

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1940

A-47. Bond Refunding Issue, Yerington.

Bond refunding issue for Yerington is controlled by chapter 70, 1937 Statutes of Nevada, as Yerington not organized under so-called home rule charter. Question of issuing such bonds must be submitted to a vote of people of Yerington pursuant to so-called "two ballot box law of 1933," as amended in 1937, and better procedure therefore is to follow chapter 169, 1937 Statutes of Nevada, as that provides lower rate of interest.

CARSON CITY, January 16, 1940.

JOHN R. ROSS, Attorney at Law, Carson City, Nevada.

FRIEND JACK: Reference is hereby made to your letter of January 4 requesting our opinion concerning whether the city of Yerington may issue refunding bonds without first holding an election as provided by the general law of this State, and other questions relative thereto.

We will answer your inquiries by number as follows, to wit:

Query No. 1: It is our opinion that the city of Yerington is not operating under such a charter as to exempt it from the provisions of chapter 70 of the 1937 Statutes. It appears that the city of Yerington was incorporated under a special Act of the Legislature in 1907, and the charter provided in the legislative Act is not such a charter as is meant by the exempting clause in section 5 of said chapter 70 as amended at page 160, 1937 Statutes. We think that the so-called home-rule charters are such charters as are contemplated under the laws of this State providing for the commission form of government. See State ex rel. Owens v. Doxey, 55 Nev. 186. Compare such case with State v. Reese, 57 Nev. 125.

Query No. 2: After a careful examination of the statutes and the cases decided by our Supreme Court subsequent to the enactment of the two ballot box law in 1933, we are of the opinion that the City Council of Yerington is without authority to proceed with the issuance of refunding bonds without the necessity of an election. We think that the enactment, or rather the reenactment of the two ballot box law in 1937 really supersedes the amendment to the Yerington charter which was by the way of adding section 54 ½ to the charter, and also such provision of the city charter relating to the issuance of bonds in existence prior to 1937. We are lead to this view by reason of the statements of the Court in Ronnow v. City of Law Vegas, 57 Nev. 332, and also State v. Reese, supra.

Query No. 3: This, of course, is answered by the answers to the above-numbered queries.

Frankly, we think that the city of Yerington would be in a far better position to follow chapter 169 of the 1937 statutes which definitely empower incorporated cities and towns to issue funding or refunding bonds at a lower rate of interest. By using chapter 169 as the basis of the authority to issue refunding bonds, there can be no question of the validity of such bonds issued under the authority of such chapter, and an election held therefor in accordance with the two ballot box law.

We recognize that an election will cost some money. However, we think the condition of the law at this time is such that it is imperative that such election be held even for the purpose of issuing refunding bonds, particularly in view of said chapter 169.

Yours very truly,

W. T. MATHEWS, Deputy Attorney-General.

A-48. Fair Labor Standards Act.

Federal Fair Labor Standards Act, unless controlled by highway construction contract No. 590, not controlling as to maximum hours of labor under highway contracts and other public works, as State law provides for shorter hours of labor on public works than does the Federal Act; and section 18 of the Federal Act makes State law, under such circumstances, applicable.

CARSON CITY, January 19, 1940.

MR. R. N. GIBSON, Labor Commissioner, Carson City, Nevada.

DEAR MR. GIBSON: Reference is hereby made to your letter of January 6 wherein you request an opinion of this office as to whether the Federal Fair Labor Standards Act of 1938 or the State Hours of Labor Act pertaining to public works applies on State Highway Contract No. 590 at Lovelock, Nevada.

It appears from the correspondence accompanying the above letter that certain employees of the construction company performing the contract of highway reconstruction worked overtime on certain days in December of 1939, and that when such overtime work was called in question by the State Resident Engineer, the construction company, among other things, claimed that it had the right to work such employees overtime by reason of the fact that such employees came within the above-mentioned Federal Act, and were governed by the provisions thereof.

It is noted from the copy of the State Highway Contract Number 590, that compliance by the contractor with the standards as to hours of labor prescribed by the Fair Labor Standards Act will be required in the performance of work under this contract, so it would seem that as a contractual proposition, that the contractor and the State agreed that the provisions of the Federal Act relative to hours should become a part of the contract. No doubt, the reason such

provision was written into the contract was the requirement, so we are advised, of the Bureau of Public Roads, upon the assumption that such Act related to all State highway contracts and the work performed by the contractor thereunder.

It is also to be noted that the Federal Acts was intended to operate and affect trades, callings, and transactions in interstate commerce. We think it very doubtful whether the construction or repair of a Federal aid highway pursuant to a contract with a State is a transaction in interstate commerce as meant by such Act.

However, whether employees of the contractor under Contract No. 590 are engaged in interstate commerce need not be determined here, because an examination of the Federal Act in question discloses that in section 18 thereof, Congress provided that no provision of the Act shall excuse noncompliance with any State law which establishes a maximum work week lower than the maximum work week established under the Federal Act. It follows, therefore, that if, under the Nevada law, the maximum number of hours which an employee of a contractor engaged in State highway construction or reconstruction is limited to a certain number of hours per week, and that such number of hours is lower than the maximum number of hours that can be worked by him under the Federal Act, that then the contractor is not excused by reason of the Federal Act from complying with the State law. In other words, section 18 in effect provides an exemption in the Federal Act itself, because common sense would dictate that a contractor in such a position could not reasonably be required to comply with both the State and Federal Acts.

Section 6170 N. C. L., 1929, as amended at 1935 Statutes, page 37, provides a maximum work week for all employees of a contractor performing work under a public works contract with the State of Nevada. Such statute provides that the hours of labor of such employees are "limited and restricted to not more than eight hours in any one calendar day and not more than fifty-six hours in any one week; and it shall be unlawful for any officer or agent of the State of Nevada, or of any county, city, town, township, or other political subdivision thereof, or any contractor, subcontractor, or other person having a contract as herein provided, whose duty it shall be to employ, direct or control the services of such employees, to require or permit such employees to work more than eight hours in any one calendar day or more than fifty-six hours in any one week except in cases of emergency where life or property is in imminent danger."

Section 7a of the said Fair Labor Standards Act provides that:

No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year

from such date.

unless such employee receives compensation for his employment in excess of the hours above at a rate not less than one and one-half times the regular rate at which he is employed.

Thus it appears that in the Federal Act itself, there is no limitation on the maximum number of hours that an employee under such Act can be and will be permitted to work so long as the hours worked over and above 42 hours in any particular week are paid for at the rate of time and one-half. Such interpretation of said section 7a has been had by the Federal Administrator of the Act. Interpretive Bulletin No. 4--Maximum Hours and Overtime Compensation of United States Department of Labor of November 1938.

In discussing and interpreting said section 71, it is there stated as follows:

It is clear that there is no absolute limitation upon the number of hours that any employee may work, but there is a requirement of time and one-half for overtime, and hours worked in excess of 44 hours a week are to be considered overtime work.

We stated just above that the overtime should be paid after 42 hours, due to the fact that after October 24, 1939, according to the interpretive bulletins of the United States Labor Department, the work week on straight time dropped to 42 hours.

It is clear that Congress intended that in those States having a maximum hour law providing a maximum work day or work week lower than the maximum fixed in the Federal Act, that the State law should govern in all cases, particularly in those cases where the work performed was performed pursuant to a contract with the State, as is the case here.

We think that it most clearly appears that the Federal Act permits and, in fact, provides for a longer maximum work week than that provided in the Nevada statute covering the hours of labor on public works. Such being the case, it is clear that section 18 of the Federal Act applies in the instant matter, and that the hours of labor of the employees of the contractor are governed by the State law.

Respectfully submitted,

W. T. MATHEWS, Deputy Attorney-General.

A-49. Gambling Law.

Cigarette slot machines are not required to have license and pay license fee.

CARSON CITY, January 20, 1940.

HONORABLE JOHN W. BONNER, District Attorney, Ely, Nevada.

DEAR MR. BONNER: Reference is hereby made to your letter of January 18 requesting advice as to whether a cigarette slot machine, which pays in cigarettes, comes within the provisions of the 1931 Gambling Act, and, therefore, required to be licensed.

