevada Compiled Laws 1929, which only gives the school trustees powers which may be necessarily incidental to carry out the duties prescribed in section 5715.

We have examined at some length the school code for the State of Nevada, and we are unable to find any provision which would enable use to decide your inquiry other than in the negative.

It is, therefore, our opinion that the problem presented by your office can be solved only by legislative enactment.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

By ALAN BIBLE, *Deputy Attorney-General*.

MISS MILDRED BRAY, *Superintendent of Public Instruction, Carson City, Nevada.*

#### SYLLABUS

#### 267. **Minimum Wage Law.**

Unlawful for any employer to cause or permit female workers to be employed more than eight hours in any one day, or more than forty-eight hours in any one week, except in the emergency cases provided for in section 2 of the Act.

#### INQUIRY

CARSON CITY, August 26, 1938.

In view of the language of the first proviso contained in section 2 of chapter 207, 1937

Statutes, the minimum wage law for women, is it lawful for a private employer to employ females eight hours per day, seven days per week, there being no sickness or other emergency involved?

#### OPINION

The Legislature of this State when it enacted the minimum wage law for women, said that:

The policy of this state is hereby declared to be that eight hours in any one twenty-four hour period and not more than forty-eight hours in any one week is the maximum number of hours female workers shall be employed in private employment, with certain exceptions in emergencies, \* \* \*. Section 1, chapter 207, 1937 Statutes.

In section 2 of said chapter, which contains the prohibition against employing female workers more than eight hours per day or forty-eight hours per week, the Legislature pointed out in what cases or emergencies such female workers could be employed for a longer period of time than eight hours per day or forty-eight hours per week, in the language contained in the first proviso found in that section, to wit:

\* \* \*; *provided*, that in the event of the illness of the employer or other employees, or a temporary increase of the business of the employer which could not by reasonable diligence be foreseen, to the extent that a greater number of female employees would be required than normally if the regularly employed females were relieved from duty at the expiration of the eight-hour period, and no additional persons are then and there available or can be obtained with reasonable certainty who are capable of performing the duties required of the regularly employed females of any such employer, the regularly employed females may then be required and permitted to work and labor an additional period of time in a twenty-four hour period but not to exceed twelve hours in a said period, and in no event shall such females be required or permitted to be employed more than fifty-six hours in any one week of seven days; \* \* \*.

The quoted language, we think, is clear. In order for an employer to cause or permit his female employees to work more than eight hours in any one day or twenty-four-hour period, or more than forty-eight hours in any one week, the circumstances must be such as to bring the employer within the terms of the proviso, *i.e.*, there must exist at the time such female workers are required or permitted to work over the statutory period, either illness of the employer or other employees, or a temporary increase in the business of the employer that could not, in the exercise of reasonable diligence on the part of the employer, have been foreseen, and no additional persons are then capable of performing the work required. If these conditions do not exist then the causing or permitting of female workers to work more than eight hours in any one day or forty-eight hours in any one week is a most manifest evasion of the law.

We are advised from the correspondence accompanying the inquiry herein, that it is claimed no additional help is available so that the business houses involved are put to considerable inconvenience if their female workers are given one day off in each week and that there is no

objection on the part of the employed females to working seven days per week. We think that mere inconvenience is no excuse for law sanctions, as all laws enacted pursuant to the police power inconvenience people to a greater or lesser degree. The practice outlined in this correspondence certainly does not square with the provisions of the proviso quoted above. Inconvenience, however regrettable, cannot be made to serve as an excuse for violations of the law even if such violations are concurred in by the very persons the law was enacted to protect and benefit.

Further, the effect of the minimum wage law is most salutary, in that it relieves unemployment amongst the female workers of the State, particularly during periods of depression.

The inquiry is answered in the negative.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

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

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

SYLLABUS

**268. Unemployment Compensation Law.**

Unemployment compensation benefit fund not State money. Neither the unemployment compensation law, nor any other law or constitutional provision, requires that State Controller issue and/or sign checks or warrants withdrawing moneys from such fund for payment of unemployment benefits. Such checks or warrants are sufficient if signed by the State Treasurer and countersigned by the commissioner or his duly authorized agent.

INQUIRY

CARSON CITY, August 27, 1938.

