

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1934

OPINION NO. 34-121 IRRIGATION DISTRICTS—Powers of County Commissioners—Reimbursements.

The County Commissioners are not empowered under sections 2027 and 2028, N. C. L. 1929, to pay money out of the County General Fund for expenses incurred on a trip to Washington, D. C., where the trip was made on behalf of an irrigation district.

INQUIRY

Carson City, January 23, 1934.

Are the County Commissioners empowered under sections 2027 and 2028, Nevada Compiled Laws 1929, to pay money out of the County General Fund for expenses incurred on a trip to Washington, D. C., where the trip was made on behalf of an irrigation district?

OPINION

The sections above referred to are a part of an Act empowering the Boards of County Commissioners to exploit and promote the agricultural, mining, and other resources, progress, and advantages of their *respective counties*, and to provide ways and means for this purpose. No part of this Act refers to an irrigation or other district within the county, but the Act applies to the county as a whole.

It is, therefore, our opinion that the County Commissioners are not empowered by this Act to pay money out of the County Fund as distinguished from the Irrigation District Fund, by way of reimbursements or otherwise for the expenses of a trip made to Washington, D. C., on behalf of an irrigation district. Neither is it legal to pay the expenses of such trip on behalf of the irrigation district out of the General Fund of the county as a whole, for the reason that the General Fund of the county is derived from taxation of all the property in the county, and is collected from all the taxpayers in the county, and is not limited to taxation upon the property situated within the irrigation district alone.

Respectfully submitted,

GRAY MASHBURN
Attorney-General.

By Julian Thruston
Deputy Attorney-General

HON. W. A. WILSON, District Attorney, Lovelock, Nevada.

OPINION NO. 34-122 WITNESSES—Jurors—Mileage.

1. Chapter 60, Statutes of 1933, does not repeal the Act of 1919 and/or sections 8490 and

8491, N. C. L. 1929, relating to mileage and the payment thereof to witnesses and jurors.

2. Chapter 121, Statutes of 1933, amends the Act of 1919 and sections 8490, 8491 and 8492, N. C. L. 1929, and chapter 60, Statutes of 1933.

3. Chapter 121, Statutes of 1933, is the law on the subject of mileage of witnesses and jurors, and the means of payment thereof.

STATEMENT

Carson City, February 1, 1934.

The 1933 Legislature enacted, and the Governor approved, two Acts, each purporting to amend "An Act to fix the fees and mileage of witnesses and jurors, providing the means of payment thereof, and to repeal all acts and parts of acts in conflict herewith," approved March 26, 1919, the same being found at sections 8490-8493, Nevada Compiled Laws 1929, and the 1933 Acts being chapter 60 and 121 of the 1933 Statutes. Chapter 60 was approved March 10, 1933, and purports to amend sections 1 and 2 of the said Act of 1919 and contains a general repealing clause. The language of the title is "An Act to amend sections 1 and 2 of an Act entitled 'An Act to fix the fees and mileage of witnesses and jurors, providing the manner of payment thereof, and to repeal all acts and parts of acts in conflict herewith,' approved March 26, 1919." The title to chapter 121 is identical with the title to chapter 60, except it includes therein a reference to section 3 of the 1919 Act. Chapter 121 was approved March 20, 1933. Chapter 121 contains a repealing section reading, "All acts or parts of acts, either general or special, in conflict with the provisions of this act are hereby repealed."

Both Acts contain provisions making them effective immediately upon their passage and approval. Both Acts contain the same amendatory language, i.e., "Section 1 of the above-entitled act, being paragraph 8490, N. C. L. 1929, is hereby amended to read as follows: * * *." The same language is applied to section 2 of the Acts and to section 3 of chapter 121, and, of course, different sections of the Nevada Compiled Laws are indicated in sections 2 and 3.

Chapter 60 so amends the then existing law as to cut the mileage rate for witnesses and jurors from thirty cents per mile to fifteen cents per mile, but leaves the witness fees and jurors' per diem as they were in the 1919 Act. Chapter 121 leaves the mileage at fifteen cents per mile, but cuts witness fees from four dollars to three dollars in criminal and civil actions in the District Courts and from three dollars to two dollars in civil cases in Justice Courts. Trial jurors in District Courts and grand jurors are allowed three dollars per day for service in chapter 121, while under chapter 60 and the 1919 Act they received four dollars. Jurors in civil cases in Justice Courts received two dollars per day under chapter 121 as against three dollars under the prior statutes. Jurors in criminal cases in Justice Courts are allowed one dollar per day, while, under the 1919 Act and chapter 60, they received no compensation. Coroner's jurors were cut from two dollars and fifty cents per day to two dollars in chapter 121.

With the exception of the hereinafter-quoted language in section 2 of chapter 121, which purports to amend section 2 of the 1919 Act, the phraseology of both chapter 60 and chapter 121 is the same as the 1919 Act. The language mentioned above is, "and in addition thereto, shall deposit with the clerk of the court a sum sufficient to pay each member of the jury panel three dollars for his first day's attendance, unless the court shall make an order and file the same with the clerk of the court providing that the county shall pay the first day's attendance of the jury panel."

INQUIRY

1. Does chapter 60, Statutes 1933, repeal the Act of 1919 and sections 8490 and 8491, Nevada Compiled Laws 1929?

2. Does chapter 121, Statutes 1933, amend the Act of 1919, sections 8490 and 8491 and 8492, Nevada Compiled Laws 1929, and or chapter 60, Statutes 1933?

3. Which chapter of the 1933 Statutes is the law on the subject of witness and juror fees and

mileage?

OPINION

It is clearly apparent from the statement preceding the queries that both chapters 60 and 121 of the 1933 Statutes purport to make substantial reductions in the travel pay and witness and juror fees as applied to witnesses and jurors summoned to serve in the courts of the State. Both chapters were enacted at the same session of the Legislature and approved within ten days of each other. It is a cardinal rule of statutory construction that where two Acts relating to the same subject are passed they are to be construed in *pari materia* and effect given to both, if it is possible so to do, and that neither Act shall fall unless there is such an unreconcilable inconsistency between them that both cannot be given effect or enforced. In the event of such inconsistency, it is well settled that the later Act will control and will supersede the prior Act.

It is clear that chapter 60 and chapter 121 cannot be construed in *pari materia*. The reduction in the witness fees and juror per diem prevents such construction; and, as chapter 121 contains the same mileage rate as chapter 60, any necessity of referring to chapter 60 for that purpose is precluded. We think that chapter 60 and chapter 121 cannot be construed in *pari materia* and that one must fall. Chapter 121 being the later Act must control, unless there are cogent reasons for holding otherwise.

We understand that it is thought in some circles that chapter 60 repealed the sections of the prior law, either by reason of the general repealing section contained in chapter 60 or by operation of the rule adopted in some States that the amending Act repeals the prior law and that, by reason of a later Act purporting to amend such prior law, it would fail of its purpose because the first amending Act had repealed the prior law and, therefore, the last Act would not be effective because it amended a law no longer in existence. Such a rule does exist in some jurisdictions (59 Corpus Juris, 852, sec. 423, and 854, sec. 427); but we think such rule does not obtain in Nevada. We think that Nevada follows a contrary rule, i.e., that, even where a statute is repealed in toto, a statute which purports to amend such repealed statute is valid when the provisions of the new statute are independent and complete in themselves and the legislative intent and purpose are intelligibly set forth in the new statute (59 Corpus Juris 853, sec. 424, 854, sec. 427; 25 R. C. L. 906, sec. 157). However, we think that chapter 60 did not repeal any part of the 1919 Act. It simply amended it. The general repealing section of chapter 60, so far as the provisions of the 1919 Act were concerned, did not act as a repeal thereof (*Worthington v. District Court*, [37 Nev. 212](#); *Ex Parte Counts*, [39 Nev. 61](#)). Chapter 60, when approved, became a part of the prior Act of 1919 and is to be treated as a part of that Act. *Worthington v. District Court*, supra.

The term "amendment" implies such addition to or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed. *An act is amended when it is in whole or in part permitted to remain, and something is added to or taken from it, or it is in some way changed or altered* to make it more complete or perfect, or to fit it the better to accomplish the object or purpose for which it was made or some other object or purpose. 25 R. C. L. 904, sec. 156.

Strictly speaking, an amendatory act is not regarded as an independent statute, and it may be framed so as to amend certain parts of the law and to add such supplementary sections as might be embraced under the title of the original act. 25 R. C. L. 905, sec. 157.

In the *Worthington v. District Court* case, supra, the Supreme Court of Nevada had presented to it an analogous question relative to the Nevada Divorce Act. It was claimed in that case that the 1875 amendment to the Marriage and Divorce Act of 1861 repealed section 22 of the 1861 Act and that, by reason thereof, a later amendment of section 22 in 1913 was void because of the alleged prior repeal. The Court held otherwise, saying:

In the Tiedemann case, [36 Nev. 494](#), 137 Pac. 824, this court treated the amendment of 1875 of section 22 of the marriage and divorce act as a part of the act of 1861, and not as a separate act, and referred to the act of 1913 as amendatory of section 22 of the original act. While the question was not specifically presented for consideration in that case, this view of considering amendatory statutes is well supported by the authorities.

Under the title and language of the act of 1875, before mentioned, considered with the provision in section 19, article 4, of the constitution, that “no law shall be revised or amended by reference to its title only, but, in such case, the act as revised, or section as amended, shall be reenacted and published at length,” it is apparent that the legislature intended to amend section 22 of the original act relating to marriage and divorce. It is contended that the act of 1875 repealed section 22 of the original act, and that the act of 1913 is void, because it attempts to amend that section after it has been repealed. The unchanged part of a section amended is deemed to continue in force. From the title stating so and the language used, it is apparent that by the act of 1913 the legislature intended to amend the act of 1875. No language could have more definitely indicated this purpose. The “act as revised and section as amended” was “reenacted and published at length.” Each of the later acts is entitled “An Act to amend,” and not “An Act to repeal.” The statement in section 2 of the act of 1913 that “all acts and parts of acts in conflict with this act are hereby repealed” is a stereotyped form, often unnecessarily used in bills. It has no effect, and may be regarded as surplusage. We think the act of 1875 should be considered as an amendment, as defined by lexicographers and scholars, and as it was intended, the same as such acts have been considered by legislatures and compilers of laws in this state, instead of a repeal, as ordinarily understood, of section 22 as originally passed. Sections 2 and 4 of our act relating to marriage and divorce were amended by an act approved March 5, 1867 (Stats. Sp. Sess. 1867) c. 51, p. 88, and in the subsequent amendment of these sections by the acts approved February 5, 1891 (Stats. 1891, c. 5), and March 6, 1899 (Stats. 1899, c. 35), the legislature, similarly as in other second amendatory acts, treated them as numbered sections of the original act, without reference to them as sections of the first amendatory act.

We think it clear from the foregoing authorities that chapter 60 simply amended sections 1 and 2 of the 1919 Act and thereby became a part of the original Act. The legislative intent is clearly shown in the title and in the body of the Act, the reference to the paragraph numbers of the 1929 compilation being simply for ready reference. For a period of ten days, the 1919 Act stood as amended by chapter 60. On March 20, 1933, chapter 121 became effective by reason of its approval, and it, in turn, amended sections 1 and 2 of the 1919 Act, the same that were amended previously by chapter 60, with the additional amendment of section 3 of the 1919 Act. The intent of the Legislature is also clearly and expressly shown in the title and in the body of the Act. Chapter 60, having become for all intents and purposes a part of the original Act, was for that reason amended by chapter 121 and superseded thereby.

For the reasons above stated we answer:

Query No. 1 in the negative;

Query No. 2 in the affirmative;

Query No. 3, that chapter 121, Statutes 1933, is the law on the subject and that it supersedes chapter 60.

Respectfully submitted,

GRAY, MASHBURN
Attorney-General

HON. JAMES DYSART, District Attorney, Elko, Nevada.

SYLLABUS

123. Bank Examiner--Employment of Special Counsel.

1. The State Bank Examiner and Superintendent of Banks may, in extraordinary cases, employ special counsel to represent him in his official capacity.
2. When special counsel is so employed the compensation for the services rendered to the Bank Examiner is to be fixed by the State Board of Finance, and a bill presented to said board by the special counsel for services rendered by him is a legal bill.

STATEMENT

CARSON CITY, February 20, 1934.

There came to my attention yesterday the recent letter of your secretary, Mr. E. J. Seaborn, to me asking the opinion of this office as to whether the employment of Messrs. Harwood and Diskin, Attorneys at Law, Reno, Nevada, by him as State Bank Examiner and as Superintendent of Banks of the State of Nevada to represent him "in connection with the closed banks of the Wingfield group up to December 31, 1933," was an employment which the Bank Examiner and Superintendent of Banks was authorized by law to make, i.e., whether such employment was legal.

Since we have not seen the "bill" referred to in the letter, this opinion will not, of course, deal with, relate to, or attempt to discuss the items thereof in detail and is to be considered as dealing solely with the legal right of the Bank Examiner and Superintendent of Banks of this State to employ special counsel (his own counsel) to represent him in situations of this nature. This is a cold, bare question of law. All the information we have as to what the bill contains is from general discussions in the newspapers and general statements from memory by certain members of the Board without going into detail as to the items.

It must be kept in mind, however, that this office does not make or approve any law. To make laws is the duty and function of the Legislature. It is the duty and function of the Governor alone to approve or disapprove them. This office has absolutely nothing to do with either the making (passage) or approval of any law. The Banking Act, pursuant to which this employment is presumed to have been made, was passed by the Legislature of this State in 1911, and then later by the Legislature of this State in 1933, the last Legislature in session in this State, and, in each instance, approved by the Governor of this State. The first (1911) law was enacted and approved soon after the writer of this opinion came to the State of Nevada and before he ever saw the Legislature or Governor of this State. He certainly cannot, therefore, be held responsible for this law of 1911. As to the 1933 law (our present Banking Act) under which, in part at least, this employment, is presumed to have been made, this 1933 Banking Act is an exact copy of the 1911 law insofar as the authorization for or legality of this employment is concerned. Both laws are the same on the point of the legality of the employment. Neither the writer of this opinion nor the office of Attorney-General had anything at all to do with the passage and approval of either of these laws. This office is not, therefore, responsible in any way for the law as it exists. The sole duty and function of this office, insofar as construing the laws is concerned, is to attempt to say

what the Legislature and Governor meant by the language used in these laws. This office has absolutely no duty to perform and absolutely nothing to do with the establishment of the public policy of the State. The public policy of the State is established entirely by the Legislature and the Governor. All we can do is to take the law as written and give our opinion as to what the language used means. This opinion is, therefore, limited to an expression of our views as to what the language of our laws means concerning the legal right of the Bank Examiner and Superintendent of Banks to employ special counsel to assist him in the legal matters relating to closed banks.

In considering this matter, it must be kept in mind that what the Attorney-General would like the law to be and what the law really is, may be, and often are, two very different matters.

It must also be kept in mind that this office has not been asked to pass upon the reasonableness of the "bill." In fact, the first thing said by the member of the Board who sought oral advice from this office as to whether the Bank Examiner and Superintendent of Banks is authorized by law to employ special counsel in matters relating to closed banks was that the Board did not desire the advice of this office, and would not ask our advice, as to the reasonableness of the bill or claim. Having expressly declined to ask the advice of this office as to the reasonableness of the claim, it was but natural that we should not undertake to advise him nor the Board of Finance as to whether the bill or claim was excessive or not excessive; and this office has not given any advice or opinion to the Board as to whether this bill was excessive. The question of the reasonableness of a claim is never a matter of law. It is always a matter of fact. Every lawyer of experience, ability, and fairness will, no doubt, agree that the reasonableness of a charge or of a matter to be determined is a question of fact. The members of the Board, no doubt, knew that that was the case. In any event, the member of the Board who sought the advice of this office began the conversation by saying that the Board realized that the question of the reasonableness or amount of the bill was a question for it to decide without advice of counsel, and stated that the Board would determine that fact without asking the advice or opinion of this office. For the foregoing reasons, this office has not passed upon the question of the reasonableness or amount of the bill, and has never been asked to do so. The members of the Board realize and have always realized that it is their duty to decide whether, in their opinion, the bill is reasonable or excessive. The writer of this opinion has his personal views on the matter; but, since the Board has declined to ask what these views are and is not entitled to an opinion on the point because it is a matter of fact rather than of law, there is no occasion to here express his views.

It is the unqualified opinion of this office that the members of the Board of Finance are correct in their views that the question of the reasonableness or excessiveness of the bill is a matter of fact for them to determine without the opinion of this office. The mere fact that the Legislature left it to the Board of Finance rather than to the Board of Examiners to fix the amount of the fee of special counsel for the Bank Examiner and Bank Superintendent quite clearly indicates that it was the intention of the Legislature of this State that lawyers should not participate in the fixing of such attorney fees. Both the old Banking Law of the year 1911 and our new and present Banking Law of 1933 leave the matter of the fixing of the amount of attorney fees in such cases to the Board of Finance, the old law designating this Board as the "State Banking Board" and the new Banking Law designating the Board as the "State Board of Finance"; but both of these designations refer to the same Board. The "State Banking Board," "State Board of Investment," and "State Board of Revenue" were abolished after the 1911 Banking Law was adopted and the "State Board of Finance" was created by the same Act, and all of the duties theretofore devolving upon these three abolished boards were imposed upon the "State Board of Finance." So, the law in both the 1911 Banking Act and the 1933 Banking Act was the same insofar as the fixing of the amount of such attorney fees and the board to determine the amount thereof are concerned. The new 1933 Banking Act, like the 1911 Banking Act, places this duty to fix the compensation of such special counsel in the following language: "* * * whose" (special counsel) "compensation shall be fixed by the State Board of Finance" (State Banking Board) "at such reasonable and

proper sum as may be determined upon by them for the services rendered.” Certainly, this makes it clear that the duty to fix the amount of the compensation of lawyers in such cases is imposed upon the Board of Finance alone. This is the law under which we are operating at the present time. The Attorney-General is not a member of the Board of Finance; and the only duty imposed upon the Attorney-General by law to this Board is the duty to advise it on points of law when asked for such advice. While the Attorney-General is willing, ready, and anxious to assist every State officer, board, and commission in every matter, whether the duty to do so be imposed by law or not, the Board of Finance has expressly stated that it did not desire the assistance or advice of the Attorney-General on this point. It should be kept in mind that the Legislature might just as well have placed the duty to fix the amount of such attorney fees on the Board of Examiners, of which the Attorney-General is a member; but the fact remains that the Legislature imposed this duty upon the Board of Finance, composed entirely of laymen, notwithstanding the fact that one of the members of the Board of Examiners is a lawyer. It seems clear from this situation that the Legislature thought that one lawyer would be liberal toward another lawyer in fixing the amount of his attorney fee and desired to place this duty upon the Board of Finance on which there is no lawyer. To the mind of the writer, it is evident from this situation that the Legislature desired to have the amount of the attorney fee fixed by a board composed entirely of laymen and on which there was not a lawyer. This was, no doubt, a wise precaution on the part of the Legislature, as it is a well-known fact that laymen usually look upon the fees charged by attorneys as excessive in every case, while lawyers who are not prejudiced by bias or some personal interest or spite are, as a rule, thought to be liberal in fixing the attorney fees of other lawyers.

INQUIRY

For the foregoing reasons, this opinion is limited to the right and to the legal authority of the State Bank Examiner and Superintendent of Banks of this State to employ special counsel of his own selection to render services to him in connection with the closed banks, and who is authorized by law to fix the attorney fee or compensation for such services, basing the opinion on the following question:

Was and is the employment of the law firm of Harwood & Diskin, Attorneys at Law, Reno, Nevada, by the State Bank Examiner and Superintendent of Banks of this State, to represent him and act as his special counsel “in connection with the closed banks of the Wingfield group,” the compensation therefor to be fixed by the State Board of Finance, a legal employment, i.e., an employment which the law permits and authorizes him to make; and, if so, is the bill for such services legal?

OPINION

A proper answer to this inquiry and the inquiry suggested by the Resolution of the Board of Finance requires a consideration of the exact language of the law under and pursuant to which the State Bank Examiner and Superintendent of Banks employed Messrs. Harwood and Diskin as his attorneys in matters in connection with these closed banks. In order that there may be a complete understanding, and because of a lot of loose and careless statements which have already been made in connection with this matter, statements not justified by either the law or the facts, we shall here quote the law so that every member of the Board and others who may take the trouble to read this opinion may know exactly what the language of the law to be construed is; and, because of at least one incorrect statement attributed to one misinformed lawyer to the effect that the 1933 Session of the Legislature of this State changed the law in order to prohibit the State Superintendent of Banks from employing special counsel in situations of this kind and place this duty upon the District Attorneys and Attorney-General, we here quote both the old 1911 Banking Act and the new 1933 Banking Act, insofar as they relate to the legal right of the Superintendent of Banks (formerly State Bank Examiner) to employ his own special counsel in such cases. The purpose of quoting both the old 1911 Banking Act and the new 1933 Banking Act on this point is

to give the members of the Board and everybody else who may be interested an opportunity to compare the language used in the old law with the language used in the new, and to enable them to see for themselves how incorrect and how unjustified the statement attributed to the above-mentioned lawyer is and how far it is from the truth. From this comparison, it will be seen that the law, in this regard, was not changed in the slightest degree by the 1933 new Banking Act, keeping in mind, of course, the fact that the present Board of Finance is the same Board as the old Banking Board mentioned in the 1911 Banking Act and that the Superintendent of Banks is the same officer as the "State Bank Examiner" mentioned in the 1911 Banking Act.