In our opinion, the machine described in your letter falls within section 10 of such Act. It will be noted that this section provides that nothing in the Act shall be construed to prohibit nickel-in-the-slot machines operated solely for cigars or drinks. The slot machine mentioned in your letter is in the same category as the so-called nickel-in-the-slot machine with which you are no doubt familiar. These nickel-in-the-slot machines, as you no doubt know, operate practically upon the same principal as the cigarette machine detailed in your letter.

It is our opinion that the cigarette machine is exempt from the provisions of the Gambling Act, and also the licensing provisions thereof.

Yours very truly,

W. T. MATHEWS, Deputy Attorney-General.

A-50. Public Health Nurse.

Boards of County Commissioners are boards of limited authority and have only such jurisdiction (authority) as is conferred upon them expressly or by necessary implication to carry out the powers expressly conferred. Such boards are precluded by law from matching out of the General Fund of the county, funds furnished from some other source unless expressly authorized by law to do so. They may, however, at their option, match, out of funds budgeted for that purpose, money furnished for that purpose through "Federal or other aid" made available for such "public benefit" within the county pursuant to chapter 148, 1939 Statutes of Nevada.

CARSON CITY, January 23, 1940.

EDWARD E. HAMER, M.D., State Health Officer, Carson City, Nevada.

DEAR DR. HAMER: Reference is hereby made to your letter of January 22 inquiring whether a county can legally appropriate a sum of money from the county treasury for the use of employing a public health nurse, providing that an equal amount would also be deposited from other sources for the same purpose.

We have examined the law of this State relative to the appropriating of money by Boards of County Commissioners from the General Fund of the county. It is our opinion that the County Commissioners are precluded from legally appropriating money from the General Fund of the county in any event, unless the purpose for which such appropriation is made has been specifically provided for by statute. We fail to find any statute specifically providing for

appropriations by Boards of County Commissioners from the General Fund of a county for the purposes mentioned in your letter.

Boards of County Commissioners have only such powers as are specifically given them by statute or such implied powers as are necessary to carry into effect the express powers granted in the law.

We suggest, however, that it might be that Boards of County Commissioners could appropriate money under chapter 148, 1939 Statutes, for the purposes mentioned in your letter. However, such statute is not mandatory and would necessarily be in the discretion of each Board of County Commissioners whether they would be inclined to follow the provisions of such law.

Yours very truly,

W.T. MATHEWS, Deputy Attorney-General.

A-51. School Law.

School law and authority of County Board of Education to lend to student bodies of high schools money to pay transportation of athletic teams for athletic contests. No such authority given by the law, although such boards may legally pay for such transportation, if included in their budgets, out of money so budgeted.

CARSON CITY, February 1, 1940.

HONORABLE HOWARD E. BROWNE, District Attorney, Austin, Nevada.

DEAR MR. BROWNE: We have your letter of January 26, together with copy of your opinion addressed to Mr. L. R. McIntire, County Treasurer, concerning the matter of payment of claims for transportation of the basketball team of your local high school, and also as to whether the County Board of Education has the authority to make loans to student bodies of the various high schools of the county, which said loans were to be paid back when money is available.

On the same day that we received your letter, we also received a letter from County Treasurer McIntire concerning the same matter and enclosing a copy of his request to you for an opinion. We also received advice from Mr. McIntire that he desired a reply to his letter by January 31, if possible, for the reason that he had to close his books for the month on that date. We wired Mr. McIntire on January 31, and we are enclosing herewith copy of our wire to him.

We have examined your opinion in the matter, and, while we agree with your opinion as to the general powers of County Boards of Education, still we do not feel that the statutes cited by you comprise all the law in the matter. Since the enactment of the budget law, County Boards of Education and Boards of School Trustees have been bound by the provisions of such law, and statutes relating to the general powers of such boards must be construed in pari materia with the

budget law. Such is the effect of Carson City v. County Commissioners, 47 Nev. 415. Section 10 of the budget law, section 3019 Nevada Compiled Laws 1929, expressly provides that it shall be unlawful for any governing board or any member thereof of any school district, county high school or high school district to authorize, allow, or contract for any expenditures unless the money for the payment thereof has been especially set aside by the budget. We think it follows from such section of the law that County Boards of Education and Boards of School Trustees, assuming that such Boards have the power to authorize the transportation of basketball teams for the purpose of engaging in athletic contests, must set aside in their annual budgets a sum of money to be used for this purpose, and if such sum or amount is not set aside in the budget, then, under the above statute, it would be unlawful for such boards to contract for the transportation of such purposes.

We assume that County Boards of Education may authorize the transportation of basketball teams by reason of the requirement for physical training in the public high schools of this State, contained in section 5919 Nevada Compiled Laws 1929. Thus the basis of our advice to County Treasurer McIntire to pay the claim for transporting the basketball team provided a fund for physical education had been incorporated in the budget and there was money in such fund.

We concur in your opinion with respect to the loaning of money by the County Board of Education to the student body. There is no basis for such a loan contained in the law of this State, and we question very much the power of a County Board of Education to at a later date require the reimbursement of a student body for the transportation expenses incurred by reason of such loan or attempted loan being made some time past.

Trusting this letter will answer your inquiries, and with kind personal regards, I am,

Sincerely yours,

W. T. MATHEWS, Deputy Attorney-General.

Attention:

MR. L. R. McINTIRE, County Treasurer, Austin, Nevada.

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

A-52. Secretary of State, Authority of as To Filing Articles of Incorporation.

Office of Secretary of State is merely a filing office, and Secretary of State is not authorized to refuse to file articles of incorporation unless they clearly violate some provision of law. Similarity of names of corporations, though not exactly the same, may be sufficient ground for an injunction to prevent filing in suit by corporation which first had the similar name, and that is the remedy to the corporation, not Secretary of State, to prevent the filing of such articles.

CARSON CITY, February 15, 1940.

HONORABLE MALCOLM McEACHIN, Secretary of State, Carson City, Nevada.

DEAR MR. McEACHIN: I have your letter of February 15, wherein you advise that articles of incorporation of the Peoples Furniture Exchange, Inc., have been offered for filing in your office. It appears from your letter that another corporation, under the corporate name of Peoples Furniture Company, Inc., is already in existence under the laws of this State, with its articles on file in your office. You inquire whether the similarity of the two names is such as to prevent your filing of the articles of incorporation of the Peoples Furniture Exchange, Inc.

Your question really deals with the question of fact upon which this office cannot reasonably be expected to express an opinion. However, an examination of several cases discloses that there is not such a sufficient similarity in the names as would warrant your office in refusing to file the articles of incorporation. Also an early opinion of this office, written in 1914, concerning a similar situation under the 1903 corporation law, was to the effect that the Secretary of State was not warranted in refusing to file articles of incorporation of a corporation under the corporate name of Indian National Mining Company, Limited, while, at the same time, there was already on file in the Secretary of State's office articles of incorporation of another corporation named Indian National Mining Company. Opinion No. 110. Opinions of the Attorney-General 1913-1914.

Under the corporation laws of this State, we are inclined to the view that the Secretary of State is vested with ministerial powers only, and we question whether, in any case unless it would be a case where the same identical corporate name was used, that the Secretary of State has the power to refuse to file the articles of incorporation. The corporation laws do not contain an express prohibition directed to the Secretary of State in matters of this kind. On the other hand, section 4B of the 1925 corporation laws, as amended in 1931, provides that the use by any corporation of a name in violation of section 4, paragraph 1, may be enjoined, notwithstanding the fact that the certificate of articles of incorporation of such corporation may have been filed by the Secretary of State. This provision in the law, it seems to us, casts the burden upon the corporation seeking to file its articles of protecting its right to the use of the corporate name chosen against any suit to enjoin the use thereof brought by another corporation. In the instant matter, the Peoples Furniture Company, Inc., would undoubtedly have the right to enjoin the Peoples Furniture Exchange, Inc., in the event that the first-named corporation felt that its rights were being infringed upon. In view of the condition of the Nevada corporation law, we think that, with respect to this particular matter, you are not wholly warranted in refusing to file the articles of incorporation.