Is it mandatory that the State Controller issue and sign the benefit payment checks drawn on the Unemployment compensation Fund provided in section 9 of the unemployment compensation law, chapter 129, Statutes of Nevada 1937?

OPINION

The Unemployment Compensation Fund, as its name clearly implies, is the fund set up in the unemployment compensation law as the fund from which benefits are paid to the eligible unemployed persons found entitled to receive benefits under the law. Such fund is to be used for no other purpose. It is made up exclusively from the contributions made thereto by the employers of labor in this State who come under the provisions of the law. Such fund is to be used for no other purpose. It is made up exclusively from the contributions made thereto by the employers of labor in this State who come under the provisions of the law. Such fund is not made up from moneys appropriated thereto by the Legislature, or moneys derived through taxation in the common acceptance of such term (see section 9(a) of the Act). After the contributions are paid in by the employer, they are deposited with the State Treasurer in a special fund, "separate and apart from all public moneys or funds of this State," known as the "Unemployment Compensation Fund," such moneys with the Secretary of the Treasury of the United States to the account of this State, or State agency, in the Unemployment Trust Fund

established by the Federal Social Security Act to be later returned to this State for specific purpose of paying unemployment benefits. Section 9(b) and section 904, title IX, Social Security Act; *i.e.*, Title 42, section 1104, Federal Code Annotated.

When needed for the payment of the unemployment benefits the money deposited with the Secretary of the Treasury in the Unemployment Trust Fund is requisitioned, returned to the State Treasurer, and thereafter withdrawn for the specific purpose of paying benefits, as provided in section 9(c) as follows:

(c) *Withdrawals.* Moneys shall be requisitioned from this state's account in the unemployment trust fund solely for the payment of benefits and in accordance with regulations prescribed by the commissioner. The commissioner shall from time to time requisition from the unemployment trust fund such amounts, not exceeding the amounts standing to this state's account therein, as he deems necessary for the payment of benefits for a reasonable future period. Upon receipt thereof the treasurer shall deposit such moneys in the benefit account and the treasurer shall issue warrants for the payment of the benefits solely from such benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to any provisions of the law requiring specific appropriations or other formal release by state officers of money in their custody. All warrants issued by the treasurer for the payment of benefits and refunds shall bear the signature of the treasurer and the countersignature of the commissioner or his duly authorized agent for that purpose.

There is no provision contained in section 9(c) or elsewhere in the unemployment compensation law or any other law requiring that the State Controller issue or sign the benefit checks. There is no constitutional provision requiring that he do so. The money in this particular fund, even though it is required to be deposited with the State Treasurer and withdrawn for payment of benefits by means of checks or warrants signed by him and countersigned by the commissioner, is not State money, or money deposited in the State treasury for public use that can only be withdrawn upon warrants of the State Controller under the general law. the fund in question here is so analogous to the State Insurance Fund, also deposited with the State Treasurer under the Nevada Industrial Act, as to be identical with it. The source of the fund and the purpose for which it is to be used is practically the same in both cases. In the one case the fund is made up of contributions by the employers for the purpose of paying insurance benefits to injured workmen, while, in the other, the contributions so made by the employers are to be used to pay unemployment benefits to unemployed workers.

The same question, arising under the Industrial Insurance Act, as propounded here was submitted to the Supreme Court of Nevada in the case of State of Nevada, *ex rel.* Beebe v. McMillan, [36 Nev. 383](#).

Section 40 of the Industrial Insurance Act provided the method by which disbursements from the State Insurance Fund were made, as follows:

The premiums, contributions, penalties, properties, or securities paid, collected or acquired by operation of this act shall constitute a fund to be known as the "State Insurance Fund." All disbursements from the state insurance fund



shall be paid by the state treasurer upon warrants or vouchers of the Nevada industrial commission authorized and signed by any two members of the commission. The state treasurer shall be liable on his official bond for the faithful performance of his duty as custodian of the state insurance fund.