The language of the 1911 Banking Act, insofar as it relates to the right of the Bank examiner (now Superintendent of Banks) to employ special counsel in such cases, is as follows:

The examiner may employ such clerks and assistants and incur such expenses for rent, office supplies and other proper and reasonable expenses as may be necessary in the preservation and liquidation of the business of such bank, and in special and important cases may employ an attorney, or attorneys at law, as special counsel to assist in the conduct of any particular case, whose compensation shall be fixed by the state banking board at such reasonable and proper sum as may be determined upon by them, for the services rendered. In ordinary cases, and for the usual advice and assistance that the examiner may require in all legal matters, such services shall be rendered by the district attorney of the county where said banking business was carried on, and also upon request of the examiner, by the attorney-general, without additional compensation, except that the state banking board may, in their discretion, allow the district attorney such sum as may be adjudged reasonable by them, not exceeding, however, fifty (\$50) dollars per month, during the period of the rendition of said services. Nevada Compiled Laws 1929, section 703.

The new 1933 Banking Act, insofar as it relates to this right of the Superintendent of Banks (formerly State Bank Examiner) to employ special counsel of his own selection in such cases, is as follows:

The superintendent may employ such clerks and assistants, and incur such expenses for rent, office supplies, and other proper and reasonable expenses as may be necessary in the preservation and liquidation of the business of such bank, and in special and important cases may employ an attorney, or attorneys at law, as special counsel to assist in the conduct of any particular case, whose compensation shall be fixed by the state board of finance at such reasonable and proper sum as may be determined upon by them for the services rendered. In ordinary cases, and for the usual advice and assistance that the superintendent of banks may require in all legal matters, such services shall be rendered by the district attorney of the county where said banking business was carried on, and also, upon request of the superintendent, by the attorney-general, without additional compensation, except that the state board of finance may, in its discretion, allow the district attorney such sum as may be adjudged reasonable by them, not exceeding, however, fifty dollars per month during the period of the rendition of said services. Statutes of Nevada 1933, sec. 54, chapter 190.

Now let us see what the above-quoted language means. It divides the cases or situations which may confront the Bank Examiner and Superintendent of Banks into two classes, in one of which the above law says that "for usual advice and assistance" that the "Superintendent * * * may require in all legal matters, such services shall be rendered by the District Attorney of the county where said banking business was carried on, and also, upon request of the Superintendent, by the Attorney-General," and, in the other of which, the Superintendent may employ "an attorney, or attorneys at law, as special counsel" to assist him in the conduct of such cases. In situations

where District Attorneys and the Attorney-General may be required by the Superintendent of Banks to give him the "usual advice and assistance," such services shall be rendered by such District Attorneys and the Attorney-General without additional compensation, except that the State Board of Finance may allow District Attorneys whatever it may deem reasonable up to but not exceeding fifty dollars per month during the period such services are being so rendered. It must be evident from the above that the Attorney-General is not expected to render services, even the "usual advice," except "upon request of the Superintendent" of Banks.

In the other class of situations, the class opposed to "ordinary" situations, "the Superintendent of Banks" may legally employ attorneys of his own choosing "as special counsel" to assist him, the Bank Superintendent; and, in such extraordinary situations where the Superintendent of Banks does employ such "special counsel" to assist him, the compensation of such special counsel (the attorney fees therefor) "shall be fixed by the State Board of Finance" at what it shall deem "reasonable and proper" for the services so rendered. The kind of situations in which the law authorizes the Superintendent of Banks to employ his own counsel or attorney is expressly designated in the law as "special and important cases" or situations. The law expressly designates the kind of situations in which the Superintendent of Banks may require the District Attorneys and Attorney-General to furnish him the "usual advice and assistance" as "ordinary cases" or situations. Again, we call attention to the fact that the Attorney-General may be required to render even this "usual advice and assistance" only "upon request of the Superintendent."

It might be of interest to those who have been so ready to insinuate that the District Attorneys and Attorney-General may have neglected their duties in this regard to note that the Superintendent of Banks has never made any request of any kind or nature whatsoever upon either the District Attorneys or the Attorney-General for services of any kind which have not been readily and willingly rendered to him. He has stated time and again that he has never asked the Attorney-General for any advice or to render any service to him in relation to these closed banks which has not been readily and willingly given and rendered. This same situation exists with reference to every other matter in which the Superintendent of Banks has asked the advice or assistance of the Attorney-General. In every instance, this office has gladly given the Superintendent of Banks all the advice and assistance at its command when requested by him, and has actually volunteered advice and assistance to him in every case where it thought he was in need of it. We have never known of a situation in which any District Attorney either failed or refused to give the Superintendent of Banks all the advice and assistance he required of him. We know of several instances where District Attorneys have actually acted as the attorney for the Superintendent of Banks in the liquidation of closed banks, and represented him in such litigation as was incident thereto, when he requested them to do so, in all of which this office participated. We know of one instance within the last two years where the District Attorney, with the advice and assistance of the Attorney-General, represented the Superintendent of Banks in the liquidation of two closed banks in his county and the litigation incident thereto. Certainly, no one with any knowledge of the law and the slightest degree of fairness would presume to say that such services so rendered by the District Attorneys and Attorney-General in the litigation incident to closed banks were "the usual advice and assistance" required by the Superintendent of Banks. Notwithstanding the fact that these services could certainly not be considered "the usual advice and assistance" which the District Attorneys and Attorney-General may be required to give and render the Superintendent of Banks, such services were readily and willingly given.

It must be plain and beyond contradiction that it is only in "ordinary cases" or ordinary situations that the Superintendent of Banks has the legal right to require or demand that even usual advice and assistance be rendered him by District Attorneys and the Attorney-General and, as to the latter, only "upon request of the Superintendent." That is the plain language of the law. It simply means what it says; and no one of reasonable intelligence and fairmindedness can possibly twist it so as to mean anything else. Since this is true, let us see what the law means by the expression "in ordinary cases." We have heard expressions from certain members of the Board which

indicate that the Board might have the idea that the word "cases" means "suits." This is certainly not correct. In the first place, it would be absolutely impossible for anyone to say when a case arose whether it was going to develop into an ordinary suit or an extraordinary suit. It would be ridiculous to give this word any such meaning as "suit" or "action." Let us see what Webster's Dictionary and the Standard Dictionary say the word "case" means. The Standard dictionary defines the word "case" as a "situation; condition; fact; instance; event; group of facts, conditions, or circumstances under discussion; a special condition of affairs." Webster defines this word "case" as "an event; an instance; a circumstance, or all circumstances; a condition; a state of things, an affair." It is true that in the body of a pleading or brief or other paper used in a suit or action in court, after the entitlement of the suit or action, the word "case" is sometimes used interchangeably with the word "suit" or "action"; but this is not the usual meaning of the word "case." The reading of the language of the last sentence in section 54 of the 1933 Banking Act, where this expression "ordinary cases" is used, indicates clearly that the Legislature did not have in mind by this expression "suits" or "actions" in court. The language itself says that the Legislature had in mind the "usual advice and assistance" required by the Superintendent.

Now let us see what is meant by the word "ordinary" as used in this expression "ordinary cases." Standard Dictionary defines "ordinary" as "customary; usual, regular; normal." Webster defines it as meaning "customary; usual, commonplace; inferior; as a rule; that which is so common, so continual, as to be considered a settled, established institution or custom." Webster defines the expression "in ordinary" as meaning "in actual or constant service."

From these definitions taken from Webster's and Standard Dictionaries and from the entire context of the sentence relating to the duties of District Attorneys and the Attorney-General, it must be absolutely clear and beyond contradiction that it is only when the affairs of the Superintendent of Banks are running along in the even tenor of their ways that the Superintendent of Banks may require the services of the District Attorneys and the Attorney-General and that, even in such situations, he may require them to give him only "the usual advice" and render him the "usual assistance" in all such legal matters, to wit, matters of legal advice and assistance relating to the ordinary or customary duties of his office. This is evidently what the Legislature meant by the language used in the last sentence of said section 54, for the very simple reason that the language is not subject to any other reasonable construction.

It is interesting to contemplate what is meant by the expression "that the Superintendent of Banks may require." The word "require" does not simply mean what he may "need." The word "require" has a stronger and more imperative meaning than the simple word "need." The Standard Dictionary defines the word "require" as meaning "insist upon; ask as of right." Webster defines the word "require" as meaning "demand; insist upon having; claim, as by right; request; order; direct." Words and Phrases Judicially Defined imports to the word "require" the element of "demand" or "command" or "compulsion."

What is there before the Board of Finance to show that the Superintendent of Banks ever required the District Attorneys to render the services covered by the "bill" or that he ever "requested" the Attorney-General to render any such services?

It must be clear and beyond contradiction to any fairminded man with a reasonable knowledge of the English language that the services rendered by Messrs. Harwood and Diskin to the Superintendent of Banks and Bank Examiner in connection with the complicated affairs of the closed Wingfield banks, and at the request of the Superintendent of Banks, were not services rendered in "ordinary cases." When almost one-half of the banks in the State in the amount of deposits involved close in a single day and are taken possession of by the Superintendent of Banks in a single day, it would certainly require an impossible stretch of the imagination of even an imaginative genius to say that such a situation was an "ordinary" situation or "condition."

The antithesis of the word “ordinary,” or opposite in meaning from “ordinary” is extraordinary. The law clearly provides that, in “ordinary” or customary or unusual situations, the District Attorneys and the Attorney-General shall advise and assist the Superintendent of Banks when requested by him to do so; but that, in extraordinary situations, he may employ attorneys of his own choosing as special counsel to assist him. The language of the statute (the 1933 Banking Act, section 54) as to when the Superintendent of Banks may employ his own attorneys in such cases, so far as it is applicable, is as follows:

“The superintendent * * * in special and important cases” (situations or conditions) “may employ an attorney, or attorneys at law, as special counsel to assist in the conduct of any particular case * * *.”

Certainly, it is a “special and important” situation, an extraordinary situation, when one-half of the banks in the State, as above mentioned, go out in one day, involving many, many interbank transactions and a great many split loans. It is a matter of record that there are a great many transactions involved in the liquidation of these banks and in the litigation incident thereto where one bank had dealings with another bank, or one bank sold its paper and securities to another bank. In several instances, a single paper and the security incident to it were split between several different banks, so that several banks are involved in the one transaction. With so many banks closing in one day and with so many complicated interbanking transactions and split loans, certainly any fair-minded person must concede that the situation is both important and extraordinary. In such a situation, the law clearly and unquestionably authorizes the Superintendent of Banks to employ his own attorney.

Who is to determine, in the first instance, whether the situation is one which justifies the Superintendent of Banks in employing special counsel, attorneys of his own choosing? Certainly, it is evident that this duty does not devolve upon the Board of Finance. Certainly, it is the Superintendent of Banks who must determine this question, in the first instance, for himself. The sole duty of the Board of Finance is to fix the amount of the compensation or attorney fee in such cases at what that board shall determine, upon a consideration of the matter, to be “reasonable and proper” for the services actually rendered. It is no part of the duty of the Board of Finance to determine when the Superintendent of Banks may legally employ special counsel, or attorneys of his own choosing. The court probably has the right to review the action of the Bank Superintendent in employing special counsel; but, certainly, the law imposes no such right or duty in the Board of Finance.

From the standpoint of justice and fairness, it certainly comes very late in this case for the legal right of the Superintendent of Banks to employ his own counsel to be questioned, when this right is questioned for the first time after the services have been rendered by the attorneys employed by him. Good conscience and fair dealing would certainly require that the legal right of the Superintendent of Banks to employ his own attorneys be questioned, if at all, at the very beginning of the rendition of these services. This questioning of the legal right of the Superintendent of Banks to employ his own attorney should have occurred as soon as it was ascertained that he had made this employment. It cannot be successfully claimed that it was not known that the Superintendent had employed Harwood and Diskin as his attorneys in connection with the closed Wingfield banks. The public press carried many, many statements to the effect that this firm of lawyers was representing the Superintendent in this situation. Members of the Board of Finance and representatives of the press sat in court many days and say the firm of Harwood and Diskin representing the Superintendent of Banks in the suits which grew out of this extraordinary and important situation. If such right of the Superintendent of Banks to employ them was to be questioned, why was it not questioned in the very beginning? The amount of the compensation can be properly questioned now when the bill is presented, in fact, the law imposes upon the Board of Finance the duty of fixing this compensation. The Board may always fix the amount of the compensation at what it deems “reasonable and proper”; but this right does not

extend to the questioning of the legality of the employment. A large element of consent, approval, and acquiescence in this employment arises from the fact that those involved sat idly by and say these services being rendered without questioning the legality of the employment.

In this connection, the same element of consent, approval, and acquiescence enters, to a very, very large extent, into the action of the Board of Finance in its allowance and approval of the bill and claim of these same lawyers, Messrs. Harwood and Diskin, in the sum of four thousand dollars for services rendered to the Superintendent of Banks in connection with these same closed Wingfield banks. This claim for four thousand dollars was allowed and approved by the Board of Finance, and, we assume, paid several months ago. If the employment were legal at that time, why is it not legal now or for the remainder of the splendid services performed by this firm of attorneys?

There is nothing unusual about the employment of special counsel in cases of this kind, in fact, an attorney was employed as special counsel to assist the Bank Examiner on the occasion when the Washoe County Bank was taken over by the Bank Examiner.

The fact that the Legislature contemplated that special counsel should be employed in such extraordinary cases is emphasized by the provisions of section 58 of the 1933 Banking Act, wherein it is expressly provided that "the compensation of the special counsel * * * shall be paid by the Superintendent of Banks out of the funds of such bank in his hands." This, in itself, indicates that the Legislature had in mind that such special counsel would be employed and that the compensation, as fixed by the State Board of Finance, should be paid out of the funds in these banks.

Reference has been made in discussions of this situation to the thought on the part of those who were discussing the matter that it is only in cases where the Attorney-General is disqualified that the Bank Superintendent may legally employ special counsel to represent him. It is impossible to even guess how this idea originated or how it may still be held by anyone who has read the law relating to such matters. If we were forced to guess upon what this idea is based, we would probably guess that the person so contending had in mind the provisions of Nevada Compiled Laws 1929, section 7320. A mere reading of that section will convince any fair-minded person that that section does not apply to cases of this kind. The section relates solely to the right of the Attorney-General to appoint special Deputies Attorney-General to represent him in portions of the State far distant from the Attorney-General's office. The first portion of that section simply prohibits any officer, commissioner, or appointee of the State from employing an attorney or counselor at law to represent the State, within the State, when he is "to be compensated by State funds," unless the Attorney-General and his Deputy are disqualified to act in the case or the Legislature has expressly provided for such employment. Certainly, no fair-minded person who has read this law would say that Messrs. Harwood and Diskin are to be "compensated by State funds."

In addition to the foregoing, it certainly must be evident to every person familiar with the situation and the matters involved that the Attorney-General and his Deputies are disqualified to represent the Superintendent of Banks in the various suits involved in the liquidation of these banks and matters incident thereto. It is both a violation of the ethics of the legal profession and of the Bar Association for a lawyer to represent both the plaintiff and defendant. There is such a conflict of duty that it would be absolutely impossible for any lawyer to properly and fairly represent both sides of any litigation. Shortly after these banks were closed under moratorium, committees appointed by the depositors of the banks met in the Golden Hotel in Reno, Nevada. This was early in the month of November, 1932, we believe. At that meeting, the Attorney-General was asked whether he could represent the Bank Examiner in connection with the Wingfield closed banks. Mr. Seaborn, the Bank Examiner, was present at that meeting. The answer of the Attorney-General was that he could not possibly do so, for the reason that it would

be necessary for him to bring a great many suits against the Bank Examiner, in which the interests of the Bank Examiner as representing the depositors would conflict with the interests of certain State officers whom it would be necessary for the Attorney-General to represent as plaintiffs in these suits. This view, as expressed at that time, was concurred in by the Bank Examiner and, so far as we know, by those present generally. No opposition to this view was expressed. Since that time, the Attorney-General has brought several suits on behalf of various State officers as plaintiffs against Mr. Seaborn as Bank Examiner and Superintendent of Banks. As representing the interests of the State, the Attorney-General has also appeared as counsel in and advised District Attorneys in many other cases brought against the Bank Examiner and Superintendent of Banks. Many of these cases in which the interests of the Bank Examiner and the interests of the State officers represented by the Attorney-General are involved are still pending, three or more of them in one of the counties of the State other than Ormsby County. There are several suits still pending in Ormsby County in which the Attorney-General and his office represent other State officers and which are brought against the Bank Examiner and Superintendent of Banks. Unless the Attorney-General could ethically and properly represent both the plaintiffs and the defendants in these cases, it would be impossible for him to act as the attorney for the Superintendent of Banks. He cannot ethically represent both the plaintiff and defendant in any single suit or related suits any more than any other lawyer could represent both the plaintiff and the defendant in any such situation. The Attorney-General is simply the lawyer for the State, where the law does not provide for other counsel. If it be said that the Attorney-General might ethically give advice in certain matters involved and covered in this bill, we do not know the specified items of it, but we know of no situation in which advice might be asked and which is covered in this bill where the interests of the other State officers involved who are clients of the Attorney-General would not conflict with the interests and duty of the Bank Superintendent as such officer. The ramifications and complications involved in this extraordinary and important situation are such that the interests of the many other State officers having deposits in these closed banks would, in some way, conflict with the interests and duty of the Superintendent of Banks as the representative of the depositors. We know of no matter covered in the bill in controversy in which the Attorney-General could properly and ethically have represented the Superintendent of Banks without conflicting with his duty to many of the other State officers. Certainly, no one would expect the Attorney-General, as a lawyer, to violate the ethics of his profession by representing both parties to any suit, even to the extent of giving advice in any such matter involved.

The strongest position the Board of Finance could possibly take with reference to this bill, if it should determine to object to the payment of it, would be to limit the objection to the question of the reasonableness or excessiveness of the bill, not to the legality of it. By objecting to the amount of the bill, the Board would avoid the above-mentioned inference of consent, approval, and acquiescence in the legality of the bill arising from its former payment of four thousand dollars as part compensation for such services under the employment and by sitting idly by without objection until after the services had been rendered. The objection to the amount is an objection which could very properly be made at any time, even at the present time, as the reasonableness or excessiveness of the bill is a matter which must be determined, in the first instance, by the Board of Finance. While we regret that the bill and compensation asked is so large, the Board has quite properly indicated that, for the reasons stated earlier in this opinion, it does not desire the official opinion of the Attorney-General as to whether the amount of the bill is reasonable or excessive and has not requested an official opinion on this point, properly assuming, we believe, that this is a question of fact for the Board to decide for itself. We have, therefore, refrained from giving an official opinion as to whether the amount of the attorney fee is reasonable or excessive, although the writer has his own personal views as a private citizen and depositor and has expressed these views at times.

Having lost practically all the money he had ever been able to save and having many friends who lost their all in these closed banks, it has been just as difficult for the Attorney-General as it has

been for any other depositor to keep a cool head and a reasonable attitude toward those who have been responsible for or have suffered conditions to arise which necessitated the closing of this group of banks and the consequent loss of so much money to the depositors. While the writer as a private citizen rebels as strongly, no doubt, as any other citizen against the injury done our people by the loss of their money, he cannot, as Attorney-General, permit this rebellious spirit to drive him to an attitude of injustice and unfairness toward those who have been apparently conscientiously endeavoring to save all that they could from the wreck for the suffering and injured depositors, especially to the extent of ignoring the law or of counseling others to ignore it.

Unfortunately the science of the law is not an exact science like the science of mathematics. Good lawyers will conscientiously differ on nearly every point of law. This is illustrated by the very recent decision of the Supreme Court of the United States, the highest court in the land, when that court divided in its decision, five to four, on a very important question, although the nine justices constituting that court are assumed to be at least among the best lawyers in the world. As to the attitude of lawyers generally, they are often influenced by their own personal feelings and the feelings and interests of those who consult them and are probably prospective clients. It is not unreasonable, therefore, to expect that lawyers will differ on the question of the legal right of the Superintendent of Banks to employ his own counsel in connection with these closed banks. In fact, it would be unreasonable to expect that they all do agree on the point. It would be just as unreasonable to expect that any group of laymen would agree upon what would be a reasonable attorney fee for the attorneys employed by the Superintendent of Banks to represent him in these matters. If the question were presented separately to any ten laymen or lawyers, there would no doubt be ten different answers as to what would be a reasonable attorney fee. We do not, therefore, expect any complete unanimity of opinion on either the legality of the employment or the reasonableness of the attorney fee. Each person involved must, therefore, satisfy his own conscience.

In closing this opinion, we feel constrained to call the attention of the State Superintendent of Banks and of the Board of Finance, and of all other persons concerned, to the very poor and regrettable policy adopted in the employment of special counsel to represent the Superintendent of Banks in matters of this kind. We urgently suggest that, if an occasion should hereafter arise which would justify the employment of special counsel by the Superintendent of Banks, he should adopt a method of procedure somewhat similar to the following: First, he should consult such an attorney as he believes would be satisfactory to him and negotiate with him with reference to either the amount or the basis of his compensation until they arrive at an understanding as to what compensation the attorney consulted would handle the case for, if employed; second, he should report to the State Board of Finance either the full amount of compensation or the basis of compensation for which he can obtain the services of this attorney; and, third, he should secure the approval of the Board of Finance to the compensation to be paid for the services to be rendered before he closes any contract of employment with the attorney. If such a plan had been pursued in this case, it would probably have avoided a lot of complications and misunderstandings for all concerned.

Summarizing this opinion, and eliminating our discussion of the points involved, it is the unqualified opinion of this office that the employment of the firm of Harwood and Diskin by the State Bank Examiner and Superintendent of Banks of this State to act as his special counsel "in connection with the closed banks of the Wingfield group" was and is a legal employment, i.e., an employment which the law permits and authorizes him to make; that this is not what is designated in the law as an "ordinary case," but presents and constitutes an extraordinary and important situation in which that officer was fully authorized by law to employ attorneys of his own choosing, insofar as these matters are revealed to this office by the information before us; and that the bill for such services, insofar as we are informed of the nature of the items thereof, is legal.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

STATE BOARD OF FINANCE, Carson City, Nevada.