Yours very truly,

W. T. MATHEWS, Deputy Attorney-General.

School law as to time of candidates for school trustees to file; last day for filing.

CARSON CITY, February 16, 1940.

HONORABLE C. B. TAPSCOTT, District Attorney, Elko, Nevada.

DEAR MR. TAPSCOTT: Reference is hereby made to your letter of February 14 relative to the last day upon which candidates for school trustees can file for the office of trustee. You refer to our Opinion No. 130, dated April 5, 1934, and desire to know whether such opinion has been changed or rescinded.

The amendment to section 5691 Nevada Compiled Laws 1929, found at 1935 Statutes 379, did not amend such section of law in any respect save as to change of date upon which the school elections were to be held. Such change was from the first Saturday in April to the first Saturday in March. This amendment had and has no effect upon our opinion, inasmuch as section 5707 Nevada Compiled Laws 1929 has not been amended, and the same time limitation applies to the amended section 5691 as applied to it prior to the amendment. In brief, our Opinion No. 130 will stand and should be applied to your coming election, and you will note from such opinion that the candidate for the office of school trustee may legally file his name as candidate for such office on Monday, February 26.

Very truly yours,

W. T. MATHEWS, Deputy Attorney-General.

Attention:

HON. MILDRED BRAY, Superintendent of Public Instruction, Carson City, Nevada.

NOTE--This situation resulting in no "closed season" in certain portions of the State should certainly be remedied by the 1941 Legislature of this State, especially if we are to have "closed seasons" in other portions of the State.

A-54. Fish and Game Law--Closed Season in Certain Instances.

Statute of 1939, page 172, amending section 29 of the fish and game law, makes first day of open season on part of Lahontan Lake begin on May 1, and leaves that portion of said lake situated in District No. 11 without any closed season, while no closed season exists in the law for Districts Nos. 7 to 17, inclusive, under said 1939 amendment or otherwise, excepting as to Topaz Lake and Walker Lake, and excepting as to Lake Mead and the Colorado River below Boulder Dam, which is provided for in chapter 175, 1939 Statutes of Nevada.

CARSON CITY, February 21, 1940.

State Fish and Game Commission, Box 678, Reno, Nevada.

Attention: L. M. Johnson.

DEAR MADAM: Reference is hereby made to your letter of February 19 requesting our opinion upon two questions propounded in the letter with respect to section 29 of the State fish and game law as amended at 1939 Statutes, page 172.

Your first question being as follows: "Does the omission of Lahontan Lake from the amended law indicate that said lake no longer opens on March 1 as provided in the 1937 Statute?"

It is noted that you state that Lahontan lake in Districts Nos. 2 and 11 was omitted from the text of the law but remains in the title. This statement is somewhat confusing to us because a reference to the title of the 1939 statute shows that the true title of the State Fish and Game Act was used and no reference is contained in the title to Lake Lahontan or Districts Nos. 2 and 11. The title to the 1939 Act and, in fact, the Act itself, was adopted in strict accordance with the constitutional provision governing the amending of statutes, and we find no error in this respect. The Legislature by dropping the Lahontan Lake from the text of the 1939 statute certainly placed such lake beyond the operation of the 1939 statute and, as we view it, having other provisions of the fish and game law in mind, placed that part of Lahontan Lake lying in District No. 2 under the operation of section 28 of the law, which would make the first day of May the opening date, whereas that part of Lahontan Lake lying in District No. 11 is probably left without any closed season whatsoever.

Your second inquiry with respect to whether there is a closed season in Districts Nos. 7 to 17, inclusive. An examination of the fish and game law, together with the 1939 amendment thereof, as found at page 172 of the 1939 statute, discloses a remarkable situation. We think it clear beyond any doubt that the Legislature, by the enactment of the 1939 amendment, has provided for no closed season in Districts Nos. 7 to 17, inclusive, excepting, of course, Topaz Lake and Walker Lake, and also Lake Mead and the Colorado River below the Boulder Dam which is taken care of by chapter 175, Statutes of 1939. The Legislature by striking the following words contained in the 1937 amendment to said section 29 of the fish and game law reading as follows:

It shall be unlawful for any person to fish in any waters of districts Nos. 7 to 17, inclusive, except as otherwise provided in this section, between the dates of October 1 of each year and the first day of April of the following year.

from the law and failing to incorporate in the 1939 amendment any similar language concerning such closed season has undoubtedly stricken from the law any provision for closed season for fishing in such districts except as above noted. We fail to find in the fish and game law any other provision fixing a closed season for the districts in question, except as specifically noted above with respect to Walker Lake, Topaz Lake, and Lake Mead and the Colorado River.

Yours very truly,

W. T. MATHEWS, Deputy Attorney-General.

A-55. Recall Election Petitions.

County Clerk's authority to examine as to legal qualification of electors purporting to sign same is limited to matters determined in Attorney-General Diskin's Opinion No. 379, dated July 14, 1930, and, as there determined, to the question of ascertaining whether each petition is supported by statutory affidavit showing signers legally qualified electors and to ascertain that petitions contained required number of purported qualified electors, County Clerks being mere ministerial officers, as distinguished from judicial officers.

CARSON CITY, February 26, 1940.

HONORABLE JULIAN THRUSTON, District Attorney, Pioche, Nevada.

DEAR JULIAN: Reference is hereby made to your letter of February 19 requesting advice upon the proposition of the County Clerk examining into the validity of a recall petition prior to filing such petition. It is noted that you cite *Postlethwait v. Clark*, 22 P. (2d) 900 and also *Landrum v. Ramer*, 172 Pac. 3, upon the proposition that a County Clerk has the jurisdiction to examine into the validity of a recall petition for the purpose of determining whether such petition should be filed. In brief, such cases apparently are authority for the proposition that a County Clerk may exercise at least quasi-judicial power. Such cases may be good law and, no doubt, are authority upon such proposition in Oregon and in Colorado. However, we are not so sure that such cases are determinative of the question in Nevada. An examination of the law upon this question as determined by an analogous case by our Supreme Court leads us to the belief that if a recall petition is filed with a County Clerk, that as far as such Clerk may go is to ascertain if the required number of names are contained on the petition and that the petition bears the proper verification by one qualified elector as required by the statute, or if separate petitions supporting the same proposition for recall are filed, then, of course, each petition must contain the proper verification. I refer to the case of *State v. Glass*, [44 Nev. 235](#). While this case did not deal with a recall petition, it did deal with a nominating petition which must be filed in substantially the same form as recall petition, and it will be noted from that case that the Supreme Court really decided that the Clerk, being a mere ministerial officer, could go no further in an examination of the petition than to ascertain if the required percentage of names appeared on the petition, and that it was properly verified. In *State v. Scott*, [52 Nev. 216](#), the court said:

Neither the recall amendment nor the statute enacted pursuant thereto make any provision for such a contingency. They provide only for a petition with certain requirements. The clerk is given no authority to consider or determine matters outside of the petition. His discretion is limited to ascertaining if the petition on its face is such as the law requires.

Admittedly in this case petitions containing the legal requirements and signed by sufficient number of the qualified electors of the city were filed with the clerk. As nothing further has been prescribed by the constitution or statute as a condition precedent to the calling of an election by the clerk, his power and duty to act in conformity with the mandate of the law attached when the petitions were filed.

Your precise question was submitted to Attorney-General Diskin and was answered by him in his Opinion No. 379, dated July 14, 1930. In that opinion, the question was "Can this petition as a whole be declared invalid on the basis that some of the signers are nonelectors and, in fact, aliens, even though it carries enough other signatures of bona fide electors to supply the number legally required on such petition?"

Attorney-General Diskin's answer to that inquiry was:

In answer to your second question, the Supreme Court of this State in the case of State v. Glass held that, if the petition had annexed to it the legal number of names, together with the affidavit required by law, the party designated by the statute to receive the petition was but a ministerial officer who had no authority to exercise judicial discretion in determining whether or not the names appearing thereon are aliens or nonelectors.