The court, after discussing the general law requiring the passing upon claims against the State by the State Controller, and the issuance of warrants in payment thereof by him, said:

Is the state insurance fund, as so derived from premiums, identical with the state treasury, and are the demands against it claims against the state within the meaning of the constitutional and statutory provisions regarding approval by the board of examiners and the drawing of warrants by the state controller? If action by this board and official were required, much of the detail work performed by the special officers and clerical force of the industrial commission would have to be delayed until it could be considered by the board, which meets bimonthly, and has many other duties to perform, and the further question would arise whether the payment of such claims would have to be deferred until an appropriation, the amount of which would not be easy to determine, could be made by the legislature. Under the law as indicated it is evident that all claims against the state treasury must be presented to the board of examiners and to the state controller before they can be paid out of that exchequer. But if the fund be regarded as a special one, placed in the hands of the state treasurer for safe keeping, in trust for employees injured and the dependents of employees who are killed, and as separate from the state treasury, presentation of claims to, or action by, the board of examiners or the controller is not required by these general laws relating to claims against the state industrial insurance fund shall be presented to the board of examiners or the state controller.

The fact that the state treasurer is made the custodian of the fund does not necessarily make it a part of the state treasury. The provision in the act that \$2,000 should be paid to the Nevada industrial insurance commission out of any moneys in the state treasury not otherwise appropriated, and that within six months after the receipt of that sum the commission should, out of the premiums received by it from employers, repay that amount to the state treasury, may be considered as indicating that the legislature intended that the commission should draw that sum as a loan from the state treasury, and thereafter disburse it without approval by the board of examiners or the state controller, and inferentially that there should be a fund separate from the state treasury, and that the commission should likewise disburse any moneys has in that fund without action by the board of examiners or the state controller.

Any act of the legislature requiring employers to contribute to the state treasury for the support of the state government a percentage on the monthly payrolls, on the basis on which premiums are paid into the state insurance fund, would be unconstitutional because not uniform taxation. (Art. 4, sec. 20.) These premiums are not paid for the purposes for which taxes and revenues are usually paid into the state treasury, and could not be used or made available for the payment of warrants for the ordinary expenses of the state government which are payable out of the state treasury. The state insurance fund being derived only from the payment of premiums by

employers who do not object to coming under the terms of the compensation act, and being provided for the special and humane purpose of compensating employees who are maimed and injured, and the widows and orphans of those who are killed, may be distinguished from the state treasury, which is provided for the payment of the general expenses of the state government, and which is supplied under compulsory laws and provisions of the constitution requiring a uniform system of taxation.

The state insurance fund should be regarded as separate from the state treasury, as are county and city funds, which are derived under general or special acts of the legislature. The "state treasury" has a well-understood meaning, which does not include such special fund as this one, providing for injured employees and their dependents, and we conclude that the requirements for presentation of claims against the state treasury to the board of examiners and the controller do not apply to the state insurance fund.

The same identical situation exists here. The Unemployment Compensation Fund, or benefit fund as it also called. occupies no different position in the State Treasury than that occupied by the State Insurance Fund. If it was not necessary or required that the State Controller issue and sign checks or warrants in the disbursing of the State Insurance Fund, under the law as construed in the above case, certainly it is not necessary or required that he do so in the disbursing of the benefit fund under consideration here. The Legislature is the judge of the expediency of the law with respect to disbursing which provides otherwise. There is no such constitutional prohibition in this case. The Legislature has seen fit to provide that benefit payments under the unemployment compensation law shall be made upon checks or warrants signed by the State Treasury and countersigned by the commissioner or his duly authorized agent. It has incorporated no requirement in the law that the State Controller issue or sign the checks or warrants drawn on the fund in question. The legislative intent on this subject is clear. We conclude that with respect to the withdrawals of moneys from the Unemployment Compensation Benefit Fund it is not mandatory, neither is it required by law, that checks or warrants issued for that purpose be issued and signed or issued or signed by the State Controller.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

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

HON. GEORGE W. FRIEDHOFF, *Director, Unemployment Compensation Division.*

HON. DAN FRANKS, *State Treasurer.*

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

#### SYLLABUS

#### **269. Unemployment Compensation Law.**

Sales representatives operating under written agreement with Electrolux Corporation whereby they sell vacuum cleaners on straight commission basis are independent contractors, the corporation not reserving the right to control the means or manner of the effecting of the sales made by the representatives.

#### STATEMENT OF FACTS

CARSON CITY, September 16, 1938.

The Electrolux Corporation, a foreign corporation qualified to do business in the State of

Nevada, manufactures an electric cleaner (commonly known as a vacuum cleaner) which it sells to its customers through representatives known as sales representatives. These sales representatives enter into written agreements the corporation which govern their relations with the corporation, and to a very limited extent their relations with the customers.