SYLLABUS

124. Fish and Game Laws--County Commissioners, Powers.

1. The County Commissioners have the power to close the fishing season on a portion of a stream within their county.
2. An ordinance published one year closing the fishing season on a portion of a stream holds good for succeeding years unless there has been a change in the Fish and Game Act, or unless the State Fish and Game Commission has changed the dates of the fishing season.
3. Where the State Board of Fish and Game Commissioners set the dates of a fishing season, the County Commissioners, in order to shorten or close the season so fixed, must enact an ordinance to that effect.

INQUIRY

CARSON CITY, February 23, 1934.

1. Have the County Commissioners power to close a portion of a stream or a stream within their county, or is this right vested only in the Nevada Fish and Game Commission?
2. If the County Commissioners have this power, must they pass a new ordinance each year, or would an ordinance published one year hold for succeeding years until rescinded?
3. Does an ordinance of the County Commissioners passed for the purpose of closing or shortening a season, either on fish or game, hold good from year to year, or must the action of the Board be repeated each year?
4. Must not the ordinance passed by the County Commissioners either closing or shortening a season be passed subsequent to the setting of the season by the Fish and Game Commission?

OPINION

Query No. 1

Section 49 of the Fish and Game Act of 1929, i.e., section 3083, Nevada Compiled Laws 1929, provides as follows:

The board of fish and game commissioners are hereby authorized to extend or close the season for fishing in any streams or parts of streams, lakes, or waters within this state which are now or hereafter shall have been stocked with food fish by the state or its commissioners, when, in their opinion, such action is necessary for the protection of the fish in said streams and waters, to the end that the supply of fish for food may be permanently increased * * *.

Section 67 of said Act, i.e., section 3101, Nevada Compiled Laws 1929, provides:

The state fish and game commissioners are hereby authorized to divide the State of Nevada into such districts as they may find expedient with reference to hunting or fishing, and fix the dates for hunting or fishing in each of said districts within the limits provided in this act; provided, that the county commissioners of any county in this state may shorten or close the season entirely, and it shall be unlawful for any person to hunt or fish in any such district or county on any other day or days than may be designated by the fish and game commissioners or the county commissioners of any county affected.

Under section 49 of the Fish and Game Act (above quoted), the State Board of Fish and Game Commissioners are empowered to close the season for fishing in any stream or part of a stream in this State, provided that such stream or part of a stream shall have been stocked with food fish by the State or the Board of Fish and Game Commissioners. The stocking of the stream sought to be closed and fishing prohibited therein by the Board of Fish and Game Commissioners is a condition precedent to the right of such Board to close the season for fishing on such stream. If such stream has not been so stocked by the State or Board of Fish and Game Commissioners, i.e., stocked from the State Fish Hatchery or with fish acquired by the State Board, then such Board does not possess the power under this statute to close the season on such stream. No other section of the law providing that the State Board of Fish and Game Commissioners be authorized to close a stream or part of a stream having been enacted, we think section 49 controls as to the power of the State Board in this particular, and that the condition imposed by such section must exist before such Board may legally close any particular stream or part of a stream.

Under section 67 of the Fish and Game Act (above quoted), it is clearly apparent that the County Commissioners of any county in the State are empowered to close the fishing season entirely within a district or districts within their respective counties; and it will be noted that the power to close the season is given to the County Commissioners alone by this section, while the State Board of Fish and Game Commissioners is only empowered to shorten the open season by the fixing of the dates thereof and, while the State Board is empowered to close streams and parts of streams entirely, by section 49, such power is only to be exercised when the condition hereinbefore discussed exists. We think that, under section 67, the Boards of County Commissioners are empowered to close the season for fishing in the district or districts within their respective counties either when the condition provided by section 49, i.e., the stocking of the stream or streams with food fish by the State or State Board, exists or when such condition does not exist, by reason of the power granted in said section 67. The power being granted to the County Commissioners to close the season entirely within a district or districts within a county, then we are of the opinion that it necessarily follows that such County Commissioners have the right to exercise such power as to a particular stream or part of a stream within a district under their jurisdiction, because the greater power, i.e., the power to close the season entirely as to a whole district, necessarily includes the right to exercise the same power over and concerning a part or portion of that district, i.e., a particular stream or part thereof within such district.

Entertaining the views above stated, we answer query No. 1 to the effect that it is our opinion that the right to entirely close the season for fishing on a stream or part of a stream is vested in the Fish and Game Commission only when the State or the Commission has stocked the stream in question with food fish, and that the County Commissioners have the power to close the fishing season on such stream or part of a stream either when so stocked as aforesaid or when not so stocked.

We think it is pertinent here to say that the Fish and Game Act, particularly in the two sections quoted above, creates an apparent conflict of power and authority between the State Board and the County Commissioners which may cause some clashes of opinion in the administration of the

Act. The matter should meet with the attention of the Legislature to the end that the intent of the Legislature be clearly and definitely expressed.

Query No. 2

The general law is that ordinances once enacted continue in force until amended or repealed by the body enacting them or the successor of that body, unless it is provided in the ordinance that it shall expire on a certain date. We think there is no different rule to be applied to ordinances enacted by the County Commissioners with respect to fish and game matters, and that an ordinance containing no limitation clause limiting the time of its life, enacted by the County Commissioners with respect to fish and game matters in one year, will be effective thereafter until amended or repealed, unless there has been some change in the Fish and Game Act, or unless, by reason of the action of the State Fish and Game Commission changing the dates of a fishing season, a change of the ordinance is required. In either of these events the old ordinance must be amended or repealed by a new ordinance conforming to the changed conditions.

Query No. 3

Query No. 3 is answered above in the answer to query No. 2.

Query No. 4

If the State Board of Fish and Game Commissioners set the dates of a fishing season, then, in order for the County Commissioners to shorten or close the season so fixed, it will be incumbent on such Commissioners to enact an ordinance to that effect. This, of course, will follow action of the State Board. On the other hand, we think that the Boards of County Commissioners possess the power to shorten or close a season, even if the State Board takes no action in the matter. In this event, the Board of County Commissioners could enact an ordinance shortening or closing a season within the limits fixed for the seasons in the Fish and Game Act.

Respectfully submitted,

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

THE STATE FISH AND GAME COMMISSION, Reno, Nevada.

SYLLABUS

125. Public School Teachers' Permanent Fund--Investment of Moneys.

The moneys of the Public School Teachers' Permanent Fund may be legally invested in the interest-bearing warrants issued pursuant to the 1933 Statutes of Nevada, p. 107.

INQUIRY

CARSON CITY, March 6, 1934.

May the moneys from the Public School Teachers' Permanent Fund be legally invested in the interest-bearing warrants authorized by 1933 Statutes of Nevada, chapter 89, page 107, and entitled "An Act to authorize counties of the State of Nevada to issue negotiable interest-bearing warrants for payment of salaries and other necessary expenses of the county and schools, and other matters relating thereto."

OPINION

Section 6009, Nevada Compiled Laws 1929, subdivision 4, provides, in effect, that such funds may be legally invested in any securities in which “the funds of savings banks” may be lawfully invested.

Chapter 190 of the 1933 Statutes of Nevada, section 6, page 295, provides, inter alia, that “The funds of any savings bank, except the reserve provided for in this act, shall be invested in bonds of the United States, or of any state of the United States, or in the public debt or bonds of any county, city or school district of any state in the United States which shall have been lawfully issued; or may be loaned on negotiable paper secured by any of the above-mentioned classes of security; or upon notes or bonds secured by mortgage lien upon unencumbered real estate.

Pursuant to the statutes above cited, it is clear that the moneys of the Public School Teachers’ permanent Fund may be legally invested in any securities in which the funds of savings banks may be invested according to law, and that the funds of savings banks may be legally invested in the lawfully issued interest-bearing warrants authorized by the statute above mentioned, since the same constitute a part of “the public debt” of the political subdivision of the State issuing the said warrants.

It is, therefore, the opinion of this office that the moneys of the Public School Teachers Permanent Fund may be legally invested in the interest-bearing warrants lawfully issued pursuant to the 1933 Statutes of Nevada, page 107, provided such warrants “shall have been lawfully issued.”

In this connection, we desire to stress the fact that, in making any such investment and before the making thereof, it is the imperative duty of the Board to see to it and to know absolutely that such warrants were issued in strict accordance with the law governing the issuance of same, as is required as to public debts in which the funds of savings banks may be invested, as specified in section 6 of the 1933 Banking Act, i.e., Chapter 190 of the 1933 Statutes of Nevada, section 6, page 295. This fund is a sacred fund and partakes somewhat of the nature of a trust fund to be used only for the purpose mentioned in the so-called “Teachers’ Retirement Salary Act,” i.e., Nevada Compiled Laws 1929, sections 6003-6021, both inclusive, and the utmost care should, therefore, be exercised by the Board in investing the moneys of this fund.

This opinion is limited entirely to the question of law involved and is not to be considered as dealing with the question of whether such investment of the moneys constituting this fund is or is not good public policy. It is not the function of this office, as established by law, to determine public policy on any point, but the law limits the function of this office to cold, bare questions of law alone, and leaves to administrative officers, boards, and commissions of this State the duty of adopting and establishing the public policy of the State. We are not, therefore, deciding whether it is or is not good public policy on the part of the State to invest in such warrants; but we leave this question of public policy to your Board, where the law leaves the matter.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

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

SYLLABUS

126. Legal Residence--Public Works.

1. A person must actually reside within this State six months, county thirty days, and precinct ten days to become a "legal resident" of the State, county or precinct.
2. This rule applies in determining preferential rights on public works and on highway work.

INQUIRY

CARSON CITY, March 6, 1934.

What constitutes "legal residence" in the State of Nevada and in each county and precinct thereof, for the purpose of determining preferential rights on public works and highway work?

OPINION

Every person who comes to the State of Nevada with the intention of making this State his or her permanent home and who does actually make such home within this State for six months, thereupon becomes a "legal resident" of Nevada. To become a legal resident of a county or precinct within the State of Nevada, the rule as to intention is the same, and the person must actually reside within the State six months, within the county thirty days, and within the precinct ten days in order to become a "legal resident" of the State, county, and precinct.

This rule should, under the law, be followed in determining preferential rights on public works and on highway work.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

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

SYLLABUS

127. Patented Mining Claims--Taxation.

Where a patented mining claim is sold by the county treasurer for non-payment of taxes and the subsequent owner uses the land for stock-grazing purposes, the same should be assessed as patented mining ground--not as grazing land.

STATEMENT

CARSON CITY, March 8, 1934.

A person became the owner of six patented mining claims sold by the County Treasurer for nonpayment of taxes, the total area of such land amounting to approximately one hundred twenty acres which the purchaser and present owner uses for stock-grazing purposes and not for mining purposes.

INQUIRY

Should this land now be assessed as patented mininggroundg pursuant to Nevada Compiled Laws 1929, sections 6593, 6594, or should it be classified and assessed as grazing land, thereby bringing the assessment much below the assessed valuation of patented mining claims as specified in the above law and in the Constitution of this State?

OPINION

The Constitution of the State, article X, section 1, requires, among other things, that the Legislature of this State shall provide by law for a uniform and equal rate of assessment and taxation on all property, except mines and mining claims, and further provides that the proceeds alone of unpatented mining claims shall be assessed and taxed and that patented mines shall be assessed at not less than five hundred dollars each, except when one hundred dollars in labor shall have been actually performed on each such patented mine during the year, in addition to the tax upon the net proceeds, and except such property as may be exempt from taxation for municipal, educational, literary, scientific, or other charitable purposes, this article X, section 1 of the Constitution being in the following language:

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

The Legislature of this State has complied with the above-mentioned requirement of the Constitution of this State in the above-mentioned sections 6593, 6594, wherein it is provided, among other things, that each patented mine shall be assessed at not less than five hundred dollars, except where one hundred dollars in labor has been actually performed upon each such patented mine during the calendar year for which the assessment is levied or where statement of intent to perform such labor and bond have been properly filed and approved as provided for in section 6595, Nevada Compiled Laws 1929, in addition to taxing the net proceeds of any such mine, said sections 6593 and 6594 being in the following language:

Each patented mine shall be assessed at not less than five hundred (\$500) dollars, except where one hundred (\$100) dollars in labor has been actually performed upon such patented mine during the calendar year for which assessment is levied or where bond and statement of intent to perform such labor has been properly filed and approved as provided in section 5 of this act, in addition to the tax on the net proceeds. Section 6593, Nevada Compiled Laws 1929.

The county assessor shall assess each patented mine in his county at not less than five hundred (\$500) dollars and return the said assessment as is now required by law. Section 6594, Nevada Compiled Laws 1929.

This property was sold by the County Treasurer as patented mining claims for the nonpayment of taxes thereon as provided for in the above-mentioned provisions of the Constitution and laws of this State. This land came into the possession of the present owner as patented mining ground. The mere fact that the present owner is grazing livestock on said land does not change the

identity or nature of it as patented mines or patented mining ground. Certainly, if ore should at any time be discovered on this land, it would not be necessary for the owner of it to again patent the ground or locate it again as mining ground. He holds title to it now as patented mines; and, if ore should be discovered, on it in paying quantities or the owner of it should desire to work the property or to develop the workings in it as mining property, he would have the absolute right to proceed with the operation of the mine and property without further compliance with the mining laws of this State or of the United States relating to the location or patenting of said mining ground.

You furnished your County Assessor, Mr. Frank Campbell, your written opinion dated March 5, 1934, in which you expressed an opinion in accordance with this opinion. We heartily concur in this opinion of yours to Mr. Campbell. It is the unqualified opinion of this office that the land involved still retains its identity and nature as patented mines and that it should be assessed by the Assessor of your county as patented mines in strict accordance with the above-mentioned views and in strict accordance with said article X, section 1 of the Constitution of the State of Nevada, and Nevada Compiled Laws 1929, sections 6593 and 6594, above quoted. This view is amply sustained by the Supreme Court of this State in the case of *Wren v. Dixon*, [40 Nev. 170](#).

While your question does not ask concerning the time within which to perform assessment or holdings work on patented mining claims, we believe it proper, in view of the fact that the question may arise, to call your attention to 1933 Statutes of Nevada, 233, 234, which amends the above-mentioned section 6593 and also sections 6595 and 6598, Nevada Compiled Laws 1929, and provides that this work may be done on patented mines at any time "during the Federal mining assessment work period ending within the year for which assessment is levied." There is Federal legislation pending regarding this matter. This situation does not, however, change the effect of the foregoing portion of this opinion.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

HON. MELVIN E. JEPSON, District Attorney, Reno, Nevada.

SYLLABUS

128. Eight-Hour Law--Mines.

The Eight-Hour Law as the same applies to open-pit and open-cut mines is silent as to the point where the eight hours shall begin and cease to run.

INQUIRY

CARSON CITY, March 8, 1934.

Does the Eight-Hour Law, as the same applies to open-pit and open-cut mines, mean that the eight hours shall begin at the time that the employees comes under the director and supervision of the employer and shall terminate at the time the said employee shall leave such direction and supervision, or does the same mean that said eight hours shall begin at the time the employee actually arrives at the point where the labor is to be performed and terminate at the time said employee leaves the same?

OPINION

The only law in this State relating to this subject is section 10240, Nevada Compiled Laws 1929, the same being section 292 of an Act entitled "An Act concerning crimes and punishments, and repealing certain acts relating thereto," approved March 17, 1911, and effective January 1, 1912, which reads as follows:

The period of employment of working men in open-pit and open-cut mines shall not exceed eight hours in any twenty-four hours, except in cases of emergency where life or property is in imminent danger.

It is clear from this section that the Legislature which passed the same either, due to inadvertence, neglected or purposely refused to provide in this law at what time or place the said eight-hour period should begin and when the same should terminate. This being the case, and the statute being silent on this question, this office, which, of course, has no right to make laws, cannot construe the same, as there is nothing in the statute on this point to construe.

It must be kept in mind that the Attorney-General's office does not make any law and that, where the law is silent on the point, there is nothing we can construe. It is for the Legislature alone to make laws; and, if the law needs amending, the Legislature alone is empowered to supply the remedy.

If anyone is of the opinion that the Labor Laws relating to the maximum number of hours of employment in this State or in any other regard are being violated, he should submit the matter to the proper law enforcement officers of the county who are on the ground or to the Labor Commissioner for investigation and such disposition as the law and the facts may justify.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

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

SYLLABUS

129. Practice of Law by Acting Governor.

The Acting Governor of this State, who is a duly licensed attorney at law, may lawfully engage in the practice of law during his incumbency in office, there being no statute to the contrary.

INQUIRY

CARSON CITY, April 2, 1934.

May the Acting Governor of the State of Nevada, who is a duly licensed attorney at law and an active member of the State Bar, lawfully engage in the practice of law during his incumbency in office?

OPINION

Section 47 of the State Bar Act of 1928, being section 586, N. C. L. 1929, provides, in effect, that all persons who are active members of the State Bar may engage in the practice of law. This section, in our opinion, contemplates that all active members of the State Bar may engage in the

practice of law, irrespective of whether such member be the Acting Governor or other officer, actually performing the duties of his office, unless it is otherwise specifically provided by law.

Section 2147, N. C. L. 1929, specifically provides that “No sheriff shall be allowed to practice law in any court of which he is an officer.”

Section 8408, N. C. L. 1929, provides that “A judge of the supreme court, or of the district courts, shall not act as attorney or counsel in any court, except in an action or proceeding to which he is a party on the record.”

Section 8409, N. C. L. 1929, provides that a partner of a judge or justice of the peace shall not act as attorney or counsel in any court in this State.

These are the only laws of the State prohibiting attorneys holding certain offices from practicing law during their incumbency in office. It is, therefore, clear that there is no law in this State which either expressly or by necessary implication prohibits the Acting Governor or other State officer who is a duly licensed attorney from practicing law while in office, except those officers heretofore specifically mentioned. To the contrary, the fact that the Legislature did not specifically prohibit attorneys from practicing law during their incumbency in certain offices is, under the doctrine of “Expressio unius est exclusio alterius,” tantamount to a legislative manifesto that all officers who are attorneys, other than those specifically prohibited, may be permitted to engage in the practice of law during their incumbency in office.

Rule VII of the Rules of Professional Conduct, adopted pursuant to the State Bar Act of 1928, provides as follows: “A member of the State Bar shall not represent conflicting interests, except with the consent of all parties concerned.” This rule, which has the effect of a law, would preclude the Acting Governor from appearing in an action in opposition to the interests of the State or a political subdivision thereof. The Acting Governor cannot, therefore, legally or in accordance with the ethics of the profession represent anyone accused of a violation of the criminal laws of this State. Since the Governor is the head of the State administration and a member of the Board of Examiners which must pass upon every claim filed against the State, the Acting Governor cannot legally or ethically represent any person having, or claiming to have, a claim against the State or in any civil suit against the State or any State officer, board, or commission or any county or other political subdivision of the State.

For the foregoing reasons, it is the opinion of this office that the Acting Governor of this State, who is a duly licensed attorney at law and an active member of the State Bar, may, except as otherwise indicated above, lawfully engage in the general practice of law during his incumbency in office.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

HON. MORLEY GRISWOLD, Acting Governor of Nevada, Carson City, Nevada.

SYLLABUS

130. Elections--School Trustees.

The rule of computation of time set forth in section 9029, N. C. L. 1929, applies to school

elections.

INQUIRY

CARSON CITY, April 5, 1934.

What is the last day prior to an election of School Trustees on which a candidate for the office of School Trustee can file his name with the County Clerk under the provisions of section 59 of the School Code of 1931, i.e., section 5707, Nevada Compiled Laws 1929?

OPINION

It is clear, from the telegram requesting the opinion of this office on the above question, that the inquiry relates to the law as applied to school districts having a voting population of one hundred or over.

Section 59 of the School Code, which is section 5707, Nevada Compiled Laws 1929, provides as follows:

In school districts having a voting population of one hundred (100) or over, candidates for the office of school trustee shall, not later than five days before the day of election, have their names filed with the county clerk of said county, with designation of the term of office for which they are candidates, and no names shall be placed upon the ballots unless filed within the time herein provided.

Under the Nevada School Law, election of School Trustees must be had on the first Saturday in April every two years. Sec. 43, School Code; sec. 5691, Nevada Compiled Laws 1929.

The above query presents the specific question, what is the last day on which a candidate may legally present his name to the County Clerk as a candidate for the office of School Trustee for the purpose of having it placed on the ballot to be voted at the coming school election in school districts having a voting population of one hundred or more?

It will be noted that the above-quoted section contains the following language, the pertinent part being underscored:

* * * candidates for the office of school trustee shall, not later than five days before the day of election, have their names filed with the County Clerk of said county * * *

It is clear that a candidate cannot file his name later than five days before the election, and it is also clear that he may file up to a time not later than five days before the day of the election." The problem then is to find the last day before the election on which the filing can be made. We think that the answer is to be found in a statute of Nevada.

Section 9029, Nevada Compiled Laws 1929, provides:

The time in which any act is to be done, as provided in this act, shall be computed by excluding the first day and including the last. If the last day be Sunday, or other nonjudicial day, it shall be excluded. If the last day be a nonjudicial day and be directly followed by one or more nonjudicial days, they also shall be excluded.

This section of the law providing the method of computing time has been declared to be applicable to the measurement of time in school elections, in a case very analogous to the

question here, by the Supreme Court of Nevada in *McCulloch et al. v. Bianchini et al.*, [53 Nev. 101](#), where the Court said:

It is contended on the part of the plaintiffs that the election held on June 6, 1929, was illegal and void, in that the notices of said election were not posted ten days prior to the date thereof, as required by section 46 of the school law (section 3284, 1 Revised Laws), relating to the election of school trustees. This section provides that not less than ten days before the election held under the provisions of the act, the trustees shall post notices in three public places in the district, which notices shall specify that there will be an election held at the schoolhouse in such district and the hours between which the polls will be kept open.