We are inclined to follow Attorney-General Diskin's opinion in this matter, feeling that it is amply sustained by the Glass case. We therefore beg to advise that if, in the recall matter in your county, the Clerk determines that a sufficient number of names appear on the petition and that the petition is properly verified according to law, that then, as a ministerial officer, it is his duty to file such petition. This, however, does not mean that any interested party may not question the validity of the petition in appropriate proceedings by way of mandamus or certiorari.

With kind personal regards.

Yours very truly,

W. T. MATHEWS, Deputy Attorney-General.

SYLLABUS

293. Community Property--Tax Exemption of Veteran.

The tax exemption provided in section 6418 Nevada Compiled Laws 1929 applies only to the one-half interest of the veteran in the community estate.

INQUIRY

CARSON CITY, March 4, 1940.

Does the \$1,000 veteran's tax exemption apply to community property in the case of a married veteran, or does it only apply to the veteran's interest in such community property?

OPINION

The statute providing veterans' tax exemption reads:

All property of every kind and nature whatsoever, within his state, shall be subject to taxation, except:

The real property owned and used by any post or unit of any national organization of ex-service men or women. The property, not to exceed the amount of one thousand dollars, of any person who has served in the army, navy, marine corps, or revenue marine service of the United States in the time of war and who has received an honorable discharge therefrom; *provided*, that such exemption shall be allowed only to claimants who shall make an affidavit annually before the county assessor to the effect that they are actual bona fide residents of the State of Nevada, that such exemption is claimed in no other county within this state, and that the total value of all property of affiant within this state is less than four thousand dollars. Sec. 6418 N. C. L. 1929.

NOTE--Section 6418 was amended at 1937 Statutes, page 156, in some respects, but not as to the above provision.

All property of the wife owned by her before marriage, and that acquired by her after marriage by gift, bequest, demise, or descent, with the rents, issues, and profits thereof, is her separate property, and all property of the husband acquired in like manner is his separate property. Sec. 3355 N. C. L. 1929.

All other property acquired by either the husband or wife or both after marriage, with certain exceptions not material here, is community property. Sec. 3356 N. C. L. 1929.

Property acquired during marriage is presumed to be community property, and it is immaterial in whose name the property is held, it may be in either the husband's or wife's name. Lake v. Bender, 18 Nev. 361; State v. Langan, 32 Nev. 176; Malstrom v. Peoples Ditch Co., 32 Nev. 246; In re Williams, 40 Nev. 241; Milisich v. Hillhouse, 48 Nev. 166.

The wife has a vested interest in the community property as of the time it is acquired, and under the Nevada community property law such interest is to all intents and purposes a one-half interest. In re Williams, *supra*.

The provision exempting the veteran's property to the extent of \$1,000 in valuation, found in said section 6418, above quoted, certainly relates to the property of such veteran only,

and not to the property or property interest of another. The exemption is premised upon service in the armed forces or in marine revenue service of the United States in time of war, and an annual affidavit to that effect must be made by the veteran claimant in order to perfect the exemption. The exemption so provided in that statute is personal in its nature and does not extend to the family of the claimant. 61 Cor. Jur. 413; Crawford v. Burrell Twp. 53 Penn. 219; Price v. Rice, 10 Watts (Pa.) 352; Ogelsby v. Poage, 40 P. (2d) 90.

And such exemption, being a personal privilege cannot be transferred or assigned to another without the consent of the Legislature in clear and unmistakable terms. 26 R. C. L. 308, sec. 270.

There is no consent to such transfer or assignment in the Nevada law.

Further, those who seek shelter under a tax exemption law must present a clear case, free from doubt, and point to a statute expressly permitting the claimed exemption, as such laws, being in derogation of the general rule, must be strictly construed against the claimant and in favor of the public. 26 R. C. L. 313, sec. 274; 61 Cor. Jur. 392, sec. 396; Erie Ry. Co. v. Pennsylvania, 22 L. Ed. 595; Railway Co. v. Philadelphia, 101 U. S. 528; Camas Stage Co. v. Kozer, 209 Pac. at page 99; Ogelsby v. Poage, 40 P. (2d) 90.

There must be no doubt or ambiguity in the language upon which the claim to the exemption is founded. It has been said that a well-founded doubt is fatal to the claim. Bank of Commerce v. Tennessee, 161 U. S. 134.

No exemption is contained in the tax exemption statute in question here with respect to the wife of a veteran or to her property or property interest. Of this there can be no doubt. The exemption extends to the veteran alone, and to his property and property interest.

The conclusion must be that veteran's exemption applies only to the one-half interest of the veteran in the community property, and does not extend to the interest of the wife therein.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By W. T. MATHEWS, Deputy Attorney-General.
THE NEVADA TAX COMMISSION, Carson City, Nevada.

SYLLABUS

294. Military Law--Courts Martial.

Such courts have the power to impose jail sentences in lieu of fines.

INQUIRY

CARSON CITY, March 7, 1940.

Does a court martial organized pursuant to the National Guard Act of Nevada have the power to impose jail sentences in lieu of, or as alternate to, or in addition to fines assessed for violations of military laws or regulations, and can such sentences be legally carried out?

OPINION

Section 40 of the National Guard Act, i.e., section 7154 Nevada Compiled Laws 1929, provides, inter alia, as follows:

All courts martial, including summary courts * * * shall also have power to sentence to confinement in lieu of fines authorized to be imposed by such courts, but such sentences of confinement shall not exceed one day for each dollar of fine authorized.

Section 44 of the Act, i.e., section 7158 Nevada Compiled Laws 1929, provides that the keepers and wardens of all city and/or county jails shall receive and confine all persons committed to such jails by the process of military courts.

Section 40, supra, clearly provides for a sentence of confinement. Section 44 provides for the incarceration of persons convicted in and by courts martial in the city or county jails. Construing the two sections in pari materia the conclusion must be that a jail sentence within the limits provided in the law may be imposed. However, by the use of the term "in lieu of fines" the Legislature has limited the power of such courts in that both fines and jail sentences cannot be imposed for the same offense.

The power and jurisdiction of courts martial to impose jail sentences having been granted by the Legislature, we know of no reason why such sentences cannot be carried out, provided the court martial was legally created, the accused person legally brought to trial, and fairly tried according to law.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

JAY H. WHITE, Adjutant General of Nevada, Carson City, Nevada.

A-56. State Board of Health.

The State Board of Health is authorized by law to adopt reasonable and nondiscriminatory rules and regulations governing public health, including milk inspection,

which are not inconsistent with the law, and milk inspection regulations are within the police power of the State and Constitution. Repeals by implication not favored and health laws and Nevada Food, Drug and Cosmetic Act should be construed together, and State Health Officer and Commissioner of Food and Drugs should cooperate with each other in the interest of public health.

CARSON CITY, March 9, 1940.

DR. E. E. HAMER, State Health Officer, Carson City, Nevada.

DEAR DR. HAMER: You recently forwarded to this office an inquiry directed to you by Mr. W. W. White, Director, Division of Public Health Engineering, in which he asked whether or not the State Board of Health had the power to prepare rules and regulations for the sanitary control of milk production and distribution for the protection of public health.

The 1939 Legislature amended section 25 of the State Board of Health Act to read, in part, as follows:

The State Board of Health shall have the power by affirmative vote of a majority of its members to adopt, promulgate, amend, and enforce reasonable rules and regulations consistent with law: (a) * * *. (b) * * *. (c) To regulate sanitation and sanitary practices in the interest of the public health; (d) To provide for the sanitary protection of water and food supplies and the control of sewage disposal. (e) * * *. (f) * * *. (g) * * *. Such rules and regulations shall have the force and effect of law and shall supersede all local ordinances and regulations heretofore or hereafter enacted inconsistent therewith.

It is uniformly held that the use of milk and cream as food and their peculiar liability to contamination and adulteration support the strictest regulation in the interest of public health and safety. Statutes which tend to that protection are within the proper exercise of the police power. It has likewise been almost uniformly held that the State may delegate its authority to regulate the sanitation of milk production and distribution to administrative officers and boards. Such legislation will be sustained as long as it is not unreasonable or discriminatory.