Briefly, the agreement is that the corporation grants to a sales representative a nonexclusive franchise to sell its cleaners in a certain territory under the jurisdiction of one of its branch offices. Such territory is not exclusive granted to the representative, as other representatives may enter such territory for purposes of selling cleaners. The cleaners are sold on a flat commission basis, *i.e.*, a certain percentage of each of the installments paid thereafter, or a certain percentage of the sales price of the cleaner if sold for cash. The sales representative must sell the cleaner for the price printed on the sales contract, he has no discretion as to the price. Also, if old vacuum cleaners are taken in trade he is governed by the instruction of the corporation as to trade-in values and cannot deviate therefrom.

The sales representative must keep on deposit with the corporation a sum of not less than \$100, as security for products delivered to him, and as security for repayment of commissions and other claims that might accrue against him in favor the corporation. He is also required to deposit with the corporation a surety bond conditioned upon the faithful performance of his agreement.

The agreement continues in force and effect for an indefinite period of time until canceled or terminated. The agreement may be canceled or terminated under certain conditions, substantially as follows:

(a) By either party, upon thirty days notice of intention to terminate the agreement, given to the other party.

(b) By the corporation, without notice, in case the representative shall have violated certain provisions of the agreement, such as the failure of the representative to remit to the branch office of the corporation all money and trade in cleaners received by the representative in connection with sales made by him.

(c) Misrepresentation of the corporation's product by the representative; the pledging of the corporation's credit; the failure to take all orders for vacuum cleaners on the printed contract form provided by the corporation; the failure to take the orders in accordance with the terms and price printed on such forms.

The corporation does not sell its cleaners and accessories in stores. The only method of sale is through its sales representatives pursuant to the written agreements. The representative may have one or more of the cleaners in his possession at any one time. He sells by means of demonstrations in the home. He sells only upon the terms and for the price contained in the sales contract. He collects no money from the purchaser when the sale is made on the installment plan, except the initial payment, he does not collect the remaining installments as they are sent to the corporation direct. All money that is received by the representative on a cash sale, or the initial installment on a time sale, is forwarded to the branch office of the corporation and the representative's commission is then sent to him. All sales made on the installment plan are made upon title retaining contracts, the title of the cleaner remaining in the corporation until the final installment is paid.

The corporation retains no control over the sales representative other than to fix the price of

the product and terms of the sale thereof. The representative can canvass his territory when he pleases; work as long as he likes; use any method of transportation he chooses; devote all or any portion of his time to the business of selling; produce any volume of business he is capable of; make no written or other report to the corporation save return of sales contracts. He is not required to collect accounts; investigate complaints or credit ratings, or make adjustments thereof.

The corporation pays none of the traveling or other expenses of the representative, neither does it furnish him with transportation facilities of any kind. It does not furnish or require any special place of business which the representative may use as his headquarters.

#### INQUIRY

In view of the foregoing statement of facts, are the services performed by the sales representatives deemed to be employment subject to the provisions of the unemployment compensation law of this State, *i.e.*, chapter 129, Statutes of Nevada 1937?

#### OPINION

The question presented for determination deals with the question of whether the sales representative of the corporation is a servant of the corporation, or whether he is an independent contractor.

Section 2 (5) of the unemployment compensation law provides:

(5) Services performed by an individual for wages shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commissioners that \* \* \*.

(A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and

(B) Such services is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession, or business.

Wages are defined in section 2 (4) (N) of said law to mean "all remuneration payable for personal services, including commissions and bonuses and the cash value of all remuneration payable in any medium other than cash. \* \* \*"

Do the facts show that the sales representatives in question here are servants of the corporation, or are they independent contractors?

After due consideration of the facts, as stated above and as gathered from documents submitted with the query, together with facts elicited at the oral hearing, we are of the opinion that as a matter of the law the relationship of master and servant does not exist, but that the sales representatives are independent contractors.

The term independent contractor has been defined as follows:

An independent contractor is one who undertakes to produce a given result

without being in any way controlled as to the method by which he attains that result. Jaggard, Torts, sec. 73.

An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. Am. Law Inst. Agency, sec. 2

An independent contractor is one who renders service to another in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *Messemer v. Bell & Coggeshall Co.*, 117 S.W. 346.