In the case at bar, the notices of the election were posted on the 27th day of May, 1929; pursuant to notice the election was held on June 6, 1929. Were the notices posted in time? Section 540 of the civil practice act (section 5482, 2 Revised Laws) provides in part that: "The time in which any act is to be done, as provided in this act, shall be computed by excluding the first day and including the last."

If this rule of measurement of time applies to school elections, the notices were posted as required by the statute. In California it is held that the rule of computation of time, under a statute identical to that of ours, applies to school election contests. *Misch v. Mayhew*, 51 Cal. 514, followed in *Hagenmeyer v. Board of Equalization of Mendocino County*, 82 Cal. 217, 23 P. 14; *Derby v. Modesto*, 104 Cal. 522, 38 P. 900; *Bates v. Howard*, 105 Cal. 182, 38 P. 715.

In the case of *Antelope Valley U. H. S. Dist. v. McClellan*, 55 Cal. App. 244, 203 P. 147, which involved the validity of a school bond election, the rule of the code of civil procedure as to the measurement of time for the publication of the notices was applied. In the early case of *Mason v. School District No. 14*, 20 Vt. 487, a school district election case, it was held that, in computing the length of time during which notice of a meeting of a school district was given, the same rule should be applied as in the case of service of process--either the day on which the notice was posted, or the day on which the meeting was held, will be counted, the court stating that no reason appears why such rule of measurement of the time should not be applied.

Applying the rule to the election in question, the full ten days' notice was given.

Applying the rule of measurement of time set forth in section 9029, supra, which rule was approved by our Supreme Court and made applicable to school elections in the case cited above, to the instant query, it at once becomes apparent that the Monday immediately preceding the first Saturday in April of school election years is the last day on which a candidate for office of School Trustee may legally file his name as candidate for such office with the County Clerk. By making the count of the days prior to the election according to the rule, i.e., "excluding the first day and including the last," it will be found that Monday is not counted but that Saturday is counted; the result is that Saturday is the fifth day and that, in order to get within the statutory limitation of "not later than five days before the day of election," the candidate would have to offer his filing on a day later than the Monday above mentioned.

We conclude that a candidate for the office of School Trustee may legally file his name as candidate for such office on the Monday immediately preceding the first Saturday of April of school election years in school districts having a voting population of one hundred or more.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

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

SYLLABUS

131. Motor Vehicles--Registration Fees.

A half year's registration fee cannot be legally granted on stock passenger cars or reconstructed or specially constructed passenger cars. The fee for the entire year must, in all cases, be collected.

STATEMENT

CARSON CITY, April 11, 1934.

The 1933 Legislature amended section 25 of the Motor Vehicle Registration Law of 1931, said amendment being found at pages 250, 251, Statutes 1933, and providing for a flat fee of \$5 only for the registration of every stock passenger car and every reconstructed or specially constructed passenger car and every reconstructed or specially constructed passenger car on and after January 1, 1934, instead of the registration fee based upon the weight of such vehicles provided in the 1931 Act. Paragraph c of section 14 of the 1931 Act permits half-year registration of motor vehicles upon a showing that the motor vehicle has not, in fact, been operated on the highways of the State prior to the first day of July of the year in which half-year registration is sought.

INQUIRY

By reason of the 1933 amendment to said section 25, can a half-year's registration be legally granted on stock passenger cars and reconstructed and specially constructed passenger cars?

OPINION

Section 25 of the Motor Vehicle Registration Law of 1931, as amended by the 1933 Legislature, so far as material to this opinion, reads as follows:

There shall be paid to the department for the registration of motor vehicles, trailers and semitrailers, fees according to the following schedule:

(a) For every stock passenger car, thirty cents per hundred pounds or major fraction thereof computed on the advertised factory weight, together with one hundred and twenty-five pounds for every passenger for which said vehicle is built to accommodate when loaded to capacity.

(b) For every reconstructed or specially constructed passenger car, thirty cents per hundred pounds or major fraction thereof, said weight to be the actual weight of said vehicle as shown by a public weighmaster's certificate, and in addition one hundred and twenty-five pounds for every passenger which said vehicle is built to accommodate when loaded to capacity; provided, that on and after January 1, 1934, there shall be paid to the department for registration of every stock passenger car and of every reconstructed or specially constructed passenger car, regardless of weight or number of passengers capacity, a flat registration fee of five dollars only.

Paragraph c of section 14 of the same law reads:

Registration of a motor vehicle for a half-year may be permitted if the applicant file with the department an affidavit showing that the motor vehicle has not in fact been operated on the highways in this state prior to the first day of July.

The amendment of 1933 to said section 25, material to the question here, appears in the proviso written into said section. We have then to deal with the question presented by applying to it the rule of statutory construction as modified by the law and construction of provisos.

A proviso is defined as:

A clause added to a statute, or a section thereof, which introduces a condition or limitation upon the operation of the enactment, or makes special provision for cases excepted from the general provisions, or qualifies or restrains its generality, or excludes some possible ground of misinterpretation of the extent of the law. *State v. Board of Comm'rs.*, Platte County, 177 Pac. 130.

And the operation of the proviso is usually and properly confined to the clause or distinct portion of the enactment which immediately precedes it. 59 Cor. Jur. 1090, sec. 640; 25 R. C. L. 231, sec. 231.

But there is an exception to the above rule and, if the legislative intent clearly appears from the law and the proviso that the proviso was intended to apply to some other part of the Act, then the courts will give the proviso such a construction. *See* citations above.

Also, it is held:

The cardinal rule that, in construing statutes, the court must ascertain and give effect to the legislative intent applies to the construction of provisos. A proviso should be construed together with the enacting clause, with a view to giving effect to each and to carrying out the intention of the legislature as manifested in the entire act and acts in *pari materia* * * *. 59 Cor. Jur. 1088, sec. 639.

In *Leader Printing Co. v. Nichols*, 50 Pac. 1001, at page 1003, the Court, after discussing various cases upon the construction of provisos, said:

The safe rule to be adopted, and which will admit of a broad and comprehensive construction of every statute, and place upon it that interpretation which will give effect to the true intention of the legislature, and which has the support of these authorities, although it embraces the always important element of legislative intent, not included in the principle of construction as stated in the Maryland case, is, that the language of a proviso in a section of a statute should be held to relate, not to the whole statute or to the whole section, but only to the clause or proviso of which it is a part, unless another purpose or intention on the part of the legislative body enacting it is deducible from the enactment. (Italics ours.)

The foregoing quoted rule is followed by the Supreme Court of Nevada. *In Re McKay's Estate*, [43 Nev. 114](#); *State v. Beemer*, [51 Nev. 192](#); *State v. Miller et al.*, [55 Nev. 123](#).

Further, it is to be observed that an amendment to a statute or a section thereof becomes a part of the prior Act and is to be so treated (*Worthington v. Dist. Court*, [37 Nev. 212](#)), so that, in now construing the 1931 Motor Vehicle Registration Act as amended in 1933, it is to be construed as an entire Act with the 1933 amendment, including the proviso, as a part of the 1931 Act.

Also, it is the law that those who seek an exemption from licensing and taxation by the State must present a clear case and one free from doubt.

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

Paragraph c of section 14 of the 1931 Act, above quoted, permitted the half-year registration of all motor vehicles within the purview of the Act. Did the proviso in the 1933 amendment to section 25 of the Act, above quoted, take away the right of half-yearly registration and the consequent reduction in registration fees of stock passenger cars and reconstructed and specially constructed passenger cars? In brief, does the proviso in the 1933 amendment of section 25 also apply to paragraph c of section 14?

If the proviso in section 25 only qualifies the provisions of section 25 immediately preceding it, then, under the rule hereinbefore stated, it does not qualify said paragraph c and, under the rule of *pari materia*, the proviso would be construed in connection with paragraph c and effect given to both as to the class of motor vehicles under consideration; but, if the proviso does qualify and is in conflict with said paragraph c, then the exception to the rule becomes the rule of construction, and, if the purpose or intention of the Legislature is to qualify some other section of the law, other than or in connection with the one in which the proviso is found, and this intention is clearly apparent, such purpose or intention will govern. We must be governed by the intent of the Legislature.

The proviso in question here contains significant language, i.e., "That on and after January 1, 1934, there shall be paid * * * a flat registration fee of five dollars only." (Italic is ours.)

We think this language is so indicative of the intent of the Legislature as to evidence clearly the purpose and intent of the Legislature that not only did the proviso relate to the provisions of section 25 immediately preceding it, but, also, to the provisions of said paragraph c of section 14, as to stock passenger cars and reconstructed and specially constructed passenger cars. By the use of the expression "on and after January 1, 1934," without any qualifying expression even remotely referring to paragraph c, the Legislature certainly provided a section of the Motor Vehicle Registration Law later in time and later in position in the Act in conflict with paragraph c of section 14 of such law, and which legislative Act of 1933, at the very least, creates such a doubt as to require the construction of the law strictly against the claiming of any exemption from or reduction of a flat license fee thereunder and in favor of the State.

We, therefore, answer your inquiry in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

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

SYLLABUS

132. School Districts--Emergency Tax Levies.

Where the governing board of a school district levies an emergency tax prior to the actual creation of an emergency indebtedness, such tax levy is void.

STATEMENT

CARSON CITY, April 13, 1934.

During the latter part of 1933, Elementary School District No. 9 situated at Yerington, Lyon County, Nevada, proceeding under the Fiscal Management Act, by Resolution declared an emergency to exist and was authorized by the State Board of Finance to secure a loan. After obtaining permitting from the State Board of Finance to borrow money, the district did not proceed to borrow the money. The said school district in submitting its annual budget, needing additional funds over and above what the county rate and the State apportionments would bring, put on a special tax of twenty-five cents, as is provided by section 5788, N. C. L. 1929, and, in addition thereto, levied a so-called "emergency" rate of seventy-five cents. There was no special district election had to authorize this so-called "emergency" levy of seventy-five cents, in accordance with section 5789, N. C. L. 1929.

INQUIRY

According to the facts set forth in the above statement, is the emergency tax levy of seventy-five cents a legal and valid levy?

OPINION

Section 3020, N. C. L. 1929, empowers the governing board of such a school district, by unanimous vote, to pass a resolution in cases of emergency, authorizing the district to secure a temporary loan, provided that such resolution shall receive the approval of the State Board of Finance prior to the borrowing of the money.

It is clear that the district in question did comply with the provisions of this section and secure the approval of the State Board of Finance; but it is also clear that the said district did not actually secure a loan. The fact that permission to borrow was obtained from the State Board of Finance is, in this particular case, immaterial and of no effect.

The portion of section 3022, N. C. L. 1929, which is material here provides that: "* * * It shall be the duty of every governing board of any school district * * * at the first tax levy following the creation of any emergency indebtedness to levy a sufficient tax to pay the same * * *." This section empowers the governing board to levy a tax sufficient to pay any emergency indebtedness already created; it does not empower the board to levy a tax to pay an indebtedness not created and one merely in contemplate. Where there is no special election called, sections 3020 and 3022, N. C. L. 1929, are the only sections of our statutes which allow governing boards of school districts to secure emergency loans or create indebtedness and levy taxes for the payment thereof; and these sections do not authorize the levy here under consideration.

No emergency indebtedness existed at the time the seventy-five cents tax levy was made; and it, therefore, is the opinion of this office that, for the reason that no emergency indebtedness existed at the time of the levy, the said tax levy heretofore made by the said School Board was and is unlawful, illegal, and void.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

HON. JOHN R. ROSS, District Attorney, Yerington, Nevada.

SYLLABUS

133. Renewal of School Teachers' Certificates.

It is the mandatory duty of the State Board of Education to renew all school teachers' certificates regardless of grade or class during the years 1933 and 1934 pursuant to chapter 57, 1933 Statutes of Nevada, p. 64.

INQUIRY

CARSON CITY, April 26, 1934.

Is it made the duty of the State Board of Education, by 1933 Statutes of Nevada, chapter 57, to renew all Nevada school teachers' certificates during the years 1933 and 1934, including second- and third-grade certificates, or does this statute apply only to first-grade and other certificates that were renewable prior to the enactment of this law?

OPINION

Section 5674, N. C. L. 1929, declares that first-grade certificates may be renewed by the State Board of Education according to such rules and regulations as the Board may prescribe.

Section 5675, N. C. L. 1929, provides, in part, "In no case shall an elementary certificate of the second grade be renewed."

Section 5676, N. C. L. 1929, provides, among other things, that "The third-grade certificate shall be valid only for the school year in which it is issued, and not more than one third-grade certificate shall be issued to the same person."

It is clear from the above sections that, ordinarily and without further legislation on the subject, first-grade certificates are renewable and that neither second- nor third-grade certificates could be renewed.

Chapter 57, Stats. of Nevada 1933, page 64, is an Act entitled "An Act authorizing and directing the state board of education to renew teachers' certificates expiring in 1933 and 1934," and was approved March 10, 1933. Section 1 thereof reads as follows:

During the calendar years 1933 and 1934 it is hereby made the duty of the state board of education, and the particular officers charged with the execution of such duty, to renew each and every certificate of each and every teacher holding the same who has in all other respects complied with the laws of the State of Nevada pertaining thereto, which at any time during said years shall expire, upon the application in writing of the holder or holders thereof, stating the grounds or reason for the renewal of such certificate or certificates.

This Act does not repeal or attempt to repeal sections 5675 and 5676, N. C. L. 1929, or any other law of the State; but the same does, by express terms, suspend the

operation and effect of the above-mentioned sections relating to the renewal of teachers' certificates of all grades and classes during the years 1933 and 1934.

It is, therefore, the opinion of this office that, pursuant to the terms of chapter 57 of the 1933 Statutes of Nevada, page 64, it is made the mandatory duty of the State Board of Education to renew each and every certificate, of each and every teacher holding the same, upon the making of proper application therefor, as provided by said statute, during the years 1933 and 1934 only, irrespective of what grade or class of certificate the holder or holders thereof may seek to renew.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

HON. L. C. BRANSON, State Senator, Ely, Nevada.

SYLLABUS

134. Election of School Trustees--Tie Vote.

1. Where a biennial election for the office of School Trustee results in a tie vote the same causes a vacancy in such office which must be filled: (1) By holding another election for that purpose as provided by section 5711, N. C. L. 1929; or (2) by appointment by the Superintendent of Public Instruction as provided by section 5712, N. C. L. 1929.

2. The school laws of the State govern School Trustee elections in case a tie vote.

INQUIRY

CARSON CITY, May 4, 1934.

1. In the event of a tie vote cast in a biennial election for candidates for the office of School Trustee, what procedure is had to effect a filling of the office for which the election was held under the school laws of this State?

2. Do the provisions of the General Election Laws relative to tie votes govern in elections of School Trustees?

OPINION

For reasons clearly apparent in our answer to query No. 1, we will first answer query No. 2.

Section 2538, Nevada Compiled Laws 1929, the same being section 100 of the General Election Laws of Nevada, reads:

School trustees shall be elected in accordance with the provisions of chapter six of an act entitled "An act concerning public schools, and repealing certain acts relating thereto," approved March 20, 1911.

We find no other statute in the school laws of the State or elsewhere in our laws contrary to or conflicting with this provision, so it is clear that the legislative intent is that the election of School Trustees is to be governed exclusively by the provisions of chapter six of the School Laws pertaining to such elections. Therefore, query No. 2 is answered in the negative.

Answering query No. 1, there is no express provision in the sections of the School Laws providing for the election of School Trustees relative to the procedure to be followed where there has been a tie vote cast for candidates for the office of School Trustee; and, by reason thereof, the query presents a question of some difficulty, unless the intentment of the Legislature can be gleaned from the sections of the School Laws bearing upon the question or in some reasonable way pointing out the method to be followed in such cases.

Section 63 of the School Laws, i.e., section 5711, Nevada Compiled Laws 1929, provides:

On the fourth Saturday after the occurrence of any vacancy or vacancies in any board of school trustees, an election may be held to elect a trustee or trustees for the remainder of the unexpired term or terms. Such elections shall be conducted in accordance with the law now in effect for the election of public school trustees; provided, that the remaining members or member of the board may serve as a full board for the purpose of making all required preliminary arrangements for conducting said elections to fill said vacancies.

Section 64 of the School Laws, i.e., section 5712, Nevada Compiled Laws 1929, as amended by 1933 Statutes, page 109, provides:

The superintendent of public instruction shall have power to fill all vacancies caused by the failure of the people to elect trustees at the regular biennial school election on the first Saturday of April of the even-numbered years. In case the voters fail to elect, or in case no election is held as provided in section 63 of this act, the superintendent may fill all vacancies in said board of trustees. The term of office of any trustee appointed by the superintendent shall not extend beyond the first Monday in May following the next regular school election; provided, that in any district in which no election shall have been held, as provided by this act, and in which district there shall not be any suitable person or persons to act as trustees therein, the superintendent shall appoint members of the board of county commissioners of the county in which such district may be situated, as and for the board of trustees in such district, and when so appointed the said county commissioners shall have all the powers and duties of school trustees in relation thereto now conferred by law upon school trustees.

The superintendent may remove from office any school trustee whom he has appointed, by serving written notice on such school trustee at least two weeks before the date of removal, stating the reason or reasons for such removal. He shall also send a copy of such written notice to each of the other trustees of the school district.

On the fourth Saturday after the occurrence of any vacancy caused by the removal of any trustee by the superintendent, as provided in this section, an election may be held to elect a trustee for the remainder of the unexpired term.

It is a cardinal rule of statutory construction in this State that sections and parts of a statute shall be construed in *pari materia* and that effect be given to the whole thereof wherever possible. Giving effect to this rule in the instant matter, it at once becomes apparent that we must construe the above-quoted sections of the law, and any other therein contained, in *pari materia* in order to gather the intent of the Legislature.

At first blush it would seem that the law pertaining to the procedure to be followed in the event of a tie vote in School Trustee elections was silent on that point. Also, it might be said that no method of filling the office in such an event had been provided in the law and that the incumbent then in office would hold over until another biennial election; but, as to this, we desire to point out that, as to the long-term School Trustee incumbent, section 11, article XV of the Nevada Constitution would intervene and prohibit such long term incumbent holding over, notwithstanding the provisions of section 62 of the School Laws, *Ex. Rel. Williamson v. Morton*, [50 Nev. 145](#). A close examination, however, of the law and an exhaustive search of authorities pertaining to the question convince us that the above-quoted sections of the School Laws, when construed in pari materia, provide two methods by which the office of School Trustee can be filled where the result of a regular biennial election therefor resulted in a tie vote.

Section 63, above quoted, clearly provides for an election to fill a vacancy or vacancies in a Board of School Trustees. Section 64, above quoted, provides that the Superintendent of Public Instruction shall have the power to fill all vacancies caused by the failure of the people to elect Trustees at the regular biennial school election, and such section also provides that such Superintendent may fill all vacancies in such board in the event the election provided for in section 64 is not held.

It is to be noted that in section 64 the term “vacancies” is used in connection with the provision empowering the superintendent to fill vacancies caused by the failure of the people to elect, and also, it is to be noted that, in section 63, the people are granted the right to fill vacancies in the Board of School Trustees by an election.

A former Attorney-General of this State held, in construing said section 63, that:

If the voters of the district failed to elect trustees on the first Saturday in April, vacancies occur in these offices on the first Monday in May. Opinion No. 118, Opinions Attorney-General, 1914.

A tie vote for School Trustee certainly results in the failure of the people to elect. There is, in fact, no election. If there is no election to a public office, one of three things happens in order to prevent the failure of important governmental and administrative agencies to function, i.e., either the incumbent in office holds over, or an appointment is made to fill the office, or another election is held by the people, depending upon the particular law under which the election was held and the provisions therein contained for ascertaining the result of the election and the method to be pursued in the filling of vacancies in the event no candidate is elected.

We think that the sections of the law under consideration here definitely point out the methods to be followed in the instant matter. When a tie vote for School Trustee results in the failure of the people to elect, we think it logically follows that the language in section 64, i.e., “The superintendent of public instruction shall have power to fill all vacancies caused by the failure of the people to elect trustees,” and “In case the voters fail to elect, or in case no election is held as provided in section 63 of this act, the superintendent may fill all vacancies in said board of trustees,” clearly imports that a vacancy in the office of School Trustee exists when the people fail to elect because of a tie vote. That such vacancy is to be filled, either by an election by the people called for that purpose pursuant to the provisions of the School Laws pertaining thereto and under the authority therefor contained in section 63 or by appointment by the Superintendent of Public Instruction, as provided in section 64, is clearly evidenced by the language of those sections, particularly so when such sections are construed together.

We are, therefore, of the opinion that the Legislature intended that a tie vote in a School Trustee election was to be deemed to cause a vacancy in the office for which the election was held and that such vacancy was to be filled by another election held for that purpose, as provided in

section 63 or by appointment, as provided in section 64. To hold otherwise would be to create a great confusion in the administration of the School Laws with respect to School Trustee elections, and a sensible construction of the law to avoid such confusion is another element to be considered in statutory construction. *Latterner v. Latterner*, [51 Nev. 285](#).

We desire to point out that it is the policy of our State Government and the theory of the law that election to office be by the people when it can conveniently be done. *Ex rel. Bridges v. Jepsen*, [48 Nev. 64](#). Also, it is the law that an election can be held to fill a vacancy only by virtue of some constitutional provision or statute, either expressed or by direct implication. *Bridges v. Jepsen*, supra. There is a direct implication contained in sections 63 and 64 that an election to fill vacancies on a Board of School Trustees should be held, if not, indeed, an express direction so to do.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

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

SYLLABUS

135. Interest-Bearing School Warrants.

Where the Board of Finance approved the issuance of interest-bearing school warrants the approval thereof is based upon the time covered by the calendar year--not the fiscal year.

INQUIRY

CARSON CITY, May 5, 1934.

In cases where the Board of Finance approves the issuance of interest-bearing school warrants, is the approval based upon the time covered by the fiscal year or by the time covered by the calendar year?