In our opinion the Legislature properly exercised its powers in delegating the right to the State Board of Health to enact rules and regulations concerning the sanitary protection of water and food supplies.

In this connection, a most exhaustive and learned dissertation concerning the constitutionality of milk and cream regulations may be found in the following books: 18 A. L. R. 235; 42 A. L. R. 556; 58 A. L. R. 673; 110 A. L. R. 646; 119 A. L. R. 246; 22 Am. Jur. 853, sec. 62.

It may be argued that the legislative enactment giving the State Board of Health power to enact rules to regulate sanitation and to provide for the sanitary protection of water and food supplies is not sufficiently definite to permit the State Board of Health to make rules and

regulations concerning milk and cream production and distribution. In this connection and in answer to such contention, we cite the cases of *Ex parte Shrader*, 33 Cal. 279, and *Johnson v. Simonton*, 43 Cal. 242.

In the *Johnson v. Simonton* case, *supra*, the California statutes of April 25, 1863, conferred authority upon San Francisco supervisors: "To make all regulations which may be necessary or expedient for the preservation of public health." The court held that such a statute was within the constitutional power of the Legislature to enact, and that under it the supervisors had authority to enact ordinances against feeding cows on still slop.

It appears to us that section 25 of the Nevada Act, although not setting forth definite or explicit limitations to the regulation of milk and cream supplies is, nevertheless, far more explicit than the legislative enactment noted in the case above. Section 25 is within the constitutional rights of the Legislature to enact, and, since it is a health measure and within the proper exercise of the police power, the section is a legal delegation of administrative powers to the State Board of Health.

It must also be noted that the 1939 Legislature enacted chapter 177, which Act is commonly known as the Nevada Food, Drug, and Cosmetic Act. Under this Act the Commissioner of Food and Drugs, or his agents, have the power to investigate and to bring actions for the prevention and punishment of those engaged in producing or distributing impure and adulterated milk.

It is likewise to be noted that section 41 of the State Board of Health Act specifically provides that nothing therein shall be construed as modifying or altering the powers conferred by law upon the Commissioner of Food and Drugs with respect to the adulteration, mislabeling or misbranding of foods, drugs, medicine or liquors, or the weighing and testing of dairy products to prevent fraud.

Construing both the Food and Drug and the State Board of Health Acts liberally, and, since they involve matters of public health they must be construed liberally, it appears that the Legislature has given the power to make regulations for the sanitary control of milk production and distribution to two different agencies.

Repeals by implication are not favored, and where two Acts are not so repugnant to each other as to be wholly irreconcilable, the two should be read in *pari materia*. We believe that this is the correct ruling to apply in this case. Section 41 of the State Board of Health Act is an indication of such legislative intention. In matters concerning public health, we cannot have too many agencies enforcing sanitary rules and regulations, as long as such rules and regulations are not inconsistent. Therefore, it is our opinion that the State Board of Health may enact rules and regulations concerning the sanitary conditions of milk production and distribution.

The Nevada statutes (sections 10219-10222 Nevada Compiled Laws 1929) make it a misdemeanor to sell impure or unwholesome milk. The enforcement of the rules and regulations of either agency and the enforcement of the Nevada statutes are ultimately left to the county law

enforcement officers. So that there may be no misunderstanding, duplication, inconsistency or discrimination in the enforcement of health rules and regulations concerning the sanitary control of milk, we suggest that the State Board of Health and the Commissioner of Food and Drugs work together in enacting and enforcing uniform rules and regulations.

Sincerely yours,

ALAN BIBLE, Deputy Attorney-General.

A-57. School Law.

Special tax for elementary school and special tax for high school purposes, when both schools are situated within the same school district and governed by the same board, and even when not so situated and so governed, may both be legally levied, and separately, under our law, if so budgeted.

CARSON CITY, March 12, 1940.

HONORABLE EDW. A. DUCKER, JR., District Attorney, Carson City, Nevada.

DEAR MR. DUCKER: Reference is hereby made to your letter of March 5, 1940, wherein you inquire whether a levy of a special tax of 25 cents for elementary school purposes and a special tax of 25 cents for high school purposes can be levied under the provisions of section 5788 Nevada Compiled Laws 1929. You advise that both schools are in Carson School District No. 1 and governed by the same Board of School Trustees.

We think that the fact that the high school district and the elementary school district are one and the same, and also the fact that both schools are governed by the same Board of Trustees, is immaterial. Each school, that is to say, the elementary school and the high school, even though they may occupy the same territory and the same district, really constitute separate and distinct entities. In brief, one represents an elementary school district and the other a high school district, and both schools, or rather both districts, may be governed by the same Board of Trustees, yet the purposes of such schools are really separate and distinct. One, the elementary school, being for the purpose of the elementary education of the pupils, while the high school is, as its name clearly demonstrates, a school for higher education. The law is well settled that each school may represent a district of and composing a separate entity. 56 Cor. Jur. 258, sec. 95; Fisher v. Beck, 160 Pac. 1012; Bunning v. Womer, 182 Pac. 387.

Your question goes to the point of whether, under section 5788 Nevada Compiled Laws 1929, a separate and distinct special tax may be levied for the high school and the elementary school. After an examination of the section in question and the school laws as a whole, we are of the opinion that section 5788 does not provide for a special tax for high school purposes. Such section, in our opinion, only provides for one special tax, and we think such section relates to elementary and grammar schools.

However, an examination of the school laws discloses that for many years, at least since 1923. Boards of School Trustees were empowered to submit to the Boards of County Commissioners budgets wherein a special district tax for high school was authorized to be incorporated and such a special tax was authorized. Sections 5927 and 5930 Nevada Compiled Laws 1929. So, such a special high school district tax was authorized in the law. The foregoing sections, however, were repealed by the repealing clause in chapter 183, Statutes of 1939. An examination of chapter 183 of the 1939 Statutes discloses that the Legislature has provided a law relating to district high schools and undoubtedly has provided in such statute the ways and means for raising revenue for such district high schools. The context of such Act deals with special district tax, and also with a county-wide tax for the support of district high schools. Before a county-wide tax may be levied under the Act, it is necessary that the Board of School Trustees of a district having a district high school shall have levied or authorized to be levied a special district tax of not less than twenty-five (25 cents) cents. (Section 4, sub-paragraph 3.) And again, we find in section 5 of such chapter the following language: “In counties not having a regularly established county high school, if the special district tax levy of not less than twenty-five (25 cents) cents * * *.” And again, in the same section, we find this language: “Provided further, that not to exceed four (\$4) dollars additional per each such high school student for each cent of the special district tax over and above twenty-five (25 cents) cents may be provided by the County Commissioners in the county levy for any such district high school.”

It is our opinion that the special district tax provided for in said chapter 183 relates to and means a special district tax for high school purposes, and that it is not the special district tax mentioned and provided for in section 5788, supra. The Legislature is presumed to have a knowledge of the state of the law concerning the subject upon which it legislates. Clover Valley Land and Stock Company v. Lamb, 43 Nev. 375. As we have heretofore shown, the Legislature had provided in a prior law for a special district tax for high school purposes, and it is not reasonable to suppose that the Legislature would strike from the law, through the enactment of a new statute, the right to levy a special district tax for high school purposes, knowing that the financial condition of many high schools, as well as elementary schools, was not of the best. And, we think, and it is our opinion, that the Legislature, by use of the foregoing quoted language, intended such special district tax to be levied for high school purposes because of the language used in the title of the act. The title, among other things, contains this language: “providing a county tax and a school district tax *for the support of such schools*.” It is to be noted that the schools provided for in the title and in the Act are district high schools, and unquestionably the term “such schools” relates exclusively to district high schools. Where the language of a statute may be ambiguous and subject to construction, we are permitted to look to the language contained in the title of an Act as an aid to the construction of the statute. 59 Cor. Jur. 1005, sec. 599; Torreyson v. Board of Examiners, 7 Nev. 19.

It is, therefore, our opinion that a special district tax for high school purposes, separate and distinct from a special and distinct tax for elementary school purposes, may be legally levied under and pursuant to chapter 183, Statutes of 1939.