An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work, he is not under the order or control of the person whom he does it, and may use his own discretion in things not specified. *Gay v. Roanoke Railroad & Lumber Co.*, 62 S.E. 436.

To same effect is *Hale v. Johnson*, 80 Ill. 185; *Bristol & Gale Co. v. Industrial Commission*, 126 N.E. 599.

It is clear that the result to be produced by the sales representative is the sale of the product of the corporation. It is also clear that such representative receives no remuneration for his services until he produces the ultimate result sought, *i.e.*, the actual sale of the product. He receives no remuneration for his time or effort unless he does make a sale. In brief, he receives no wages for his time, efforts, and endeavors unless and until his time, efforts, and endeavors result in an actual sale of the product he agrees to sell. In this respect he is certainly in an entirely different category from the employee or servant who is paid for his time and effort irrespective of whether the result desired by his employer or master is accomplished. For this reason we think the method of payment of the sales representative for his services is immaterial here. We think the controlling factor in the instant question is the factor or element of control over the sales representative by the corporation.

The vital test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Stated as a general proposition, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor. \* \* \*. 14 R.C.L. 67, sec. 3.

The control of the work reserved in the employer which makes the employee a mere servant is a control, not only of the result of the work, but also of the means and manner of the performance thereof; where the employee represents the will of the employer as to the result of the work but not as to the means or manner of accomplishment, he is an independent contractor. \* \* \*. 14 R.C.L. 68, sec. 4.

The foregoing text is supported by the weight of authority and, we think, states the law on this question. See 2, Am. Jur. 17; sec. 8, *Bristol & Gale Co. v. Industrial Commission*, *supra*, and cases therein cited; 61 A.L. 4. 229-231, note III, 31 Cor. Jur. 473-474; *James v. Tobin-Sutton Co.*, 29 A.L.R. 457; *Aldrich v. Tyler Grocery Co.*, 17 A.L.R. 617.

From the facts and circumstances surrounding the instant matter, we think it clear that the

corporation, in the written agreement with the sales representative, has not retained therein the right to control the means and manner of effecting the ultimate result, *i.e.*, the actual sale of its product, as will denominate such representative as its servant. It appears that the control over the representative reserved by the corporation extends only to the sale or contract price of its product and the terms upon which such product is to be sold, and the regulation of the trade-in value of old vacuum cleaners. The terms of the agreement requiring the deposit of money and the surety bond are not inserted therein for the purpose of controlling the representative, concerning the means and manner of effecting the result, but such terms are for the purpose of insuring the corporation against dishonesty of the representative. and, we think, the same is true of the provisions of the agreement with respect to the conditions under which the corporation may cancel the agreement. In all other respects, particularly with respect to the actual physical performance of his work of canvassing his territory, the corporation has no right of control whatsoever. In brief, it has no control over the actual means and manner of the effective of the ultimate result by the representative.

The facts here are, in our opinion, sufficient to satisfy the requirements of section 2 (5) (A) and (B) of the law in question, hereinbefore quoted. With respect to sub-paragraph (C) of said section (also quoted hereinbefore), we are advised, from documentary evidence, that the sales representatives are not required to refrain from engaging in other employment or other business activities, and that many of such sales representatives have been and are now engaged in other lines of employment and business, and at the same time are acting as sales representatives for the corporation.

It may be thought that the sales representatives are the agents of the corporation, and for that reason should be deemed employees. But such is not the law. The same test is to be applied in determining whether one is an agent or independent contractor as is applied with respect to whether he is a servant. 2 Am. Jur. 17, sec. 8.

We conclude that the sales representatives in question here are independent contractors. the query is answered in the negative.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

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

HONORABLE GEORGE W. FRIEDHOFF, *Director, Unemployment Compensation Division, Carson City, Nevada.*

## SYLLABUS

### **270. School Districts Abolition of When Only One Resident Child in Attendance.**

Resident children: Duty of Superintendent of Public Instruction to notify Board of County Commissioners that a school district has fewer than three resident children in actual attendance, and if only one resident child in attendance, school must be closed and district abolished. Children resident of another district attending school in district having fewer than statutory number of resident children cannot be counted for apportionment purposes. Children resident of school district in one county attending school in a district in another county are not resident children of the latter county. Salary of teacher in a school closed by operation of law need not be paid for balance of school year.