OPINION

The Act regulating the fiscal management of governmental agencies, commonly known as the "Budget Law," i.e., sections 3010-3025, Nevada Compiled Laws 1929, clearly provides a budgeting of estimated receipts and disbursements for the calendar year, and this applies to all schools and school districts (sec. 3018, supra). The revenue laws of the State pertaining to the levying and collection of taxes for county and school purposes are based upon the calendar year as the measure of time in which to operate.

An examination of section 1 of the 1933 Act authorizing the issuance of interest-bearing county and school warrants (chap. 89, 1933 Stats.) discloses that such warrants are to be issued only when the money actually received from the collection of taxes, and which is available to pay the legal charges against the county or school district, is less than the amount budgeted for such purposes and then only to the extent covered and provided for in the budget or expenses theretofore duly made and adopted for such county and school district for the year in which the claims against the county or school district are presented for payment. Thus, the Legislature had in mind the calendar year as provided in the Budget Law.

The intent of the Legislature is further evidenced by the provisions of section 4 of the Act making the law ineffective on and after June 30, 1935, but providing that any warrants registered in the office of the County Treasurer on or before December 31, 1935, shall still be subject to the provisions of the Act. This provision certainly contemplates the approval of an issuance of such warrants payable from funds budgeted in the 1935 calendar year budget.

It is, therefore, our opinion that the approval of interest-bearing school warrants, issued pursuant to chapter 89, Statutes of Nevada 1933, is to be based upon the time covered by the calendar year.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

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

SYLLABUS

136. Frozen Bank Deposits--Insolvent Banks.

Where the deposits of a bank are frozen and the bank opened under the provisions of sections 79 and 80 of the 1933 Banking Act, the license fees provided for in section 47 of said act may be legally taken from the assets of the old and insolvent banking institution and paid pursuant to said section 47.

INQUIRY

CARSON CITY, May 9, 1934.

The opinion of this office has been asked on the following inquiry:

In case where the deposits of a bank are frozen and the bank opened under the provisions of sections 79 and 80 of the 1933 Banking Act, so-called, that is, chapter 190 of the 1933 Statutes of Nevada, pages 328, 329, may the license fees provided for in section 47 of said Act be legally taken from the assets of the old and insolvent banking institution and paid pursuant to said section 47?

OPINION

It is the opinion of this office that this question should be answered, and it is hereby answered, in the affirmative.

In our Opinion No. 114, given you on August 17, 1933, we held that it was mandatory for banks reopening under said sections 79 and 80 of the 1933 Banking Act to pay this fee and to secure from the Superintendent of Banks the license to do such banking business as is provided for in said sections 79 and 80, and advised you that the amount of this fee should be the minimum provided for in section 47 of said 1933 Banking Act, for the reasons therein stated. We still believe that said Opinion No. 114 is correct, notwithstanding your letter to the writer of this opinion, dated April 25, 1934, and the matters and difficulties of enforcement called to our attention by you in that letter.

One of the difficulties called to our attention is the fact that, when a bank is reopened under said sections 79 and 80, the moneys deposited must be kept intact or invested in certain securities and kept available for the payment only of the depositor making such deposit, in connection with the fact that the bank cannot be reopened for the limited banking business it may do under said sections until it shall have paid the license fee and obtained the license, if it be necessary for it to obtain such a license and pay such a fee. These two situations combine to make it impossible to pay this license fee out of the new deposits made in the reopened bank, and would make it particularly difficult to pay the license fee out of the first deposit made in the bank, for the very simply reason that the moneys so deposited in the reopened bank must be kept available to pay the depositor.

This difficulty, however, is avoided by the answering of your above-mentioned inquiry in the affirmative; and it is the opinion of this office that, under the terms of said section 79, this license fee for the reopened bank may be legally paid out of the assets of the old closed or insolvent bank. This view is based upon the fact that, under the terms of said section 79, the bank in question can only be reopened "upon consent in writing of the representatives of fifty percent (50%) or more of the amount of deposits of any such bank or banks." It must be remembered that this consent to reopen the bank is based upon and made in view of the provisions of said section 47 of the 1933 Banking Act, which definitely requires that the license fee be paid before the bank can legally be reopened. For this reason, it seems clear and unquestionable that, in giving the written consent referred to in said section 79, for the reopening of the bank, the depositors in the old closed or insolvent bank consented to, or, at least, acquiesced in, the payment of the license fee provided for in section 47 out of the old assets, especially in view of the fact that the payment of this license fee is an essential prerequisite to the reopening of a bank.

We would be glad to hold that the payment of this license fee is not a prerequisite to reopening if we could consistently do so and come to the conclusion that it is not required by the law; but, in our opinion, this is impossible in face of the plain, clear, unambiguous, and positive language used in said section 47. It will be noted that the language of this section requires the payment of this license fee before the transaction by any bank of "any banking business," the language used in the section being as follows: "the transaction of any banking business without such authority shall constitute a gross misdemeanor." The authority above-mentioned is the license of the Superintendent of Banks authorizing the person, firm, company, corporation, or association "to transact the business of a bank."

Under the circumstances, we cannot conscientiously hold that the law does not require the payment of this license fee before "any banking business" can be legally transacted by a bank. It is true that the reopened bank does not transact the entire business of a banking institution; but it cannot consistently be said that the acceptance of deposits and the paying out of deposits upon checks are not a part of a banking business and that such transactions do not fall within the language of this section of the law designated as "any banking business." In this connection, it must be remembered that it is the old banking institution which is reopened. It is still a bank; and the limited business conducted by it is in the name of the old bank. In other words, the old bank reopens and certainly transacts the banking business to the extent specified in said sections 79 and 80.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

HON. E. J. SEABORN, State Superintendent of Banks, Carson City, Nevada.

SYLLABUS

137. Industrial Insurance Act--F.E.R.A.

The administrative and supervisory relief personnel under the Federal Emergency Relief Administration in this State, do not come within the provisions of State Industrial Insurance Act.

INQUIRY

CARSON CITY, June 2, 1934.

In your letter of 31st ultimo you ask the official opinion of this office on the following inquiry:

Are State funds available or may they be legally used to pay premiums on industrial insurance for administrative and supervisory relief personnel to cover persons working under the Federal Emergency Relief Administration in this State, and may State bond money derived from the sale of the bonds issued pursuant to chapter 132 of the 1933 Statutes of Nevada be used for that purpose?

OPINION

The Supreme Court of this State recently decided, in the case of *The State of Nevada on the Relation of the State Board of Charities and Public Welfare v. Nevada Industrial Commission*, that persons put to work under the Federal Emergency Relief Administration program do not come within the provisions of the Nevada Industrial Insurance Act. This decision of the Supreme Court of this State is based upon the theory that such persons are not employees, and that there is neither employment nor employer, and that there is no contract of hire. It is essential that there be an employment, an employer, an employee, and a contract of hire in order to bring the worker or other person under the provisions of the Nevada Industrial Insurance Act. In the face of this decision of the Supreme Court of this State, I must hold that the administrative and supervisory relief personnel under the Federal Emergency Relief Administration program in this State do not come within the provisions of this Act and must, therefore, answer your entire question in the negative.

In addition to the foregoing, the budget law of this State absolutely prohibits the payment of any public funds, either State, county, or municipal, for purposes not covered in the budget of the particular political subdivision. No State funds were budgeted for this purpose and no money appropriated which could be used for that purpose. State officials, boards, and commissions are absolutely prohibited by law from paying out funds unless expressly appropriated by the Legislature for the purpose for which they are expended; and the law imposes a severe penalty for the violation of this law. Under these circumstances, it would be impossible to pay industrial insurance premiums out of State funds without violating this law. As to money derived from the sale of State bonds under said section 132, I find no provision in said chapter authorizing the expenditure of any money so derived for any such purpose, or broad enough to cover industrial insurance premiums.

County and city budgets for the current year have not yet reached any State office; but I doubt very much whether industrial insurance premiums on such workers have been included in the budgets for either cities or counties in this State. In fact, since the Supreme Court of this State has decided that such workers are not employees and that there is no employment and no employer or contract of hire, it is my opinion that the Industrial Insurance Commission could not legally cover the persons composing such administrative and supervisory relief personnel.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

MR. CECIL W. CREEL, Executive Secretary, State Board of Charities and Public Welfare, Reno, Nevada.

SYLLABUS

138. Elections--Independent Candidates.

The names of candidates who file as independent candidates for elective county offices are not to be placed on the primary election ballot.

INQUIRY

CARSON CITY, June 8, 1934.

1. Will the names of candidates who file as independent candidates for an elective county office be placed on the primary election ballot?
2. If such names are placed upon the primary election ballot, will the two independent candidates receiving the highest number of votes be nominated and their names placed on the ballot for the November election?

OPINION

An examination of the Primary Election Law of this State, to wit, sections 2404-2437, Nevada Compiled Laws 1929, discloses that the intent of the Legislature was that party candidates were to be nominated at the primary election and that, also, certain nonpartisan candidates, to wit, the judiciary, were to be nominated at such primary election, the purpose being to do away with the old convention system of nominating candidates for public office. The intent of the Legislature is certainly made clear in the Primary Law as to party candidates and nonpartisan candidates for judicial offices; but the Primary Election Law does not provide for the nomination of independent candidates by an election, and we do not believe that the term "nonpartisan" can be applied to independent candidates for the reason that the term "nonpartisan" is limited to judicial offices and school elections. On the other hand, section 2435, supra, provides for the nomination of independent candidates by means of petition signed by electors of the political subdivision or the State equal in number to at least five percent of the entire vote cast at the last preceding general election in the State or political subdivision. The language of such section makes it clear that the independent candidates are nominated by petition and are not to be voted on at the primary election--in fact, such section simply provides by law what used to be a custom during the convention days whereby an independent candidate, if sufficiently supported by petitions of electors, could run at the general election for the office he was seeking. We think said section 2435 simply means that the independent candidates are nominated by petition, provided such petition contains the required number of signatures and is properly verified, and that, when such a petition is filed with the proper officer, then such independent candidate has the right to have his name placed upon the ballot to be voted at the November election, and that all independent candidates having the proper petitions filed in their behalf are entitled to a place upon the general election ballot.

Entertaining the views above set forth, we are constrained to answer query No. 1 in the negative, which in turn, obviates any answer to query No. 2.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

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

SYLLABUS

139. Motor Vehicles--Public Service Commission.

1. The Public Service Commission has the power to regulate the rates of a common carrier of passengers by automobile, and to apply the Public Service Commission Law to such carrier.
2. A common carrier of passengers by automobile is not exempt from licensing provisions of chapter 165, Statutes of Nevada 1933.

STATEMENT

CARSON CITY, June 11, 1934.

A common carrier of passengers by automobile prior to the enactment of the Motor Carrier Licensing Act of 1933 obtained a certificate of public convenience to operate as such carrier from the Public Service Commission of Nevada, and, in such certificate, was granted the right to operate and conduct a common carrier passenger business on call from Boulder City over and along the public highways of the State to other points in the State. Such certificate was granted under the provisions of the Public Service Commission Act of 1919, i.e., sections 6100-6146, Nevada Compiled Laws 1929, which said Act granted the Public Service Commission the power to fix the rates and charges and regulate such carriers. The rates and charges of the carrier in question were fixed by the Commission upon the granting of the certificate. In 1933 the Legislature enacted the Motor Carrier Licensing Act of 1933, the same being chapter 165, Statutes Nevada 1933, and provided therein that the Public Service Commission Law above mentioned relating to the powers, duties, authority, and jurisdiction of the Public Service Commission over common carriers is made applicable to all common motor carriers of passengers or property defined in said chapter, except as in said chapter otherwise specifically provided. Objection is now made by the aforesaid carrier to the jurisdiction of the Commission to regulate the rates and charges of such carrier between Boulder City and Las Vegas, upon the ground that the provisions contained in section 3 of said chapter 165 reading: "None of the provisions of this act shall apply to any motor vehicle operated wholly within the corporate limits of any city or town in the State of Nevada; nor to city licensed taxicabs operating within a ten mile radius of the limits of a city or town," create an exemption as to this carrier. It is claimed by the carrier that the operation of its motor vehicles between Boulder City and Las Vegas and intermediate points, even though pursuant to its certificate of public convenience, is a taxicab service and, by reason of holding licenses and permits for the operation of taxicabs in both Boulder City and Las Vegas, it is exempt from regulation of rates and charges by the Public Service Commission because of the above-quoted provision of section 3 of chapter 165 and because the carrier claims the distance between the limits of the two towns is less than twenty miles, causing an overlapping of the ten-mile radius beyond the limits of each town. The carrier also claims exemption from the operation of said chapter 165 for the same reasons.

INQUIRY

1. Has the Public Service Commission the power to now regulate the rates and charges and apply the Public Service Commission Law to the carrier above mentioned?

2. Is the above carrier exempt from licensing provisions of chapter 165, Statutes of Nevada 1933?

OPINION

Answering query No. 1:

Chapter 165, Statutes of Nevada 1933, contains no express repeal of the Public Service Commission Law or any portion thereof, and, unless the provisions thereof pertinent to the above inquiry are so repugnant to the Public Service Commission Law as to be irreconcilable therewith, there is no implied repeal, and the two acts must be construed in *pari materia* and effect given to both. *State v. Eggers*, [36 Nev. 373](#); *Carson City v. Board of County Commissioners*, [47 Nev. 415](#); *Presson v. Presson*, [38 Nev. 203](#).

An examination of the two Act fails to disclose any such repugnancy as will even tend to invoke the rule of an implied repeal of the Public Service Commission Law, or any portion thereof, by chapter 165. To the contrary, the legislative intent to tie the provisions of chapter 165, relating to common carriers, to the law creating the Public Service Commission and providing its powers and duties is clear. It is certainly expressed in unequivocal language in sections 5, 6 and 7 of chapter 165; and the purpose of the Legislature in so doing was and is to grant to the Public Service Commission beyond any doubt the power to regulate, continue to regulate, and to license common carriers of persons and/or property in intrastate service, if any such doubt existed or any need for additional legislation on this point was, in fact, needed.

It must be borne in mind that the Public Service Commission Law of 1919 was and is not a licensing or revenue statute. Its purpose was and is to regulate public utilities and utilities affected with a public interest, while chapter 165 is a revenue measure primarily, the regulatory powers therein granted to the Commission being incidental and a reiteration of previously granted power. (*See Ex Parte Iratacable*, [55 Nev. 263](#), 30 Pac. (2d) 284.) Applying, therefore, the rule of statutory construction applicable here, i.e., the construing of the two acts in *pari materia*, it at once becomes clear that the legislative intent was and is that, as to common carriers of persons and/or property in intrastate service or commerce, the Public Service Commission not only was and is empowered to exercise its regulatory powers provided in the Public Service Commission Law, but, also, in addition thereto, to exercise such powers over the same carriers as are defined and provided in chapter 165 and to collect the revenue therein provided according to the terms of such chapter. In brief, that as to regulatory powers over public utilities and utilities affected with a public interest, the Legislature simply reiterated what it had theretofore said should be the power of the Public Service Commission.

An examination of section 7 of the Public Service Commission Law (sec. 6106, N. C. L. 1929) discloses that the Public Service Commission had ample power to regulate the carrier in question here at the time of the granting of the certificate of public convenience to it. We think that there is nothing in chapter 165 which takes away or abridges such power of the Commission as to the carrier here so far as regulation of rates and charges and other regulatory features are concerned. The regulatory powers of the Commission as to rates and charges and such matters of common carriers are provided in and by the Public Service Commission Law and were by that law made applicable to the carrier in question here and, we think, can be enforced as to such carrier irrespective of chapter 165. The provisions of chapter 165 as regards regulatory matters are supplemental to the provisions of the Public Service Commission Law and do not add to nor detract from the powers granted the Commission in the prior Act. This is clearly evidenced by the language contained in sections 5, 6 and 7 of chapter 165.

We think that the language of these sections, standing alone or construed in *pari materia* with the

Public Service Commission Law, clearly indicates that the legislative intent was and is that, insofar as the regulation of the rates and charges of an intrastate common carrier by motor vehicle is concerned, the Public Service Commission had and has the right to exercise the power to so regulate, granted in the Public Service Commission Law, notwithstanding the provision in section 3 of chapter 165 to the effect that none of the provisions of chapter 165 shall apply to certain motor vehicles therein mentioned. It will be noted that the language of said section 3 is, "None of the provisions of this act shall apply" etc. This is clearly a limitation of the nonapplicability of chapter 165 alone and does not relate back to the Public Service Commission Law.

Entertaining the views expressed above upon the question of the regulatory powers of the Commission as to the carrier in question here, we are of the opinion that the carrier is subject to the regulatory powers granted the Commission by the Public Service Commission Law and that such powers are not restricted by the provisions of chapter 165 and, even though the rates and charges of the carrier were fixed and put into effect prior to the enactment of chapter 165, they are still subject to the operation of the law under which they were made effective.

Answering query No. 2:

From the data submitted with the request for this opinion, it seems that the carrier in question now claims to be operating one or more taxicabs, notwithstanding its application was made to secure the certificate of public convenience granted under the Public Service Commission Law, as an on-call carrier of passengers for hire by motor vehicles to accommodate the public on sight-seeing trips to Boulder Dam and to transport persons to all Nevada points with Boulder City as its initial station. It also seems that the carrier obtained a permit to operate its motor vehicles in and around Boulder City, which is its initial station and principal place of business, and also obtained licenses at Las Vegas to there operate its said vehicles. It also appears that said carrier claims that the distance between the limits of the two towns is less than twenty miles and that, by reason thereof, it has the right to operate its motor vehicles as taxicabs over the State highway between Boulder City and Las Vegas, carrying passengers for hire in common carrier service without being required to obtain the licenses for its motor vehicles provided in chapter 165, Statutes of Nevada 1933, the carrier relying upon the claimed exemption it says is contained in section 3 of said chapter, reading: "None of the provisions of this Act shall apply to * * * city licensed taxicabs operating within a ten mile radius of the limits of a city or town * * *."

We think, for the purposes of this opinion, that it is unnecessary to determine whether the carrier is engaged in the operation of taxicabs; it is sufficient to say that, if the carrier is operating taxicabs, there is no question but what it is engaged in intrastate common carrier service and is subject to the provisions of the Act in question, unless the claimed exemption is a valid exemption.

It is a well-settled principal of law that those who seek shelter under an exemption law or clause providing a tax or license exemption must present a clear case, free from all doubt, as such laws, being in derogation of the general rule, must be strictly construed against the claimant and in favor of the public. 17 R. C. L. 522, sec. 42; 37 C. J. 237, sec. 91; 61 C. J. 391, sec. 395; 61 C. J. 392, sec. 396; *Railway Company v. Philadelphia*, 101 U. S. 528; *Erie Ry. Co. v. Pennsylvania*, 21 Wall, 492; 22 L. Ed. 596; and many other cases.

We think the carrier's interpretation of the language of said section 3 and its claimed exemption thereunder are not well taken. It is not a reasonable or common sense construction because, if such a construction is adopted, it will result in imputing to the Legislature an absurdity in the law. A statute is to be construed to avoid absurd results. *Escalle v. Mark*, [43 Nev. 172](#); *State v. Scott*, [52 Nev. 232](#).

The Legislature provided a revenue measure when it enacted chapter 165. The revenue is derived

from and for the use of the highways by motor vehicles used thereon in a gainful occupation. It is conceivable and very probable that, applying the interpretation to the law which the carrier here claims is correct, a taxicab operator obtaining licenses and permits to operate in towns other than where his principal stand is located could operate over many, many miles of public highway license free. We think that the Legislature intended no such result. It may be that it could have chosen more apt language to express its intent in section 3, but a reading of the whole Act clearly shows that the intent of the Legislature was and is to require compensation for the use of the highways in a gainful occupation and that, as to taxicabs, it intended an exemption within a radius of only one city or town licensing such taxicab. To construe the language of said section 3 as interpreted by the carrier creates such a doubt as to clearly bring the claimed exemption within the rule and cases above cited on this point.

Further, we are not without authority for the interpretation that the language means that the taxicab is to be permitted to operate within a ten-mile radius of only one city or town licensing it. It was so interpreted in *Continental Baking Co. v. Woodring*, 55 Fed.(2d) 347, where the court had under consideration a similar provision of the Kansas Motor Truck Licensing Act.

But, even if the carrier's interpretation of the exemption clause should be correct, still it will not avail the carrier anything in the instant matter. It develops that the actual distance between the limits of Boulder City and the limits of Las Vegas is more than twenty miles. Even if the carrier can legally operate its so-called taxicabs within a ten-mile radius of each town without obtaining the license required by the law, still, if it crosses the line marking the extent of the radius limit, a violation of the law occurs.

We are, therefore, constrained to answer query No. 2 in the negative.
Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

PUBLIC SERVICE COMMISSION OF NEVADA, Carson City, Nevada.

SYLLABUS

140. Corporations.

1. A domestic corporation that has filed its list of officers and designation of resident agent cannot legally change the location or address of its principal office in this State by simply designating such change on its list of officers and designation of its resident agent required to be filed annually by the law of this State providing for the filing of the list of officers.
2. It is the duty of the Secretary of State to refuse to file the annual list of officers in which the corporation has named a new resident agent and a new principal office, with certain exceptions.

INQUIRY

CARSON CITY, June 14, 1934.

A domestic corporation filed its list of officers and designation of resident agent, as required by the law providing for the annual filing thereof. In designating the resident agent, the corporation designated a new or different principal office in this State than appears in its articles of incorporation.

1. Can such domestic corporation legally change the location or address of its principal office in this State by simply designating such change on its list of officers and designation of its resident agent required to be filed annually by the law of this State providing for the filing of the list of officers?

2. Is it the duty of the Secretary of State to refuse to file the annual list of officers in which the corporation has named a new resident agent and a new principal office?