Respectfully submitted,

W. T. MATHEWS, Deputy Attorney-General.

A-58. State Highway Law.

Right to require removal of pole line of public utility, at expense of such utility, constructed without written franchise on highway right-of-way, when such removal is made necessary for widening and realignment of highway. No explicit rule can be given which would be applicable to every case, as the answer would depend upon many circumstances which might be involved, such as consent or acquiescence of State and Highway Department, to the placing of poles for the pole line within the right-of-way without understanding as to right to require them to be removed and as to who should bear expense of removal, if and when removal should become necessary, and also whether pole line was established over privately owned property five years or more prior to obtaining highway right-of-way, the length of time the pole line had been so maintained on the right-of-way, the understanding between the public utility and the owner of the land, and many other facts and circumstances, although State and its Highway Department have right to remove or require removing of such pole lines by court action condemning right-of-way, the right of the utility being subordinate to the right of the public for highway purposes. Adverse possession does not run against the State, although it might have run against the private owners of the property prior to the securing of the highway right-of-way, and that title could not be legally defeated without consent of the utility or a judgment of the court condemning the property on which the pole line is located for the superior right of the public for highway purposes. Ordinarily both the law and the principles of equity and fair dealing apply.

CARSON CITY, March 29, 1940.

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

DEAR SIR: Early in February you submitted to this office certain questions concerning the cost of removing telephone can telegraph poles from State highway rights-of-way. Due to the continued absence of General Mashburn from the office and the resulting amount of increased work, we have been unable to answer your inquiry until now.

The first question propounded by Mr. C. H. Sweetser, District Engineer, Public Roads Administration, is as follows:

What is the law as to rights and responsibilities of a utility whose lines are located, without franchise, on a State highway right-of-way?

No general answer can be given to this question, but each answer must of necessity depend upon the particular facts of the case involved. We assume that this question relates to the removal of actual poles on Nevada Federal Aid Project 73-A(4) on the Verdi-Reno road, and our answer will be limited to the facts stated in that case.

In project 73-A(4), the Postal Telegraph Cable Company originally located its line outside of the then existing county road. This location was made in 1909 and was on private ground. We are advised that the highway which superseded the county road existing in 1909 was widened in 1922 so as to include the telegraph poles within the limits of its right-of-way. At the time of the widening, no agreement, written or otherwise, was entered into between the county or State and the telegraph company regarding the status of the pole line. The telegraph company continued to enjoy the use of this pole line from 1922 to 1939, when widening and realignment made it necessary to remove the telegraph poles.

We assume that there is no question as to the right of the Highway Department to compel the removal of the poles, and we will, therefore, devote our opinion solely to the question of who must bear the expense of removal under the above-stated set of facts.

In our opinion, under the facts cited by you, the telegraph company is entitled to reimbursement from the State Highway Department for the costs incurred in adjusting its line.

Under date of September 17, 1934, this office held that the Pitt Mill & Elevator Company could obtain a prescriptive easement to a right-of-way over private property for its power line by reason of its open, notorious, uninterrupted, adverse, and exclusive enjoyment for a period of more than five years. This office at that time held that the company "has a good and legal title to the said right-of-way by prescriptive easement, which title is just as valid under the laws of this State as would be a title by grant." (Attorney-General's Opinion No. 147, 1934-1936 biennium.)

The same principle applies to the instant case, and the telegraph poles being on private property, the telegraph company acquired a prescriptive easement after a period of five years. It therefore appears to us that in 1914 and thereafter the telegraph company had as good a title to its right-of-way line as if it had obtained such title by deed or grant.

It appears equally clear to us that the Nevada State Highway Department could have condemned the telegraph company's right-of-way and compelled removal in 1922 under the laws of our State. (See sections 9153-9156, Nevada Compiled Laws 1929.) Under such condemnation, the court would have allowed reasonable compensation for the readjustment of the telegraph poles. The mere fact that such removal was not requested until 1939 does not, it seems to us, in any way detract from the application of this principle. The mere permissive use by the highway and the telegraph company of a joint right-of-way from 1922 to 1939 cannot legally divest the telegraph company of its title, or, by the same token, invest the highway with a superior right under which it could escape financial responsibility for the removal of the telegraph poles.

(2) Mr. Sweetser has asked the following question:

In case the utility holds a franchise, what provision is made as to responsibility of the utility when highway reconstruction necessitates changes in the utility lines?

We believe that this second question was completely answered by an opinion addressed

to the State Highway Department under date of January 24, 1935, being Attorney-General's Opinion No. 156, 1934-1936 biennium, wherein this office held that the franchise rights of telephone and power companies are subordinate to the rights of the traveling public in the highway, and such companies are required to bear the expense of removal of their lines located on a county right-of-way which is abandoned, and the reinstallation of such lines on the new right-of-way. It is also there held that such expense should not be borne by the county or State. We are enclosing herewith a copy of this opinion for your further use.

(3) The five-year right of adverse possession does not run against the State. See 1 Am. Jur., sec. 104, page 848; and sec. 106, page 850.

(4) Question 4 is not completely clear to us, and we would therefore appreciate a statement of facts upon which the question is based.

I trust this answers your inquiries.

Sincerely yours,

ALAN BIBLE, Deputy Attorney-General.

A-59. School Law--Investment of Public School Teachers Permanent Fund.

Moneys of said fund may be legally invested only in bonds of the United States, or of any State of the United States, or bonds or securities of any county, city, or school district in any State in the United States, that being the limitation on such authority to invest provided in the law. Since, under the authorities, the word "towns" includes in its meaning "cities" also, sound bonds of towns legally issued may constitute legal investments of the moneys of said fund if and when the Public School Teachers Retirement Salary Fund Board has carefully examined into the financial condition of such towns and found it to be sound.

CARSON CITY, March 29, 1940.

HONORABLE MILDRED BRAY, Superintendent of Public Instruction, Carson City, Nevada.

DEAR MISS BRAY: You recently asked this office whether or not the bonds of the town of Gardnerville, Douglas County, Nevada, are a legal investment for the Public School Teachers Permanent Fund. The town of Gardnerville is an unincorporated town.

Subdivision 4 of section 22 of the Retirement Salary Act of 1937 provides, in part, that retirement funds shall not be invested in any securities except such securities as those in which the funds of savings banks may legally be invested. Section 6 of the 1933 Banking Act provides that the funds of a savings bank 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.

Under the legal maxim that the “inclusion of one is the exclusion of another,” it would appear that the word town cannot be read into the banking statute, and that, inasmuch as the Legislature failed to specifically mention the word town, it intended to exclude it. Strength for this argument is found by examining the same comparative section of the former Banking Act of 1911, which stated that the funds of any savings bank could 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 city, county, township, irrigation district, village, or school district of any State in the United States which shall have been lawfully issued. It is to be noted that the 1933 Banking Act dropped the investment of savings bank funds in townships, irrigation districts, or villages. It should be noted that the word town is not used in either Act.

Certainly the word city as commonly used and understood is not synonymous with the word town, and yet we find in examining the authorities an almost hopeless conflict in the cases as to whether or not the word city includes the word town. Webster’s definition of a city is a large town; an incorporated town. Likewise, it is clear that the word town is generic, and that of this genus cities and boroughs are generally considered species. Under this definition it is generally held that although a city is always a town, a town is not always a city.

We find ample support for this interpretation. For example, the word city has been construed to include a town in the following cases: *People v. Stephens*, 62 Cal. 209; *Herd v. State*, 39 S. E. 118; *Murphy v. Waycross*, 15 S. E. 817; *State v. Glennon*, 3 R. I. 276; *Green v. Hudson*, 104 So. 171.