## STATEMENT OF FACTS

CARSON CITY, December 3, 1938.

In a certain school district, "A," there are living at present six resident school children. Five of these children are attending school in a school district, "B," other than the one in which they reside. School district "B" is in another county. A teacher was legally hired to teach the school in district "A," but when school opened in district "A" there was only one resident child in attendance. Two children, one of them not of school age, who lived in a third organized school district "C," were transported to district "A" for a short time but later dropped out to attend school in a district nearer their residence than district "A." Three children were then imported from a fourth organized school district "D," and have been in attendance at district "A." These three latter children were placed in the school through the Child Welfare Service, but the transfer of these three children was not made in accordance with section 5938, N.C.L. 1929.

## INQUIRY

1. Is it the duty of the Deputy Superintendent of Public Instruction to notify the commissioners that school district "A" has only one resident child in attendance, since there are six children in actual school attendance although five of them are in attendance in a school district in another county?
2. Can the children who are attending the school in district "A" but whose residence is in district "D" be counted for apportionment in district "A"?
3. Can the children who have a residence in district "A" but who are attending school in district "B" be counted for apportionment purposes in district "B"? Where should their A.D.A. be counted?
4. Has district "A" a right to continue school with only resident child in attendance in the school district "A"? If the answer to this question is in the negative, must the salary of the teacher be paid for the school year for which she has been contracted?

## OPINION

Answering Query No. 1: Section 5772 Nevada Compiled Laws 1929 as amended at 1935 Statutes 378, so far as pertinent here, provides:

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

The term "resident child" or "resident children" as used in this act shall be defined in such a way as to include—

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

The term "resident children" is further defined in such a way as to exclude—

1. All children residing in the district (or who may be attending said school through residing in unorganized Nevada territory) who have already completed the eight grades in an elementary school.

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

This office, in Opinion No. 177, dated June 24, 1935, which opinion appears at pages 102-105, Report Attorney General 1934-1936, had under consideration the question of what constitutes a “resident child” and “resident children,” as defined in above-quoted statute.

In such opinion we held that the term “resident child” or “resident children,” as quoted above, particularly with reference to the maintaining of a school and the legal apportionment of school funds thereto, meant a child or children between the ages of six and eighteen years who has or have not completed eight grades in an elementary school and who shall have actually resided within the school district with its or their parents or guardians for a period of at least three months prior to the making of the annual report of said school, which said report contains the daily attendance record of the pupils in such school for the school year, and from which the average daily attendance of each pupil for the school year is computed for the purpose of computing the funds to be thereafter apportioned such school for the next school year. No change having been made in the school laws with respect to the definition of the term “resident child” or “resident children” since the writing of Opinion No. 177, such opinion governs in the instant matter. It is also to be noted that Opinion No. 177 holds that children of requisite age living in unorganized territory attending school in an organized school district shall be deemed “resident children” within the meaning of that term as used in the school law. But, that children, whose parents or guardians reside in or have their homes in an organized school district, cannot be brought within another organized school district for the purpose of augmenting the number of resident children in such latter district and thereby enable such district to receive an apportionment of the public school funds.

Section 5746 Nevada Compiled Laws 1929, provides:

Upon notice from the deputy superintendent of public instruction that a district has fewer than *three resident children in actual school attendance*, the board of county commissioners shall abolish such school district; provided, however, that where there are at least *two resident children in actual attendance*, and there is sufficient funds to the credit of the district or in its treasury to meet the actual expenses attendant on the continuation of the school, the district shall be continued and the school maintained so long as such funds so exist. (Italics ours.)

Section 5729, Nevada Compiled Laws, 1929, provides:

From and after September first, nineteen hundred eleven, no school district, except when newly organized in which there was not taught, by a legally qualified teacher, a public school for a term of at least six months of the school year ending the last day of June preceding, with at least *three resident children* between the ages of six and eighteen years in *actual attendance* for one hundred days, shall receive any portion of the public school moneys. (Italics ours.)



The Legislature has certainly expressed its intent in unmistakable language that the term "resident children," in order that a school may be maintained and receive apportionment of public school funds, means the resident children as defined in the law, as pointed out in Opinion No. 177, and that such resident children must be in actual attendance in the school sought to be maintained. And it is most clear that a school must be closed and the district must be abolished if in such school there is in actual attendance therein fewer than *three resident children*, except that if there are *two resident children* in actual attendance such school may continue on until the money there on hand for the maintenance of such school is expended.