OPINION

1. An examination of the corporation laws of this State discloses that a domestic corporation must unequivocally designate its principal office in this State in its articles of incorporation (par. 2, sec. 4, Corporation Law 1925). Such corporation must have a resident agent in this State in charge of its principal office (sec. 78, Corporation Law 1925). It must annually, on or before the first day of July, file with the Secretary of State a list of its officers and a designation of its resident agent, together with a certificate of acceptance of appointment signed by such designated resident agent (sec. 1 of Act requiring all corporations to file annually with the Secretary of State a list of their officers and directors, etc., i.e., sec. 1804, N. C. L. 1929, as amended, 1931 Stats. 408).

A further examination of the corporation laws discloses three methods by which the location of the principal office of a domestic corporation in this State may be changed:

First--By an amendment of its articles of incorporation, duly adopted and thereafter filed with the Secretary of State according to law.

Second--By the adoption of a resolution by the board of directors reciting the change in the location of the principal office within this State, and the certification and filing of such resolution in accordance with the provisions of section 89, Corporation Law 1925.

Third--The changing of the address of the principal office or place of business within the limits of the city or town wherein the corporation had heretofore designated its principal office, by the execution of a certificate, duly acknowledged by the resident agent of such corporation in charge of such office, certifying the change of address and designating the new address therein, and filing the same with the Secretary of State, and filing a copy of such certificate with the County Clerk of the county wherein such office is located (chap. 17, Stats. 1931).

From a study of the above-mentioned sections of the Nevada Corporation Laws, we think it most clear that the legislative intent was and is that the incorporators of a domestic corporation shall clearly designate in the articles of incorporation where its principal office in the State shall be located; and it also is most clear that the Legislature intended that the location of such principal office shall remain where so located until thereafter changed by the action of the board of directors in amending the articles of incorporation in this respect, or by changing the location thereof by resolution in accordance with section 89, Corporation Law of 1925, unless it is only desired to change the location of the principal office within the limits of a city or town where the principal office had theretofore been designated by the board of directors, as provided in chapter 17, 1931 Statutes. In any event, the location of the principal office in this State must first have been designated and located by and in the articles of incorporation, and, since a corporation or its officers cannot exercise a power not granted by the Legislature (*George v. N.C.R.R. Co.*, [22 Nev. 228](#)), we think the statute necessarily implies a prohibition on such corporation and/or its officers and directors to effect a change in the location of its principal office in this State in any manner or form other than is provided in the statutes above mentioned.

It is also to be noted that no provision is made in the Act of 1925 requiring the annual filing of the list of officers (*see* sections 1804-1807, N. C. L. 1929, as amended, 1931 Stats. 408, 409) for the filing of any paper showing a change of location of the principal office in this State. We think this is significant of the fact that the Legislature did not intend to grant the corporate directors the power to change the location of the principal office in a manner other than had already been established in the law.

We conclude that a domestic corporation, by and through its officers, agents, and/or board of directors, can effect a change in location of its principal office in only two ways, i.e., by amendment of the articles of incorporation or by resolution adopted by the board of directors in accordance with said section 89. Such change may be made from one city or town in the State to any other therein. We also conclude that a resident agent, once having been appointed and having filed or caused to be filed his acceptance of such appointment with the Secretary of State, and being then and there actually in charge of the principal office of the corporation theretofore designated in the articles of incorporation or any amendment thereof or in the resolution provided in said section 89, may legally change the location of such principal office from one address to another in the same city or town theretofore selected by the corporation as the situs of its principal office, provided such change is made in strict accord with chapter 17, Statutes 1931. We think it most necessarily follows that no change of location of the principal office can be effected by and through the annual filing of the list of officers and designation of resident agent.

2. Entertaining the views set forth in answer to query No. 1, we are constrained to answer query No. 2 in the affirmative to the following extent: While the Secretary of State in the filing of all papers pertaining to corporations acts ministerially, still such an obvious departure from the requirements of the law with respect to the important matter of the designation and location of the principal office of a domestic corporation in this State, as would appear from the attempted change of such designation and location in the list of officers filed pursuant to a law that carries no provision for the changing of the principal office from one place to another, certainly warrants the rejection of that portion of the list of officers which contains the change of location or designation of the principal office.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

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

SYLLABUS

141. State Engineer's Powers--Writ of Prohibition.

The writ of prohibition issued by the Supreme Court against the District Court of the First Judicial District and the Judge thereof, in the case of *Mexican Dam and Ditch Co. v. District Court*, [52 Nev. 426](#), decided July 1, 1930, does prohibit the State Engineer from now proceeding to distribute the waters of Carson River and its tributaries in accordance with the Order of Determination filed in said court and with the Clerk thereof on November 21, 1928, there being no change in the status of the matter of the adjudication of the relative rights of the claimants to the waters of said Carson River in said District Court since the opinion of the Supreme Court aforesaid.

INQUIRY

CARSON CITY, June 27, 1934.

Does the writ of prohibition issued by the Supreme Court of Nevada, directed against the District Court of the First Judicial District of the State of Nevada and the Judge thereof, in the case of *Mexican Dam and Ditch Company et al. v. District Court of First Judicial District*, [52 Nev. 426](#), decided July 1, 1930, prohibit the State Engineer from now proceeding to distribute the waters of the Carson River and its tributaries in accordance with the Order of Determination filed in said court and with the Clerk thereof on November 21, 1928? No change in the status of the matter of the adjudication of the relative rights of the claimants to the waters of said Carson River in said District Court has been made since the opinion of the Supreme Court aforesaid.

OPINION

We feel that it is unnecessary to here set forth, even briefly, the history of the case mentioned in the query. The files in your office and your familiarity with it obviate a repetition here. Suffice it to say that, after the initiation of proceedings, by the filing of the Order of Determination in the District Court of Ormsby County to adjudicate the relative rights of claimants to the waters of the Carson River and its tributaries by the State Engineer, the Mexican Dam and Ditch Company and others instituted an original proceeding in prohibition in the Supreme Court to restrain the District Court from adjudicating the relative rights above mentioned. An alternative writ of prohibition issued from the Supreme Court directed to the said District Court and the Judge thereof pending the final determination of the matter, which said alternative writ contained, among other things, the following language:

NOW, THEREFOR, We Command You and Each of You, that until further order of this Supreme Court, you and each of you desist and refrain from further proceeding, hearing, entertaining, trying or adjudging in said matter; and that you and each of you show cause before this Supreme Court of the State of Nevada on Tuesday, the 21st day of May, 1929, at the hour of 10 o'clock A.M. at the Court Room of this Supreme Court in the Capitol, in Carson City, Ormsby County, State of Nevada, why you and each of you should not be restrained and prohibited absolutely and permanently from taking any further proceedings in said matter, except to refer the same back to the State Engineer for full and complete determination of the water rights on the entire Carson River Stream System in the State of Nevada.

We understand the opinion of the Supreme Court in the matter to be and to mean that the alternative writ, including the above-quoted language, be made absolute and that all the District Court could do thereafter was to refer the Order of Determination back to the State Engineer for full and complete determination of the water rights of the Carson River and its tributaries, even though the Supreme Court held that the District Court had no jurisdiction of the matter because of a defect in the publication of notice to claimants of the then-pending hearing in the District Court.

We understand no change in the status of the matter of the adjudication of the relative rights in question has occurred in the District Court, or in the office of the State Engineer, since the decision and opinion of the Supreme Court. It is also clear from the record that the Supreme Court made no change at the time of its decision, or thereafter, in the order appearing in the alternative writ; therefore, the District Court and the Judge thereof were and are powerless to take any action whatsoever or exercise any jurisdiction in the matter save to refer the Order of Determination back to the State Engineer. This being the status of the case, we think that the effect of the Supreme Court's decision was and is to withdraw the Order of Determination from the District Court and the Clerk thereof and prevent any action from being had thereon by and in such court until such time as said Order of Determination shall have been again filed in said

court after a full determination of the relative rights of the said stream system shall have been made by the State Engineer.

It is well established by statutory law and by the Supreme Court of this State that the State Engineer has no power to distribute the waters of a stream system until his Order of Determination pertaining thereto has been filed with the County Clerk as ex officio Clerk of the Court according to law (sections 36 ½ and 38 of the Water Law of 1913, as amended; *Pacific Live Stock Co. v. Malone*, [53 Nev. 118](#)). The Order of Determination in the matter in question standing withdrawn from the District Court, and such court being powerless to proceed with the adjudication of the relative rights, and no change in the status of the case as would confer jurisdiction on the District Court to again entertain the matter having occurred, we think so operate as to render the State Engineer powerless to distribute the waters of the Carson River and its tributaries at the present time, and that he has been powerless so to do since the determination of the matter by the Supreme Court, for the reason that the alternative writ of prohibition, being made absolute without change and no other order being made therein by the Supreme Court, had the effect of restoring the Order of Determination to the status it occupied after its compilation but before its filing by the State Engineer with the County Clerk. Such order now occupying such a status can create no power, statutory or otherwise, in the State Engineer to distribute the waters of the stream in question.

Entertaining the views above expressed, we answer your query in the affirmative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

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

SYLLABUS

142. Smelters--Period of Employment of Workingmen.

Section 10238, N. C. L. 1929, governs the period of employment of workingmen in "smelters."

INQUIRY

CARSON CITY, July 13, 1934.

Is the period of employment of workingmen in smelters governed by section 10237, N. C. L. 1929, or is the same governed by section 10238, N. C. L. 1929?

OPINION

Section 10237, N. C. L. 1929, refers to the period of employment of workingmen in "underground mines" or "underground workings" only and makes no reference whatever to smelters.

Section 10238, N. C. L. 1929, refers to the period of employment of workingmen in "smelters and in all other institutions for the reduction or refining of ores or metals."

Therefore, the period of employment of workingmen in "smelters" is governed by section 10238,

N. C. L. 1929.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

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

SYLLABUS

143. Hunting--Open Season for Doves.

1. Section 3036, N. C. L. 1929, applies to "doves" as "upland game birds."
2. Section 3095, N. C. L. 1929, provides an "open season" on "upland game."
3. Section 3103, N. C. L. 1929, as amended by Chap. 188, 1933 Statutes of Nevada, p. 285, set daily bag limit on "doves" at twenty-five.

INQUIRY

CARSON CITY, July 27, 1934.

Does the law of this State provide for an "open season" within which it is lawful to hunt doves?

OPINION

Section 3036, Nevada Compiled Laws 1929, classifies wild birds as follows: (1) migratory game birds; (2) upland game birds; (3) predatory birds; and (4) nongame birds. Doves are not specifically named by the statutory definition in any of these classifications.

Paragraph 2 of this section reads as follows:

The words "upland game bird," wherever used in this act, shall be held to mean and include prairie chicken, sagehen and sagecock, grouse, pheasants, partridge, mountain quail, valley quail, plover, rail, ibis, or any variety of shore birds.

Doves are shore birds of the same class as some of the birds specifically enumerated in this paragraph and section; therefore, "doves" are included in this section as "upland game birds."

Section 3095, Nevada Compiled Laws 1929, provides for an "open season" on "upland game." Section 3103, Nevada Compiled Laws 1929, as amended by chapter 188, 1933 Statutes of Nevada, page 285, sets a daily bag limit during open season on "upland game" and, in doing so, it specifically sets the daily bag limit on "doves" at twenty-five.

These sections of the State Fish and Game Law, when read in *pari materia*, clearly, in our opinion, evince a legislative intent to declare an open season on doves in this State. We are, therefore, constrained to answer the inquiry in the affirmative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.
By JULIAN THRUSTON, Deputy Attorney-General.

HON. JOHN R. ROSS, District Attorney, Yerington, Nevada.

SYLLABUS

144. Funds--Cost of Transmission from County to State.

1. Section 6532, N. C. L. 1929, provides that the County Treasurer shall "send" all State moneys to the State Treasurer, at expense of the county.
2. Section 7031, N. C. L. 1929, provides that the County Treasurer may transmit State moneys to the State Treasurer by depositing the same in banks, etc., after obtaining the written consent and approval of the State Board of Examiners.

INQUIRY

CARSON CITY, July 31, 1934.

Are the transmission costs of funds from the County Treasurer to the State Treasurer at Carson City to be paid by the county or should the same be paid by the State of Nevada?

OPINION

Our attention is called to the fact that, in the State of California, the commonly called State-County settlement is made by the County Treasurer delivering in person to the State Treasurer the State's share of tax moneys and that the State of California pays the County Treasurer his expenses for such trip.

It is true that this is done in the State of California. The reason that California pays such expenses is that the State pays the County Treasurer forty cents per mile for each mile traveled in making the trip. Section 3876 of the Political Code, as amended by Statutes 1919, page 186, which is now the law of California, provides that the State shall pay the County Treasurer his actual expenses necessarily incurred in making the trip from the county seat to the State capitol and return to the county seat. It is clear that this is done in California because the statute expressly so directs. Such is not the law of Nevada; therefore, the California cases and plan are not in point.

The State-County settlements in this State are governed by section 6532, Nevada Compiled Laws 1929, or by section 7031, Nevada Compiled Laws 1929. This last-mentioned section relative to settlements by counties with the State, by depositing the State's share of the moneys in banks, etc., can only be taken advantage of after obtaining the written consent and approval of the State Board of Examiners. The records of the State Board of Examiners show that Elko County has received no such written consent and approval; therefore, the Elko County Treasurer must "send" all the State's moneys to the State Treasurer pursuant to the terms of section 6532, N. C. L. 1929, which reads as follows:

The county treasurer of each and every county in this state shall, on the third Monday of June and December of each year, settle in full with the state controller, and send to the state treasurer all funds which shall have come into his hands as county treasurer for the use and benefit of the state, taking therefor a receipt from the state treasurer. He shall hold himself in readiness to settle and pay all moneys in his hands belonging to the state at all other times whenever required to do so by order signed by the state

controller, who is hereby authorized to draw such order whenever he deems it necessary.

This section of the statute has never been construed by our Supreme Court; but, in our opinion, the language of the statute makes it clearly the duty of the County Treasurer to cause to be delivered into the hands of the State Treasurer all moneys collected by him for the use and benefit of the State. Attention is here called to the fact that this section makes it mandatory that the County Treasurer "send" to the State Treasurer all funds, etc. The word "send" is defined in the Standard Dictionary as synonymous with the word "forward." The statute of South Dakota relating to State-County settlements is similar to section 6532, N. C. L. 1929, except that the word "forward" is there used instead of the word "send." This South Dakota statute was construed by the Dakota Supreme Court in the case of *State v. Welbes*, County Treasurer, 75 N. W. 820, and, while the exact question here under consideration was not decided, it was nevertheless clearly pointed out by this decision that the statute makes it incumbent upon the County Treasurer to deliver the State's share of tax moneys into the hands of the State Treasurer and that it is no part of the duties of said State Treasurer to facilitate or aid the County Treasurer in anyway in the performance of this duty. The reasoning set forth in this case, we believe, supports our opinion that it is the duty of the county to pay transmission costs of the State-County settlement.

Under our own law, strictly speaking, it is of no legal concern to the State Treasurer whether the County Treasurer delivers the State's share of the tax moneys to him or not, neither he nor his sureties being liable for anything that may happen to the money until it is actually delivered, in cash, to him. On the other hand, if the same is lost in the course of transmission or if it is collected by the County Treasurer and, for any reason whatsoever, not delivered into the hands of the State Treasurer, the County Treasurer and his sureties are liable. We also point out that our statute provides that the State Treasurer give to the County Treasurer, upon acceptance by the State Treasurer of the State's share of tax moneys, "a receipt therefor." This means a receipt for the State's entire share of the tax money--not the State's share, less transmission costs.

It is apparent from what has been said that it is our opinion, and we do hold, that the transmission cost of funds from the County Treasurer to the State Treasurer is to be paid by the county making the settlement, and not by the State of Nevada.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

HON. GEORGE R. RUSSELL, State Treasurer, Carson City, Nevada.

SYLLABUS

145. Boards of County Commissioners--Power and Jurisdiction to Abandon Right of Way.

Section 1942, 4th subdivision, N. C. L. 1929, provides that Boards of County Commissioners may abandon a right of way.

STATEMENT

CARSON CITY, August 14, 1934.

Prior to December 5, 1931, the county of Douglas had a right of way through and over the property of Louis Bartlett *et al.*, over which was constructed a public county road. This public

county road lies and is within the lands of Louis Bartlett *et al.* In the NW 1/4 of the SE 1/4 of section 27, township 13 N., range 18 E., M. D. B. & M. This public county road lies between State Line and Edgewood in Douglas County, Nevada. On December 5, 1931, the County Commissioners of Douglas County, at a regular meeting of the board, passed a resolution abandoning this right of way and road for and in consideration of the granting to the State of Nevada by Louis Bartlett *et al.* of another and different right of way through and over their property on which there was to be constructed a State highway running northerly from State Line to Kellums, in Douglas County, Nevada.

INQUIRY

Is this resolution of the Douglas County Board of County Commissioners valid and within the powers and the jurisdiction of the Board of County Commissioners?

OPINION

Section 1942, Nevada Compiled Laws 1929, reads, in part, as follows:

The board of commissioners shall have power and jurisdiction in their respective counties:

* * * * *

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

There is no law prohibiting the County Commissioners from passing a resolution abandoning a public county road or any portion of the same. To the contrary, it is our opinion that the above-quoted fourth subdivision of section 1942, Nevada Compiled Laws 1929, grants the express power and the jurisdiction to the Douglas County Board of County Commissioners to pass the resolution in question.

We are, therefore, constrained to answer the inquiry in the affirmative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

SYLLABUS

146. Vaccination of School Children--Authority of County Boards of Health to Require Same.

The health laws of this State do not require the compulsory vaccination of school children for smallpox as a condition precedent to the entering of the public schools. Health officers and school boards have authority to exclude from the public schools, during such time as there is an actual outbreak of the disease in the community, and for such time as the prevalence of the disease and danger of infection therefrom shall warrant, children not vaccinated.

INQUIRY

CARSON CITY, August 22, 1934.

Can a County Board of Health legally require, as a condition precedent to the entering of the public schools of the county or city thereof, that school children shall be vaccinated for smallpox, there being no smallpox epidemic?

OPINION

The inquiry undoubtedly raises the question of whether compulsory vaccination of school children is legal or provided for by the laws of Nevada.

In our Opinion No. 113, dated August 14, 1933, we held that the health laws of this State did not permit of the compulsory inoculation of human beings for typhoid fever, and that the Legislature had not granted to the State Board of Health or the local health officers the power to compulsorily inoculate for typhoid fever. We think the reasoning in Opinion 113 applies here. There has been no change in the law.

It may be that, where the law of a State expressly provides that school children shall be vaccinated prior to entering school, all school children must be so vaccinated as a condition imposed upon their right to attend the public schools. In such case, no doubt the health officer of such State would be empowered to make necessary rules for the enforcement of the law, or it might be left to the local school boards to so do; but an examination of the statutes of Nevada fails to disclose that the Legislature has expressly provided that school children shall be vaccinated for smallpox as a condition precedent to their being permitted to attend the public schools of this State. Neither do such statutes convey the necessary implication that such vaccination must be had, unless it clearly appears that there is an immediate danger of epidemic smallpox, and, even then, the power to be exercised by the health officers and school boards extends only to the exclusion from the schools of children not vaccinated, if it is deemed advisable to keep the schools open during the period of danger.

Section 5849, Nevada Compiled Laws 1929, provides for the compulsory attendance at school of all children in this State between the ages of seven and eighteen years, except under certain conditions, none of which are that the child has not been vaccinated. Violation of this section is punished as a misdemeanor. Section 5851, *supra*. Nowhere in the laws of Nevada pertaining to public schools do we find any authority granted to Boards of School Trustees to exclude school children from such schools upon the ground that they have not been vaccinated.

It was pointed out in Opinion 113 that sections 5259, 5260, 5262, 5264, and 5265, Nevada Compiled Laws 1929, contain the grant of powers to health officers and boards of this State, and that the broadest power granted, with respect to control over the individual, is that of restraint for purpose of quarantine and disinfection, but that there was no grant of the power to invade the individual's person for purpose of inoculation for typhoid. We think the same holding applies with respect to vaccination for smallpox; and our view is supported by section 5266, Nevada Compiled Laws 1929, which provides for the controlling of contagious diseases in schools and expressly points out the duties of the health officer with respect thereto. Said section reads:

§5266. CONTAGIOUS DISEASES IN SCHOOLS. §32. 1. Duty of Health Officer. Upon the appearance of any dangerous contagious disease in any school district, it shall be the duty of the health officer in whose jurisdiction the schoolhouse is located to notify at once, in writing, the principal or teacher of such school and the librarians of all libraries in such school district, giving the names of all families where the disease exists. If the rules of the state board of health provide for the exclusion from school of teachers, or pupils from homes where such disease exists, the health officer

shall request the principal of the school to exclude from school attendance all such persons until a written order signed by the health officer permitting attendance at school is presented.

2. Duty of Principal or Teacher. Whenever the principal or teacher of the school has been notified of the presence of a dangerous contagious disease in the school district, or whenever the principal or teacher of the school knows or believes that a dangerous communicable disease is present in the school district, it shall be the duty of such principal or teacher to at once notify the health officer in whose jurisdiction the schoolhouse is located of such sickness. The health officer shall then investigate all such cases, to determine whether or not a dangerous contagious disease is present in such family, and take proper action.

3. Exclusion from School. Parents, guardians, or persons having custody of any child or children, shall not permit knowingly such child or children, if afflicted with a dangerous contagious disease, to attend school.

Thus, it appears that, if the rules of the State Board of Health provide for the exclusion from school of teachers and pupils, the health officer may then exclude them in school districts where a contagious disease has made its appearance. We think the above section itself negatives any inference that a child can be required to be vaccinated as a condition precedent to entering school at a time when no contagious disease is known to be in existence in the school district. The law itself carries a most obvious inference that it is only upon the appearance in the school district of a contagious disease that children may be excluded from the school unless vaccinated.

In making the foregoing statements, we are not unmindful of the power of the State, acting under its police power, to provide for the safety and welfare of its inhabitants, particularly in the realm of health; and, in this regard, we think the State Board of Health, as well as the local health officers, has broad powers and, in cases of emergency where epidemics of contagious disease are imminent in a community, may make all necessary rules and take all precautions recognized by the science of medicine as preventive of the spread of such diseases, limited only by the law creating such board and officers. Beyond the law, however, they may not go.