We have likewise carefully examined the Constitution and statutes of the State of Nevada, and the joint use of the words cities and towns as used in the Constitution and statutes might well indicate that the two are considered synonymous. For example, the Act of 1919, page 48, being sections 1213-1222 N. C. L. 1929, provides without distinguishing for the incorporation and disincorporation of “cities and towns.” Likewise, the Act of 1881, page 68, being sections 1231-1247 N. C. L. 1929, provides without distinguishing for the government of unincorporated towns or cities. Likewise, the Act of 1915, page 294, being sections 1248-1256 N. C. L. 1929, provides without distinguishing for the commission form of government for cities and towns. Also see the Act of 1927, page 112, being section 1257 N. C. L. 1929, which provides without distinguishing for the amendment of charters of incorporated cities or towns. The Planning Commission Act of 1921, page 209, being sections 1267-1273 N. C. L. 1929, provides without distinguishing for the creation of city or planning commissions for incorporated cities and towns. Also to the same effect see the Zoning Act of 1923, page 218, being sections 1274-1280 N. C. L. 1929. The Act of 1911, page 348, being sections 1327-1340 N. C. L. 1929, refers without distinguishing to unincorporated cities and towns.

We have carefully attempted to read all pertinent Nevada statutes in the hope of being able to determine some distinction between the use of the word city and town. Obviously, incorporation is not the test, for the statutes indistinguishably refer to incorporated cities and incorporated towns and to unincorporated cities and unincorporated towns.

In spite of the rule of exclusion cited by us and in spite of the change in the Banking Act, it is our opinion that the word city as used in section 6 of the Banking Act can be held to include the word town. The Public School Teachers Retirement Salary Fund Board is charged with the duty of carefully scrutinizing the soundness of its investments. With this safeguard, we do not believe that there is any clear legislative expression prohibiting your board from investing in the bonds of cities or towns which are lawfully issued.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By ALAN BIBLE, Deputy Attorney-General.

A-60. Insurance Law.

Unimpaired cash capital requirement of the law precedent to right to do business as an underwriter of insurance is not satisfied by deed of trust of insurance company to Insurance Commissioner, and such commissioner has no lawful authority to accept any such deed of trust in lieu of the unimpaired cash capital required by law.

CARSON CITY, April 22, 1940.

HONORABLE HENRY C. SCHMIDT, Insurance Commissioner, Carson City, Nevada.

DEAR MR. SCHMIDT: Reference is hereby made to a certain deed of trust by and between the International Life Underwriters, Inc., and yourself as trustee, and the International Life Insurance Company as beneficiary.

We understand this deed of trust was submitted as an attempted compliance of section 3541 Nevada Compiled Laws 1929, as amended at page 100 of the 1939 Statutes, with respect to the amount of nonimpaired cash capital an insurance company must have before commencing business as an underwriter of insurance. We understand the insurance company mentioned is a Nevada corporation.

We find no authority in the law for the submission or acceptance of a deed of trust in connection with this matter. It is our opinion that no domestic insurance company may be legally authorized to transact an insurance business until it has complied literally with the above-cited section of the law.

Very truly yours,

W. T. MATHEWS, Deputy Attorney-General.

A-61. State Board of Health--Merit System for Personnel.

State Board of Health Act, chapter 184, 1939 Statutes of Nevada, does not authorize that board to adopt rules and regulations putting into effect the merit principle applying to the personnel administration of the Department of Health. Neither does any other Nevada law authorize the same. Board authorized to subpoena witnesses and, by implication, to administer oaths to them in hearings before the board.

CARSON CITY, April 26, 1940.

DR. E. E. HAMER, State Health Officer, Carson City, Nevada.

DEAR DR. HAMER: This will acknowledge receipt of your letter of April 17, 1940, in which you ask us what section of the State Board of Health Act, chapter 184, 1939 Statutes, grants the board the authority to enact rules and regulations for the application of the merit principle of personnel administration in the State Department of Health.

We have carefully examined the 1939 statutes quoted by you and we find no authority whatever empowering your Board of Health to enact such rules and regulations. It is, therefore, our opinion that in the absence of such express statutory authority, your board is without the power to enact rules and regulations for the application of the merit principle.

In this same letter, you have also asked us whether or not the State Board of Health has the power to subpoena witnesses and administer oaths. Section 6 of chapter 184 of the 1939 Statutes provides as follows: "The board may hold hearings and summon witnesses to testify before it." Clearly your board may subpoena witnesses. Although there is no express authority as to the administering of oaths, it appears to us that it is the plain intent of the Legislature, as expressed in the word "testify," to require witnesses before the board to be under oath, and, in this connection, it is our suggestion that the chairman of the board may administer oaths.

Sincerely yours,

ALAN BIBLE, Deputy Attorney-General.

A-62. Taylor Grazing Act as Relating to Chapter 67, 1939 Statutes of Nevada.

State Grazing Board as set up by Nevada law is separate and distinct from Advisory Board, and the duties of the two boards are different. A member of a State Grazing Board may legally act as secretary thereof and receive compensation for his services as such secretary.

CARSON CITY, May 6, 1940.

HONORABLE MERWIN H. BROWN, District Attorney, Winnemucca, Nevada.

DEAR MR. BROWN: This will acknowledge receipt of your letter of May 1, 1940, sending us further information concerning the Advisory and State Grazing Boards as set up under the Taylor Grazing Act and under the provisions of chapter 67 of the 1939 Statutes of Nevada.

It is our understanding that the State Grazing Board and the Advisory Boards are separate entities and act in different capacities, even though each board is composed of the same members.

Under this statement of facts, you have asked whether or not a member of the State Grazing Board can be a secretary of such board and legally receive compensation for his services as such secretary under the provisions of the Nevada law.

Section 3 of chapter 67, 1939 Statutes, provides in part as follows:

The members of such boards (State Grazing Boards) shall serve without remuneration for their time and services, but shall be entitled to their actual necessary travel and subsistence expenses while performing their duties as prescribed in this Act. * * *

Each state grazing board is hereby authorized to select and determine the remuneration of its own secretary, and such remuneration shall be considered as administrative expenses of each board concerned, to be paid as provided for herein.

It appears to us that these two subdivisions of section 3 can and should be read in pari materia, and that there is nothing repugnant in the first subdivision which would make it impossible for a member of the State Grazing Board to serve as a secretary of such board with compensation. It further appears to us that the first subdivision of section 3, providing that members of the board shall serve without remuneration, applies to a remuneration for their time and services as members of the Grazing Board and does not apply to extraordinary duties which they might perform if they were selected as a secretary by their constituent members. It is, therefore, our opinion that a member of the State Grazing Board may serve as secretary of such State Grazing Board and be entitled and legally receive compensation for such services.

Sincerely yours,

ALAN BIBLE, Deputy Attorney-General.

A-63. State Pharmacy Board.

Authority to adopt reasonable and nondiscriminatory rules and regulations not in conflict with law and prescribe requirements of eligibility of applicants to take examinations for licenses as pharmacists. Such authority of Board is limited to conformity with the law.

CARSON CITY, May 23, 1940.

MR. R. W. FLEMING, 160 North Virginia Street, Reno, Nevada.

DEAR MR. FLEMING: This will acknowledge receipt of your letter of May 22, 1940, asking our opinion concerning the eligibility of applicants to take your State pharmacy examinations. You ask whether or not the board can properly require the applicants (1) to be United States citizens; (2) to be 21 years of age; and (3) to have five years practical drug store experience. Section 3 of the pharmacy law of 1913 partly governs the qualifications of applicants. This section reads as follows:

Licentiates in pharmacy must be such persons as possess the fundamentals of a high school education and who have had at least five (5) consecutive years' actual experience in drug stores where the prescriptions of medical practitioners have been compounded, and who have passed a satisfactory examination before the State Board of Pharmacy * * *.

It appears clear to us that this section requires the applicant to have had at least five consecutive years practical drug store experience in stores where the prescriptions of medical practitioners have been compounded. It appears to us that this is a condition precedent which must be satisfied before the applicant is eligible to take your examination.

We have carefully examined the entire law and we find no statutory authority requiring applicant to be either a citizen or 21 years of age. However, under section 7, subdivision (d), the board is empowered "to examine and register as pharmacists and assistant pharmacists all applicants whom it shall deem qualified to be such." Likewise, see section 7, subdivision (a), empowering the board to make rules and regulations. Under the general law, it is clear that the Legislature may delegate to an administrative board the power to make rules and regulations within certain definite prescribed statutory limits. In our opinion the Legislature has, in subdivision (d) of section 7, given your board the power to enact further qualifications of its applicants, the only restriction being that such rules and regulations must be reasonable, apply without discrimination, and not violate any of the constitutional guarantees.