From the facts as contained in the Statement of Facts, hereinabove set forth, we think it is absolutely clear that there is only *one resident child* in actual attendance at the school in school district "D" "A." The three children imported from school district "D" were not and are not "resident children" in actual attendance in school district "A," for the reason, so we are advised, that they were at the time of their importation into school district "A" residing with their parents in and attending school in district "D." It is clear that such children do not come within the term "resident children," contained in the statute. Further, we are advised that they were not transferred to district "A" in accordance with the provisions of section 5937 Nevada Compiled Laws 1929, providing for the transfer of school children from one school district to an *adjoining school district* in the same county by and with the consent of the Board of Trustees of both districts. But, even if such children were transferred in accordance with section 5937, still that fact would not make them resident children in district "A." Such section provides, in effect, that the County Treasurer shall transfer from the funds of the district from which the children are transferred to the funds of the other district the pro rata of State and county moneys for each of such children theretofore apportioned to each of them. Under this statute we think it is clear that such transferred children would be deemed resident children of the district from which transferred. Such statute contemplates the transfer of children between adjoining districts in the same county for the purpose of convenience of the children only. We are advised that school districts "A" and "D," while in the same county are not adjoining districts. The fact that the Child Welfare Service had something to do with the transfer of such children gives the transfer no validity. The law must be followed. It is binding on the Child Welfare Service as well as on the Boards of School Trustees. As the matter now stands it is our opinion that only one resident child is in actual attendance in school district "A." The five children attending school in district "B" in another county are not in actual attendance in school in district "A" and are not to be *now* counted as resident children within district "A" for school maintenance purposes.

There being only one resident child in actual attendance in school district "A," we think the deputy Superintendent of Public Instruction is bound to follow the mandatory language in section 5746, *supra*, and give notice of such fact to the proper Board of County Commissioners. We think such section is mandatory, and that its express language is to be complied with.

Answering Query No. 2. For the reasons contained in the answer to Query No. 1. Query No. 2 is answered in the negative.

Answering Query No. 3. We fail to find in the laws of this State any legal authority for the transfer of school children from a school district in one county, where their legal residence has been established and maintained, as here, to a school district in another county, so as to effect a legal apportionment of school funds to the latter district for such children. Section 5937, *supra*, limits the right of transfer of school children to adjoining districts in the same county. We

understand that the five children here in question reside with their parents in district "A" and are transported daily to and from school in district "B" in an adjoining county. it is most clear that they are not "resident children" in district "B" within the meaning of section 5772, Nevada Compiled Laws 1929, as amended, 1935, 378, hereinabove quoted, and construed in said Opinion No. 177. The query is answered in the negative.

Answering Query No. 4. Section 5946, supra, being mandatory in its provisions and district "A" not coming within the exception contained in such section, we are of the opinion and so hold that district "A," under the facts and circumstances set forth in the statement of facts, does not now have the right to continue with only *one resident child* in attendance in the school.

If the school in district "A" is now closed, pursuant to section 5746, supra, it is our opinion that the salary of the teacher thereof for the balance of the present school year need not be paid. Section 5746, supra, is a mandatory statute. Its provisions, we think, impliedly become a part of the contract of employment of the teacher, and by reason thereof the teacher is bound by the terms of such statute. This phase of the law is well stated in 56 Cor. Jur. 420, section 373, as follows:

The provisions of a statute under which school boards are not permitted to open or maintain schools unless an average attendance of a stipulated number can be maintained, are impliedly embraced in teachers' contracts of hire, so that where the school is closed because of attendance below the statutory minimum, the teacher cannot recover compensation for the balance of the term; \* \* \*.

To same effect is 24 R.C.L. 619, section 77.

And in 12 Am. Jur. 956, section 379, it is stated:

Where performance becomes impossible by lawful acts of the public authorities subsequent to the making of the contract, the situation apparently becomes similar to that under which by a change in the law rendering performance impossible, nonperformance is excused. The rule that where the performance of a contract becomes impossible, subsequent to the making thereof, the promisor is not thereby discharged, does not apply where the performance becomes impossible either by reason of a change in the law or by some action or authority of the government.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

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

MILDRED BRAY, *Superintendent of Public Instruction*.