We think this is most aptly stated by the court in the case of *Mathews v. Board of Education*, 86 N. W. 1036, where the court said, at pages 1039, 1040:

As the police power imposes restrictions and burdens upon the natural and private rights of individuals, it necessarily depends upon the law for its support, and, although of comprehensive and far-reaching character, it is subject to constitutional restrictions; and, in general, it is the province of the lawmaking power to determine in what cases or upon what conditions this power may be exercised. As applied to the present case, the relator had a right, secured by statutory enactment, to have his children continue to attend the city schools in which they were respectively enrolled as pupils; and they, too, had a right to so attend such schools. Whether it be called a "right" or "privilege" cannot be important, for in either view it was secured to the relator, and to his children as well, by the positive provisions of law, and was to be enjoyed upon such terms and under such conditions and restrictions as the lawmaking power, within constitutional limits, might impose. There is no statute in this state authorizing compulsory vaccination, nor any statute which requires vaccination as one of the conditions of the right or privilege of attending the public schools; and, in the absence of any such statute, we think it cannot be maintained that the rule relied upon is a valid exercise of the rightful powers of the state board of health. The state board of health is a creation of the statute, and has only such power as the statute confers. It has no common-law powers. To lawfully exclude the relator's children from the city schools for the cause relied on required such a change

in the existing law as the legislature alone could make--a change that should make vaccination of pupils compulsory, or at least prescribe it as a condition of the right or privilege of attending the public schools generally, or during the occurrence of certain emergencies, or upon the happening of certain contingencies or conditions in respect to the prevalence of smallpox. The powers of the state board of health, though quite general in terms, must be held to be limited to the enforcement of some statute relating to some particular condition or emergency in respect to the public health; and, although they are to be fairly and liberally construed, yet the statute does not, either expressly or by fair implication, authorize the board to enact a rule or regulation which would have the force of a law changing the statute in relation to the admission, and the right of pupils of a proper school age to attend the public schools. It is not a question as to what the legislature might do, under the police power, about requiring vaccination as a prerequisite to attending school; nor is it a question of whether the legislature could confer this power upon the school board. The board of education is a creature of the statute. It possesses only such powers as the statute gives it. The legislature has said who may and should attend the public schools. It has nowhere undertaken to confer the power upon the school board to change these conditions by passing a general, continuing rule excluding children from the public schools until they comply with conditions not imposed upon them by the legislative branch of the government.

Entertaining the views set forth herein, we conclude: that no board of health or officer thereof in this State may legally make or enforce any rule excluding from the public schools any child who has not been vaccinated for smallpox when there is no epidemic of smallpox in existence or threatened; that the power of the boards of health or officers in this respect only extends to the exclusion from school of children who have not been vaccinated when there is an actual outbreak of the disease in the community, and then only for such time as the prevalence of the disease and danger of infection therefrom shall warrant.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

HON. E. E. HAMER, M. D., Secretary, Nevada State Board of Health, Carson City, Nevada.

SYLLABUS

147. Easements to Rights of Ways to Operate Power Lines.

Section 8517, Nevada Compiled Laws 1929, provides that title to real property by adverse possession is obtained after a period of five years' adverse use where all of the constituent elements of adverse possession are present. A prescriptive easement to a right of way may be obtained in this State by the mere unexplained use of such right of way over the property of another for a period of five years or more.

STATEMENT

CARSON CITY, September 17, 1934.

The Pitt Mill and Elevator Company has a power line which parallels the State highway from the city of Lovelock, Pershing County, for about five miles east and was constructed about the year

1904. This power line has been in operation at all times since the date of its construction. The operation thereof has been open, notorious, adverse, uninterrupted, exclusive, and continuous. The records of the County Recorder's office show no grant or license from the property owners to the Pitt Mill and Elevator Company conveying to it a right of way over said property. The company has, since the date of the construction of the power line, assumed to have a right of way over the property and has continuously exercised that right since the date of the construction of the power line and for more than five years without consulting the owner of the soil or asking permission of said owner. The possession has, by actual occupation, been open, notorious, continuous, uninterrupted, and adverse.

INQUIRY

According to the facts set forth in the foregoing statement, does the Pitt Mill and Elevator Company have an easement of the right of way to operate this power line over the said property?

OPINION

Section 8517, Nevada Compiled Laws 1929, provides that title to real property by adverse possession is obtained after a period of five years' adverse use where all of the constituent elements of adverse possession are present.

It is well settled, in analogy to the statute of limitations which applies only to corporeal hereditaments, that the enjoyment of an incorporeal hereditament exclusive and uninterrupted for a time sufficient to acquire title to the soil by adverse possession affords a conclusive presumption of a grant to be applied as a presumption *juris et de jure*; and title so acquired is as effective and complete as one obtained by grant. As applied to incorporeal rights, this method of acquiring title is still denominated prescription, since corporeal property can be acquired by direct operation of the statute of limitations, or what is generally terms adverse possession. 19 C. J. 874, sec. 18; *Fleming v. Howard* (Cal.), 87 P. 908; *Thomas v. England* (Cal.), 12 P. 491; *Kripp v. Curtis* (Cal.), 11 P. 879; *Barbour v. Pierce*, 42 Cal. 657.

In *Chollar-Potosi Mining Co. v. Kennedy and Keating*, [3 Nev. 361, at 375](#), second paragraph, it is held:

But even admitting that plaintiff did not appropriate the soil, but only claimed the right of way when locating the road, we do not see how that could aid the defendants. An uninterrupted adverse enjoyment of the right of way for more than five years would by prescription establish the plaintiff's right to continue in the enjoyment of the same privileges.

In volume 19, Corpus Juris, p. 887, section 51, it is said:

It is not necessary that there be an express "claim of right" in words, or that the adverse party should expressly admit his knowledge thereof, for these facts may be inferred from the nature of the use, and the situation of the parties; nor is it necessary that the claim be well founded, or that the claimant have color of title, as the open, notorious, uninterrupted, adverse use of the land under a claim of right for the statutory period may ripen into a title by prescription to an easement, although originally known to be a trespass.

The law is well established in this State that a prescriptive easement to a right of way may be obtained by the mere unexplained use of such right of way over the property of another for a period of five years or more.

It is held in *Howard v. Wright*, [38 Nev. 25, at 38](#), that a presumption of a right arises from the mere unexplained use of a way over the land of another for the statutory period (in this State, five years).

In conclusion, we are constrained to hold that, the Pitt Mill and Elevator Company having enjoyed the said right of way in an open, notorious, uninterrupted, adverse, and exclusive manner for a period of more than five years, the said company now has a good and legal title to said right of way by prescriptive easement, which title is just as valid under the law of this State as would be a title by grant.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

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

SYLLABUS

148. General Election Ballots.

When two candidates file for a partisan nomination for an office on one party ticket and no candidate files for a partisan nomination for the same office on any other party ticket, to which office only one person can be elected, and where there is one independent candidate for the same office, the two party candidates must run in the primary election. The party candidate receiving the greater number of votes at such primary election becomes the nominee of this party and his name and the name of the independent candidate appear on the general election ballot.

INQUIRY

CARSON CITY, September 20, 1934.

Where only two candidates file for a partisan nomination for any office on one party ticket and no candidate or candidates file for a partisan nomination on any other party ticket for the same office to which only one person can be elected, and where there is also an independent candidate filed for the same office, do all three names appear on the general election ballot?

OPINION

Prior to the adoption of the State Primary Law, under the commonly called "Convention System" the respective political parties met in convention and nominated a candidate of each political party to represent the party as its nominee at the general election. Under this law, as many independent candidates might run in the general election as desired to do so, by complying with the law relative to independent candidates. To suppress the supposed evils of this law, the Legislature passed an Act entitled "An Act regulating the nomination of candidates for public office in the State of Nevada," approved March 23, 1917, and commonly known as the "Primary Law." It is to be noted that this law provides, as did the convention system which preceded it, for the nomination of candidates for public office--not the election thereof.

It was held in *State ex rel. Pittson v. Beemer*, [51 Nev. 192, that section](#) 22 of the Primary Law, being section 2425 Nevada Compiled Laws 1929, as it existed prior to the 1933 amendment,

provided that where two candidates filed for the same office on one party ticket and no member of another party filed for the same office on any other party ticket, and there was no independent candidate, then the two candidates, members of the same political party, must run both at the primary and in the general election, the candidate receiving the highest number of votes at the general election being elected regardless of the outcome of the primary election. This decision exemplifies the rule that no candidate can be declared elected at a primary election, but can only be nominated thereat.

This decision construed section 22 of the Primary Law as amended in 1927 and as the same existed until again amended in 1933.

Section 22 of said Primary Law was amended by chapter 69, 1933 Statutes of Nevada, page 82, to read as follows:

The party candidate who receives the highest vote at the primary shall be declared to be the nominee of his party for the November election. In the case of an office to which two or more candidates are to be elected at the November election, those party candidates equal in number to positions to be filled who receive the highest number of votes at the primary shall be declared the nominees of their party; provided, that if only one party shall have candidates for an office or offices for which there is no independent candidate, then the candidates of such party who received the highest number of votes at such primary (not to exceed in number twice the number to be elected to such office or offices at the general election) shall be declared the nominees of said office or offices; provided further, that where only two candidates have filed for a partisan nomination for any office on only one party ticket, and no candidates have filed for a partisan nomination on any other party ticket, for the same office, to which office only one person can be elected, the names of such candidates shall be omitted from all the primary election ballots, and such candidates' names shall be placed on the general election ballots. In the case of a nonpartisan office to which only one person can be elected at the November election, the two candidates receiving the highest number of votes shall be declared to be the nonpartisan nominees; provided, however, that where but two candidates have filed for a nonpartisan office, to which only one person can be elected, the names of such candidates shall be declared to be the nonpartisan nominees for such office. In the case of a nonpartisan office to which two or more persons may be elected at the November election, those candidates equal in number to twice the number of positions to be filled who receive the highest number of votes shall be declared to be the nonpartisan nominees for such office.

The question to be decided relates exclusively to the construction to be placed upon the first and second provisos of the second sentence of this section as amended. The Supreme Court, in *State v. Beemer*, supra, held that that portion of the section down to the first proviso in the second sentence deals only with the nomination, not election, of candidates at the primary election where both parties have candidates for nomination, and that the last two sentences of the section relate only to the nomination of nonpartisan candidates. These provisos, when read together, are probably somewhat ambiguous and, for this reason, extrinsic aids to construction may properly be applied.

In *National Mines Company v. District Court*, [34 Nev. 67, at 75](#), it is held:

In construing any statute the language of which is not clear, it is well first to consider the law as it existed prior to the enactment.

The law as it existed prior to the 1933 amendment required candidates, as stated in *State v.*

Beemer, supra, to run in the primary and in the general election regardless of the outcome of the primary contest; and it must here be noted that this was only in cases where there were two candidates running on the same party ticket and no candidate of the opposite party and no independent candidate. This obviously entailed unnecessary expense both upon the candidates and upon the taxpayers. The question arises, what was the intention of the 1933 Legislature in amending the second proviso of section 22 of the Primary Law? (This is the only change made in the prior existing law.)

It is a cardinal rule of construction that the intention of the Legislature is to be obtained primarily from the language used in the statute. *State v. Hamilton*, [33 Nev. 418](#); 111 P. 1026; *Ex parte Rickey*, [31 Nev. 82](#), 100 P. 134. But, where such language is vague, ambiguous, or uncertain, the court may look not only to the language but to the object to be accomplished or the purpose to be subserved. *State ex rel. Bartlett v. Brodigan*, [37 Nev. 245](#), 141 P. 988.

The object to be accomplished and the purpose to be subserved by this amendment are clearly, in our opinion, to obviate the theretofore unnecessary expense entailed by law upon candidates and taxpayers when two members of the same party run for office without opposition from the opposite party or from an independent candidate, by providing that, in such case, the names of such party candidates be omitted from the primary ballot and placed on the ballot at the general election. The first proviso of the 1933 amendment, heretofore quoted verbatim in this opinion, should be construed as if it read, when applied to a case of this kind, as follows:

provided, that if only one party shall have candidates for an office or offices for which there is an independent candidate, then the candidate of such party who receives the highest number of votes at such primary shall be declared the nominee of said party for such office.

This proviso as it actually reads is, so far as it relates to independent candidates, in the negative; but it is held that, in a proper case, “a statutory provision containing a negative may be read as an affirmative, for the sake of clarity.” *Hedrick v. Pack*, 106 W. Va. 322, 145 S. E. 606.

The second proviso of this amendment, heretofore quoted verbatim, does not, in our opinion, stand out as an independent law, but relates back, refers to, belongs to, and is limited by the first proviso which immediately precedes it.

The rule in this regard is laid down by our Supreme Court in *State v. Beemer*, supra, at page 200, as follows:

The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it, unless it clearly appears to have been intended for some other matter. It is to be construed in connection with the section of which it forms a part, and is substantially an exception. If it is a proviso to a particular section, it does not apply to others unless plainly intended. It should be construed with reference to the immediately (*italics ours*) preceding parts of the clause to which it is attached.

This is also held to be the law in *In re McKay's Estate*, [43 Nev. 114](#), 184 P. 305.

The most recent decision in this State on this point is *State ex rel. Miller v. Lani et al.* (Nev.), 27 P. (2d) 537, decided December 5, 1933, which holds the proviso contained in article XV, section 9, of the State Constitution to be limited by the operation of the section which immediately precedes it. In this connection, it is said at page 537:

The portion of a proviso is usually and properly confined to the clause or distinct portion of the enactment which immediately (*italics ours*) precedes it, and does not

extent to or qualify other sections, unless the legislative intent that it shall so operate is clearly disclosed.

The second proviso of section 22, under the rule of law above quoted, refers and belongs to the proviso immediately preceding it, which contains the words “for which there is no independent candidate.” This being the case, the said second proviso should be construed as if it read as follows:

provided further, that where only two candidates have filed for a partisan nomination for any office on only one party ticket, and no candidates have filed for a partisan nomination on any other party ticket for the same office and for which there is no independent candidate, to which office only one person can be elected, the names of such candidates shall be omitted from all primary election ballots, and such candidates’ names shall be placed on the general election ballot.

In *State v. Brodigan*, [37 Nev. 245, at 249](#), it is held:

Under the rules of statutory construction the court may consider prior existing law upon the subject under consideration and may consider the purpose of the changes sought to be effected, as the same may be deduced from a consideration of the whole subject matter.

Under this rule, when we consider the prior existing law upon the subject under consideration and the purpose of the changes sought to be effected, as the same are deduced from a consideration of the whole subject matter, we are forced to the conclusion that the sole and only purpose sought to be accomplished by the 1933 amendment, and, therefore, the only purpose which it does accomplish, is to provide that, where there are two candidates for the same office running on the same party ticket and where there is no candidate for the same office who is a member of the opposite political party and no independent candidate, then, in such case, and only in such case, shall the names of said candidates be omitted from the primary and placed on the general election ballot. Even if we concede, which we do not, that certain words are omitted from this amendment which the Legislature intended to be contained therein, even then it is held in *State v. Brodigan*, [37 Nev. 245, at 250](#), that:

Where, from a reading of the entire act, certain words necessary to give it complete sense have manifestly been omitted, courts, under well-established rules of construction, are permitted to read the same into the act in order that the law may express the true legislative intent.

In *Gibson v. Mason*, [5 Nev. 227, at 257](#), where it became necessary for the court to interpolate certain words into the statute, it is said:

So also it is always the first great object of the courts in interpreting statutes, to place such construction upon them as will carry out the manifest purpose of the legislature, and this has been done in opposition to the very words of an act.

Again, in *Abel v. Eggers*, [36 Nev. 373, at 381](#), Point No. 7, it is held:

In the interpretation of statutes, the courts so construe them as to carry out the manifest purpose of the legislature, and sometimes this has been done in opposition to the very words of an act.

It is our opinion that the interpretation we have placed upon this 1933 amendment, when the first and second provisos are read together with the entire 1933 amendment, is properly within the “letter” of the Act; but, regardless of the “letter,” this interpretation is clearly within the “spirit”

thereof.

In pursuance of the general object of giving effect to the intention of the legislature, the courts are not controlled by the literal meaning of the language of a statute. *People v. Stratton* (Ill.), 167 N. E. 31; also, 84 Conn. 234.

But the spirit or intention of the law prevails over the letter thereof. *Ex Parte Prosole*, [32 Nev. 378](#), 108 P. 630.

It is generally recognized that whatever is within the spirit of the statute is within the statute itself, although it is not within the letter thereof. *New York v. Davis*, 7 Fed.(2) 566; *Orono v. Bangor Ry. Co.*, 105 Me. 428; *State v. Long*, 43 Mont. 401, 117 P.104.

The first proviso of the Act, as we interpret it, provides that where two democrats and one independent file for the same county office, the democrat receiving the lesser number of votes in the primary is eliminated; the democrat receiving the greater number of votes in the primary runs against the independent in the general election. The second proviso, if read as an independent law (which cannot legally be done), without regard to the first proviso, would say that the two democrats and the independent all run in the general election. To construe the second proviso as independent of the first would, therefore, lead to an irreconcilable contradiction. When construed together, as we have done, there is no contradiction, with the result that effect may easily be given to both; and, since they are both in the same section of the law, that is exactly what must be done.

It is held that:

The rule of construction according to the spirit of the law is especially applicable where adherence to the letter would result in absurdity or contradiction. *United States v. Katz*, 271 U. S. 354, 70 L. Ed. 984; *McGraph v. Koelin*, 66 Cal. App. 41, 225 P.34.

In *Nye County v. Schmidt*, [39 Nev. 456](#), 157 P. 1073, the rule is emphatically set forth that legislative Acts shall be construed so as to make all parts thereof harmonious, if a reasonable construction can accomplish this result; and we are of the opinion that, when the first and second provisos are considered together and with the rest of the 1933 amendment, as we have done in this opinion, the whole thereof is harmonious and there is no contradiction. Where two candidates file for a partisan nomination on one party ticket and no candidate files for a party nomination for the same office on any other party ticket and there is one independent candidate for the same office, to hold that the Legislature intended, by the enactment of the second proviso of the 1933 amendment, that the three candidates go on the general election ballot would, in our opinion, offend the entire elimination theory of the Primary Law. It is not to be presumed that the Legislature intended, by the 1933 amendment, to so completely revise the Primary Law as to open the door to possible absurdities--such was not the intention of the Legislature. The Legislature, having in mind the fact that there can be no such thing as an election at the primaries in this State, and being aware of the unreasonableness of the law requiring two partisan candidates without opposition from another party or an independent to run in both the primary and general election, did provide in the 1933 amendment an exception to the rule of elimination in the primaries, this exception being that, where there are two party candidates and no candidates of the opposite party and no independent candidate, then the party candidates' names are omitted from the primary election ballot and they must run in the general election.

For the foregoing reasons, we are constrained to answer your inquiry, and we do hold, as follows:

When two candidates file for a partisan nomination for an office on one party ticket and no candidate files for a partisan nomination for the same office on any other party ticket, to which

office only one person can be elected, and where there is one independent candidate for the same office, the three names do not appear on the general election ballot, but the law is that the two party candidates run in the primary election and the party candidate receiving the greater number of votes at such primary election becomes the nominee of his party and, therefore, does run against the independent candidate in the general election; the party candidate who received the lesser number of votes at the primary election was legally and lawfully eliminated thereat.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney General.

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

SYLLABUS

149. Railroad Transportation--Public Service Commission.

1. Members of the Public Service Commission, or its inspectors, in strict pursuance of official duty for the purpose of making train-service inspection in Nevada relative to cost thereof, fixing of rates therefor, and ascertaining the quantity and quality of such service, may enter and ride upon trains without payment of transportation charges therefor.
2. The furnishing of such free transportation does not subject the railroad companies nor their agents, servants, or employees, or the public officer duly authorized thereto, to prosecution for violation of the State law prohibiting free transportation of state officers.

INQUIRY

CARSON CITY, November 23, 1934.

1. May a member of the Public Service Commission of Nevada, or its duly appointed and qualified inspector, enter and ride upon trains of railroads operating in and through the State of Nevada, for the purpose of making train-service inspection within Nevada relative to the cost thereof and the fixing of rates therefor and ascertaining the quantity and quality of such train service, without payment of transportation charges to such railroads for the transportation of such member or such inspector while making such inspection?
2. Would the furnishing of such free transportation subject the railroad companies or their agents, servants, or employees to prosecution for violation of the State law prohibiting free transportation of State officers?

INQUIRY

CARSON CITY, November 23, 1934.

1. May a member of the Public Service Commission of Nevada, or its duly appointed and qualified inspector, enter and ride upon trains of railroads operating in and through the State of Nevada, for the purpose of making train-service inspection within Nevada relative to the cost thereof and the fixing of rates therefor and ascertaining the quantity and quality of such train service, without payment of transportation charges to such railroads for the transportation of such member or such inspector while making such inspection?

2. Would the furnishing of such free transportation subject the railroad companies or their agents, servants, or employees to prosecution for violation of the State law prohibiting free transportation of State officers?

OPINION

1. Answering query No. 1, all persons, firms, associations, or corporations, their lessees, trustees, or receivers, owning, operating, managing, or controlling any railroad or part of a railroad in Nevada are deemed to be "public utilities" under the Nevada law (section 6106, Nevada Compiled Laws 1929); and, as public utilities, they are under the jurisdiction of the Public Service Commission of Nevada so far as the operations of such railroads are concerned within the State. *See* Public Service Commission Act, sections 6100 - 6146, Nevada Compiled Laws 1929.

The Legislature of Nevada has delegated the power of testing the service rendered by any public utility within the State to the Public Service Commission and empowered such Commission to enter upon any premises occupied by any public utility for the purpose of making an examination and test of the product or service rendered by the utility (section 6112, Nevada Compiled Laws 1929, as amended, 1931 Statutes Nevada, 320). It is to be noted that, in this section of the law, there is provided a penalty for any utility's refusing to allow such inspection and test to be made. Further, it is the duty of the Public Service Commission to investigate and ascertain the value of the property of public utilities (section 6107, *supra*); also, to prescribe classification of service and fix and regulate rates and charges therefor (section 6116, *supra*); and, in connection with interstate traffic and the regulation thereof, together with the fixing of rates therefor, the Public Service Commission is empowered to cooperate with the Interstate Commerce Commission of the Federal Government (section 6117, *supra*).

We think that the Nevada law clearly empowers the Public Service Commission to make inspections of railroad property and the mode of operation thereof, when such becomes necessary, in order for the Commission to pass upon questions presented to it relating to the rates and charges of the railroad for the transportation of persons or property thereover or the quantity and quality of the service rendered by the railroad to the traveler or shipper. To make a proper and thorough inspection or examination of a utility plant to determine whether such plant is rendering efficient service to the user thereof, for which such user is paying the rate or charge fixed for such service, it undoubtedly becomes the duty of the public authority charged with the duty of examining into the matter to examine and inspect every part of the operating plant so as to determine, if possible, if the complaint of the user is founded on fact. The plant of a railroad from which it derives its revenue and with which it renders service to the user is its trains. The mode of operation of these trains determines whether reasonably efficient service is being rendered to the user commensurate with the charge therefor paid by him. To ascertain if the plant of a railroad is being operated so as to provide reasonably efficient service and service commensurate with the charge therefor and in compliance with the regulations of the public authority, it certainly becomes necessary for the Public Service Commission to inspect the plant and examine into the operation thereof. To do so means the actual observance of the operation of the plant, i.e., the actual riding upon the operating units of the plant or some of them--in brief, the actual riding upon the trains operated by the utility.

We think a public utility is required to acquiesce in the reasonable examination, inspection, and observance of operation of its plant by the public authority, without charge being made by it for the entrance upon the plant by such authority for such purpose, and that, in the instant matter, the Public Service Commission, or a member thereof, or its duly appointed and qualified inspector, in strict pursuance of official duty could enter and ride upon trains without payment of transportation charges therefor.

2. Answering query No. 2, section 21 of the Public Service Commission Act, i.e., section 6121, Nevada Compiled Laws 1929, as amended, 1931 Statutes Nevada, 18, prohibits railroad companies and other common carriers from furnishing free or reduced transportation to any State, county, or municipal officers, and it also prohibits such officer from receiving such transportation. It is our opinion that such statute relates to the transportation of such officers as passengers, traveling either privately or on official business other than the business of actual inspection of railroad operating property and the mode of operation thereof. The law directing examination and inspection of utility plants contemplates as inexpensive a method as possible; it also contemplates the acquiescence therein by the utility and the admission to the plant of the public authority for such purpose.

We think that the State would be and is estopped from entertaining any prosecution, either of the railroad corporation, its officers, agents, or employees, or of the public officer duly authorized thereto, for violation of the statute where such violation would be based upon the matters discussed in this opinion. The query is answered in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

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

SYLLABUS

150. Estate Matters--Fees of County Clerk of Humboldt County.

The proviso in paragraph 5, page 87, chapter 59, 1929 Statutes of Nevada, is unconstitutional and invalid as violative of article X, section 1, and article IV, section 17, of the Nevada Constitution.

INQUIRY

CARSON CITY, December 6, 1934.

Is that certain proviso of chapter 59, 1929 Statutes of Nevada, page 87, paragraph 5, which reads as follows:

provided, that at the time of filing the inventory and appraisement in any such proceeding there shall be collected the sum of fifty cents for each additional one thousand dollars of the appraised value in excess of two thousand dollars; said fee to be in addition to the court fee of one dollar and fifty cents now provided by law;

valid and constitutional?

OPINION

This question has not been passed upon by the Nevada Supreme Court, and we must, therefore, base this opinion upon authorities from other States.

Article XIII, section 1, of the California Constitution, and article X, section 1 of the Nevada

Constitution, are substantially the same, in that they both provide that: "The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory," etc.

In the case of *Fatjo v. Pfeister* (Cal.), 48 P. 1012, the court holds that this portion of the California statute, containing a provision the same as the one here under consideration, is unconstitutional, in that it does impose a tax in violation of article XIII, section 1, California Constitution. In arriving at this conclusion the court says:

The provisions of the fee bill of 1895 require, at the time of the filing of the inventory and appraisalment, the payment of one dollar for each one thousand dollars in excess of three thousand dollars of the appraised value of an estate, imposes a tax, and is in violation of this section in imposing an extraordinary tax in addition to the equal and uniform tax to which alone property is liable.

We are of the opinion that the case of *Fatjo v. Pfeister*, supra, is predicated upon sound reasoning and is applicable here; and we, therefore, hold that the proviso mentioned in the inquiry is unconstitutional and void as violative of article X, section 1, of the Nevada Constitution.

Article IV, section 24, of the California Constitution, and article IV, section 17, of the Nevada Constitution (title provision), are, so far as here material, the same in substance. The title of 1895 Statutes of California, page 267, and the title of chapter 59, 1929 Statutes of Nevada, p. 87, are very similar, and so far as material to this opinion, are the same.

In *Fatjo v. Pfeister*, supra, in connection with this constitutional provision, the Court says:

The title of Statutes of 1895, page 267, * * * does not express the subject of section 1, imposing a graduated tax on the estates of decedents, infants, and incompetents, and, hence, such section is in conflict with article IV, section 24, of the Constitution.

The subject set forth in the proviso herein under consideration would, if valid, impose a tax and, hence, be a subject relating to taxation; and the title of the Act expresses only the subject of "Fees of the County Clerk of Humboldt County."

This proviso is, therefore, also unconstitutional and void as violative of article IV, section 17, of the Nevada Constitution. *Berryman v. Bowers* (Ariz.), 250 P. 361, and *State ex rel. Davidson v. Gorman* (Minn.), 41 N. W. 948, 2 L. R. A. 701, also support the conclusion arrived at in this opinion.

This proviso of chapter 59, 1929 Statutes of Nevada, p. 87, being unconstitutional and void, the County Clerk of Humboldt County shall disregard the same in filing the inventory and appraisalment in estate matters.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

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

SYLLABUS

151. Motor Bus and Truck Operation--Liability Insurance or Bond Required.

In lieu of providing liability insurance or bond, as required by section 16, chapter 165, 1933 Statutes of Nevada, an operator may create a trust fund; place such fund in the hands of a responsible trustee; and make such trustee surety on the bond required, with the qualification, however, that the full amount of the bond required shall be in the hands of the trustee at the time of the filing of the bond, and conditioned upon such amount remaining in the hands of such trustee during the life of such bond. The Public Service Commission may not be made trustee of the fund.

INQUIRY

CARSON CITY, December 7, 1934.

Can an operator of motor busses or trucks in motor carrier service on the highways of Nevada provide the liability insurance or bond required by law for the protection of the public, by creating a trust fund and paying into such fund monthly installments until such fund reaches an amount equal to the amount of the insurance policy or bond fixed by the Public Service Commission for such carrier, and substitute such trust fund in place of liability insurance or bond?

OPINION

We are advised that operators of motor busses and trucks in carrier service are having great difficulty in securing the liability insurance or bond required by the Public Service Commission pursuant to section 16, Motor Carrier License Act of 1933 (chap. 165, Stats. Nevada 1933), due to the refusal of responsible companies to furnish such insurance or bond. We understand from your inquiry and correspondence that an operator desires to create a "trust fund" equal in amount to the amount of the insurance policy or bond required by the Commission and to substitute such trust fund in place of the insurance policy or bond. We also understand that this "trust fund" will be built up by monthly payments thereto over a period of time; and we assume that the entire amount of the trust fund will not be in existence at the time of the requiring of the insurance policy or bond by the Commission, but will be in the process of building and reach its maximum amount at some later date.

The Public Service Commission, while possessing broad powers in the matter of administering the Motor Carrier License Act, still is a creature of the Legislature, possessing only such powers as are expressly granted it, and such implied powers incident to the express powers as are necessary to carry out the will of the Legislature; and, while the Commission may make rules and regulations in the administration of the Act, still such rules and regulations must have their basis in and be premised on the powers granted in the law and cannot transcend the law.

Section 16 of the Motor Carrier License Act provides:

In issuing the licenses provided in section 18, the public service commission shall require within such time, and in such amounts as it may designate, the filing with the commission in form required and approved by the commission of a liability insurance policy or bond of a surety and bonding company, or other surety, * * * to adequately protect the interest of the public and public safety. * * *

Thus, the mandate of the law is that the Commission shall require insurance for the benefit of the public, either in the form of an insurance policy or bond which binds the obligors thereunder to pay compensation for injury to the persons or property of third persons (*see* remainder of section 16). The Commission is bound

by this section of the law to require the licensee to furnish the security for the public that is stated in the law. It has no power to deviate therefrom, no matter how meritorious the plan may be. Further, the insurance policy or bond must be in the full amount required by the Commission at the time of the furnishing thereof, otherwise adequate protection would not be afforded the public as contemplated by the statute.

However, we think the plan proposed to your Commission relative to the trust fund possesses some merit and, no doubt, should receive the attention of the Legislature next to be holden; but, under the present law, such plan could not be legally put into effect save under the following conditions, i.e., we think there is no legal reason why the operator could not create a trust fund, placing such fund in the hands of a responsible trustee and making such trustee surety on the bond required, with this qualification, however, that the full amount of the bond required shall be in the hands of the trustee at the time of the filing of the bond, with a condition therein that such amount shall remain in the hands of such trustee during the life of such bond. It may be well here to point out that we think there is no provision under our law whereby the Public Service Commission could be made trustee of the fund.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

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

SYLLABUS

152. Nevada State Board of Embalmers--Renewal License Fees.

The failure of a licensed embalmer, upon notification that his renewal license fee is due and payable on a certain date and that, unless it is received by that time, said embalmer will be dropped from the list of licensed embalmers in this State, to pay the renewal fee required by law and requested in such notice, is not a ground upon which refusal of renewal can be predicated. If the embalmer should practice his profession of embalming in this State during the interim between the expiration of his license, by reason of his failure to pay the lawfully required fee, and the renewal thereof by your board, he would be legally guilty of a misdemeanor and subject to the punishment provided by section 2671, Nevada Compiled Laws 1929.

STATEMENT

CARSON CITY, December 14, 1934.

The Nevada State Board of Embalmers in July, 1934, notified a certain licensed embalmer that his renewal license fee was due and payable August 31, 1934, and that unless it was received by that time, said embalmer would be dropped from the list of licensed embalmers in the State of Nevada. This embalmer has not, to date, paid the lawfully required renewal fee as requested in said notice.

INQUIRY

Should this embalmer apply for a renewal of his license now or at some future time, should the State Board of Embalmers refuse to grant a renewal thereon on the ground that said embalmer had not complied with the law?

OPINION

Section 5 of "An Act to establish a state board of embalmers;" etc. being section 2669, Nevada Compiled

Laws 1929, as amended by 1931 Statutes of Nevada, chapter 27, page 32, subsection g, reads in part as follows:

If the applicant desires a renewal of the license, the state board shall grant it, except for cause, and the annual fee for renewal of licenses shall not exceed the sum of \$5.

The refusal of the State Board of Embalmers to renew this license, should proper application therefor be made, would be tantamount to a revocation thereof. It, therefore, necessarily and naturally follows that, unless a failure to pay the renewal fee, as required by the law and as requested in the notice, is sufficient grounds for the revocation of the embalmer's license in question, then the same must be renewed by the board upon receipt of proper request for the renewal by said embalmer and the payment of the required fee.

The language of the above-quoted statute that "If the applicant desires a renewal of the license, the state board shall grant it, except for cause," means except for such legal cause as would be grounds for the revocation of the license. The causes for a revocation of an embalmer's license are specifically enumerated in section 3, subsection b of the Act, being section 2667, Nevada Compiled Laws 1929; and the failure to pay the fee required by the law and requested in the notice is not enumerated as a legal cause for revocation and it is, therefore, not a ground upon which refusal of renewal can be predicated.

It is held that:

Where an act, ordinance, or statute enumerates the causes for which a license may be revoked, it cannot be revoked for any cause not enumerated. In re Lyman, 160 N. Y. 96, 54 N. E. 577; In re Kocher's License, 12 Pa. Dist. 513, 27 Pa. Co. 432; *Peterson v. Guernsey* (Wyo.), 183 P. 645.

It is here pointed out that, under the statute above quoted, your board was within its rights in dropping the name of the embalmer in question from the list of licensed embalmers in the State of Nevada, and, should the same embalmer, during the interim between the expiration of his license (by reason of his failure to pay the lawfully required fee) and the renewal thereof by your board, practice the profession of embalming in this State, then said embalmer would be legally guilty of a misdemeanor and subject to the punishment provided by section 7 of the Act, being section 2671, Nevada Compiled Laws 1929.

Maintaining the views herein expressed, we answer the inquiry in the negative.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

HON. S. E. ROSS, President of Nevada State Board of Embalmers.

SYLLABUS

153. Bounties for Destruction of Predatory Animals.

1. The Act providing an appropriation for the payment of bounties for the destruction and eradication of predatory animals does not make any appropriation of public funds for the purchase or securing by the State Controller of the devices to be furnished by him to the various County Clerks for the purpose of marking the skins of such animals.

2. Neither the whole nor any part of the appropriation made in the Act is applicable to the year 1934.

INQUIRY

CARSON CITY, December 21, 1934.

Section 4 of an Act providing for the payment of bounties for the destruction and eradication of predatory animals, etc., adopted by the people of Nevada at the last general election pursuant to an initiative petition therefor, contains the following language:

He (meaning the County Clerk) shall be provided by the state controller with a device for perforating said skin with the lettering and words. "Bounty paid--Nevada," * * *

Section 5 of said Act provides an appropriation of \$17,000 for each calendar year the Act shall be in effect "for the payment of bounties." No specific appropriation is made in the Act for the payment of the device for perforating the skins of such predatory animals, which device is required to be furnished to the respective County Clerks by the State Controller.

1. Does the Act authorize the State Controller to pay for said device from the amount appropriated in the Act for the payment of bounties?
2. Is the whole or any part of the appropriation made in the Act applicable to the year 1934?

OPINION

The questions presented in the foregoing inquiry require an examination into constitutional law as applied to laws enacted by the vote of the people pursuant to an initiative petition. It may be thought that because a law is enacted by vote of the electorate that constitutional inhibitions are not applicable to such laws, and, further, that other laws enacted by the Legislature pertaining to the subject of the initiative law in some manner would have no bearing thereon. An examination of the authorities discloses to the contrary:

Constitutional limitations and restrictions imposed upon the legislature are obligatory upon the people when legislating by the initiatory method. 59 Cor. Jur. 686, sec. 231.

See, also: Hammond Lumber Co. v. Moore, 286 P. 504.

The people, in the exercise of their legislative prerogatives, are subject to the same constitutional limitations as are applicable to the legislative assembly. *State v. Dixon*, 195 P. 841.

Through the initiative the people are a coordinate legislative body with coextensive legislative power, exercising the same power of sovereignty in passing upon measures as that exercised by the legislature in passing laws. Statutes enacted by the people directly under the initiative are of equal dignity with those passed by the legislature, for the result is the same in either case. Although the constitutionality of an initiative enactment is prima facie presumed, when acting as a legislative body the people can no more transgress the constitution than can the legislative assembly * * *. 59 Cor. Jur. 687, sec. 233.

Thus it appears that the people of the State, while possessing the power to initiate laws and pass them by a direct vote thereon, nevertheless are bound by constitutional provisions relating to the affairs of their State Government, including the fiscal affairs thereof, and legislation initiated by the people is enacted by them at the polls subject to constitutional restrictions. This must be so, else the State Constitution would be set at naught by legislation at any time, and constitutional government most seriously impaired.

Section 19 of article IV, Constitution of Nevada, provides:

No money shall be drawn from the treasury but in consequence of appropriations made by law *

* * .

Supplementing this constitutional provision, the Legislature provided in section 6931, Nevada Compiled Laws 1929, as follows:

The sums appropriated for the various branches of expenditure in the public of the state shall be applied solely to the object for which they are respectively made, and for no others.

And in section 7050, Nevada Compiled Laws 1929, it is provided:

It is hereby declared to be unlawful for any state officer, commissioner, head of any department, or employee in this state to bind, or attempt to bind, the State of Nevada or any fund or department thereof, in any amount provided by law, or in any other manner than that provided by law, for any purpose whatsoever.

Pertinent to the instant matter is the rule of law laid down by the Supreme Court of Nevada that the Legislature must be presumed to have knowledge of the state of the law upon the subject upon which it legislates. *Clover Valley L. & S. Co. v. Lamb*, [43 Nev. 375](#).

The pronouncement of our Supreme Court is, we think, applicable to the people of the State when enacting initiatory measures at the polls, as well as to the Legislature when engaged in legislating for the same people. The people are presumed to know the state of the law in existence upon the subject upon which they legislate. The state of the law, in existence at the time the people enacted the initiative Act under discussion, was that no money shall be drawn from the State Treasury but in consequence of an appropriation made by law (*see* constitutional provisions, *supra*); that appropriations, when made, must be applied solely to the objects for which made, sec. 6931, *supra*; and that the officer or officers charged with the disbursement of such appropriations cannot disburse them in any other manner than provided by the law, neither can they bind the State or any of its funds in any amount in excess of such appropriations, sec. 7050, *supra*.

Did the people, in the initiative Act, abrogate or set aside such existing law? We think not. The initiative Act is not so inconsistent with the cited statutes as to effect an implied repeal thereof. The inconsistency, if any inconsistency exist, is the failure of the initiative Act to properly and constitutionally make an appropriation for one of the elements necessary for proper administration thereof, i.e., the furnishing of the device. In no event can the Act be inconsistent with the constitutional provision quoted.

The initiative measure is to be construed in *pari materia* with these prior statutes to determine the effect thereof. It is clear that insofar as the initiative Act appropriated money for the payment of bounties that a valid appropriation has been made, and it is also clear that a specific amount has been set aside by the Act for a specific purpose, i.e., the payment of bounties, but there is no language in the initiative Act making an appropriation of public funds for the purchase or securing by the State Controller of the devices to be furnished by him to the various County Clerks for the purpose of marking the skins of predatory animals. The words "He shall be provided by the state controller with a device," without other and additional language somewhere in the Act more specifically setting aside public money for the purpose of securing such device, falls far short of making such an appropriation as will protect the State Controller in a contract binding the State for the payment of the device. The appropriation made in and by the initiative Act is for a specific purpose, i.e., the payment of bounties, and made in such express language as to exclude any implication that any part of the sum appropriated can be used for any other purpose. We know of no other Act or appropriation now in existence that authorizes the State Controller to purchase the devices required in the administration of the initiative Act.

The Supreme Court in *State v. La Grave*, [23 Nev. 25](#), said:

To constitute an appropriation there must be money in the fund applicable to the designated purpose.

By a specific appropriation we understand an Act by which a named sum of money has been set apart in the treasury and devoted to the payment of a particular claim or demand.

The appropriation made in the initiative Act conforms to this holding of the Supreme Court as regards the bounty payment, but fails to do so with respect to the purchase of the device, and the Act being defective in this respect brings the matter squarely with the case of *State v. Eggers*, [29 Nev. 469](#). We here quote the syllabus:

State Appropriations--Necessity, Stats. 1907 (p. 408, c. 185) created the state industrial and publicity commission, and provided (sec. 3, p. 409) that the chairman should receive from the state treasury the sum of twenty-five hundred dollars a year in monthly installments, and that the members of the commission should be allowed necessary mileage and traveling expenses on affidavit of the members claiming the same that the mileage and expenses were actually and necessarily incurred in official business, etc. Held, that the act constituted a sufficient appropriation of the salary of the chairman; but, as it failed to prescribe any maximum expenditure for traveling expenses, the act was void insofar as it authorized payment of such expenses by the state, under the constitution, art. IV, sec. 19, providing that no money shall be drawn from the state treasury except under appropriations made by law.

It is therefore our opinion that no appropriation has been made in the initiative Act whereby the State Controller is legally empowered to expend public moneys in the purchase of the device mentioned in said Act. Inquiry No. 1 is answered in the negative.

We suggest, however, that we think there is no constitutional objection to a legislative appropriation to cover the cost of the device, as such appropriation Act would be in aid of the initiative Act and not necessarily an amendment thereof.

Answering query No. 2. The initiative Act became effective upon the official declaration of December 17, 1934, following the official canvass of the vote on the measure. Whether the appropriation made by the Act is available for the balance of the year 1934 is somewhat doubtful. The Act provides for an appropriation for "each calendar year while this act shall be in effect." The term "calendar year" means the period from January 1 to December 31, next thereafter, inclusive. *Byrne v. Bearden*, 107 S. E. 782.

To the same effect: *Shaffner v. Lipinsky*, 138 S. E. 418; *People v. Milan*, 5 P.(2d) 249.

The Act is not retroactive. The appropriation could not in any event be made to relate to the calendar year 1934 prior to December 17. We think the real intent of the people, as expressed in the above-quoted language, is that the first appropriation is to relate to the first full calendar year commencing after the effective date of the Act, but, be that as it may, we think the administration of the initiative Act must await the furnishing of the device for the perforating of the skins of the predatory animals at the time of the counting and examination of such skins by the County Clerk. This is a necessary proceeding in order to safeguard the public moneys and prevent perpetration of fraud against the State. For the reasons contained in the whole of the foregoing opinion, query No. 2 is answered in the negative.

Respectfully submitted,
GRAY MASHBURN, Attorney-General.

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

HON. ED. C. PETERSON, State Controller, Carson City, Nevada.
HON. L. C. BRANSON, Senator, White Pine County, Nevada.