Under this section it is our opinion that your board may require the applicant to be 21 years of age, and that it may likewise require an applicant to be an American citizen. By the same token, it appears to us that your board may allow an applicant to take the examination if the applicant has indicated his bona fide intention of becoming an American citizen. This latter provision is very analogous to the situation arising in the location of mining claims, as the Federal law governing this location specifically states that the United States lands are open to exploration by citizens of the United States and by those who have declared their intention to become such. Therefore, if you have among your applicants one who has taken out his first papers, and is in good faith doing everything in his power to attain his American citizenship, your board could, under the powers granted it by section 7, subdivision (d), allow such applicants to take the examination. However, this is a matter for the decision of your board.

I trust this answers each of your questions.

Sincerely yours,

ALAN BIBLE, Deputy Attorney-General.

A-64. Election Law--Polling Places Within Election Precinct.

Boards of County Commissioners are authorized to establish election precincts and define their boundaries, and to consolidate, alter, and abolish same as public convenience requires, provided the number of voters voting in any one place shall not exceed 400, but such boards are not authorized to divide the voting places so that those whose surnames begin with certain letters of alphabet shall vote in one place within the precinct and those whose surnames begin with other letters of the alphabet shall vote in another place therein.

CARSON CITY, June 10, 1940.

HONORABLE JOHN W. BONNER, District Attorney, Ely, Nevada.

DEAR MR. BONNER: Reference is hereby made to your letter of June 6 requesting an opinion upon the validity of the establishment of election precincts in the city of Ely, the town of McGill, and the town of Ruth, Nevada. In brief, you inquire whether an election precinct, as presently constituted, contains more than 400 voters, can be in affect divided by establishing another polling place in the same precinct and requiring registered voters whose names begin with the letter "A" and ending with the letter "M" to vote at one polling place while those whose names beginning with the letter "N" and ending with the letter "Z" vote in the other polling place. Your inquiry is whether the establishing of election precincts in such a manner is legal.

With respect to the city of Ely, you refer us to sections 1106 and 1113 Nevada Compiled Laws 1929, which sections provide for the classification of cities and the creation of wards within such cities so classified. We think that such sections have no bearing on the establishing of election precincts. Such sections deal with the number of wards and the creation of wards within incorporated cities and for the purpose of city government. On the other hand, the general election law, and particularly section 2439 Nevada Compiled Laws 1929, deal with the general election law of the State as applicable not only to the State and counties at large, but also to incorporated cities, and, we think, provides the method and the only method by which election precincts can be legally established. Such section provides that it shall be the duty of the Boards of County Commissioners to establish election precincts *and define the boundaries thereof*, and to alter, consolidate, and abolish the same as public convenience or necessity may require. It is also provided in the same section that the Board of County Commissioners shall so arrange and divide the voting places in the respective counties so that no greater number than 400 voters *shall vote in one precinct*. The intent of the Legislature is, it seems to us, most clear, and that is that the Boards of County Commissioners being vested with the power so to do shall establish voting precincts by defining the boundaries thereof, and also that when the boundaries are so defined that not more than 400 voters shall vote within such defined boundaries. It is, therefore, our opinion that the only legal way in which voting precincts may be established under the law is as set forth in section 2439 Nevada Compiled Laws 1929.

You inquire further whether any nominee at an election held in the precincts established as stated in your letter could question the vote case in such precinct and set the same up as invalidating an election. It has been the established practice of this office to not pass upon questions unless and until an actual happening has occurred upon which the question concerning the validity thereof can be premised. In brief, this office has established a practice of not rendering opinions upon questions which are moot or which may be moot. However, if the question should arise, it seems to us that the nominee or candidate raising the question would first have to show that he was specially injured by reason of the precinct being established contrary to law. This, it seems to us, would be almost impossible to show. However, as stated above, we think that an election precinct in order to be a legally created and established precinct must be established according to the law provided therefor.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

A-64. Election Law--Polling Places Within Election Precinct.

Boards of County Commissioners are authorized to establish election precincts and define their boundaries, and to consolidate, alter, and abolish same as public convenience requires, provided the number of voters voting in any one place shall not exceed 400, but such boards are not authorized to divide the voting places so that those whose surnames begin with certain letters of alphabet shall vote in one place within the precinct and those whose surnames begin with other letters of the alphabet shall vote in another place therein.

CARSON CITY, June 10, 1940.

HONORABLE JOHN W. BONNER, District Attorney, Ely, Nevada.

DEAR MR. BONNER: Reference is hereby made to your letter of June 6 requesting an opinion upon the validity of the establishment of election precincts in the city of Ely, the town of McGill, and the town of Ruth, Nevada. In brief, you inquire whether an election precinct, as presently constituted, contains more than 400 voters, can be in effect divided by establishing another polling place in the same precinct and requiring registered voters whose names begin with the letter "A" and ending with the letter "M" to vote at one polling place while those whose names beginning with the letter "N" and ending with the letter "Z" vote in the other polling place. Your inquiry is whether the establishing of election precincts in such a manner is legal.

With respect to the city of Ely, you refer us to sections 1106 and 1113 Nevada Compiled Laws 1929, which sections provide for the classification of cities and the creation of wards within such cities so classified. We think that such sections have no bearing on the establishing

of election precincts. Such sections deal with the number of wards and the creation of wards within incorporated cities and for the purpose of city government. On the other hand, the general election law, and particularly section 2439 Nevada Compiled Laws 1929, deal with the general election law of the State as applicable not only to the State and counties at large, but also to incorporated cities, and, we think, provides the method and the only method by which election precincts can be legally established. Such section provides that it shall be the duty of the Boards of County Commissioners to establish election precincts *and define the boundaries thereof*, and to alter, consolidate, and abolish the same as public convenience or necessity may require. It is also provided in the same section that the Board of County Commissioners shall so arrange and divide the voting places in the respective counties so that no greater number than 400 voters *shall vote in one precinct*. The intent of the Legislature is, it seems to us, most clear, and that is that the Boards of County Commissioners being vested with the power so to do shall establish voting precincts by defining the boundaries thereof, and also that when the boundaries are so defined that not more than 400 voters shall vote within such defined boundaries. It is, therefore, our opinion that the only legal way in which voting precincts may be established under the law is as set forth in section 2439 Nevada Compiled Laws 1929.

You inquire further whether any nominee at an election held in the precincts established as stated in your letter could question the vote cast in such precinct and set the same up as invalidating an election. It has been the established practice of this office to not pass upon questions unless and until an actual happening has occurred upon which the question concerning the validity thereof can be premised. In brief, this office has established a practice of not rendering opinions upon questions which are moot or which may be moot. However, if the question should arise, it seems to us that the nominee or candidate raising the question would first have to show that he was specially injured by reason of the precinct being established contrary to law. This, it seems to us, would be almost impossible to show. However, as stated above, we think that an election precinct in order to be a legally created and established precinct must be established according to the law provided therefor.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

STATE OF NEVADA
DEPARTMENT OF HIGHWAYS

CARSON CITY, NEVADA, May 29, 1940.

HONORABLE GRAY MASHBURN, Attorney-General, Carson City, Nevada.

DEAR GENERAL MASHBURN: On May 28 we received bids for construction of three different sections of highway. Among the bids submitted was one for each job from the Silver

State Construction Company, Incorporated, by A. D. Drumm, Jr., President.

It was noted after the bids were opened, which was the first knowledge that we had as to who the bidder was, that the above name was given. Our records indicate that the Silver State Construction Company is the firm name qualified to bid on highway jobs.

We submit to you herewith a statement of facts relative to the prequalification of the Silver State Construction Company and an affidavit from Mr. A. D. Drumm, Jr., who is the owner of the Silver State Construction Company as well as the President of the Silver State Construction Company, Incorporated. We also submit a certified copy of section 3, "Award and Execution of Contract," paragraph 3.1, "Consideration of Proposals," taken from the Standard Specifications adopted by this Department in 1937. You have a copy of this document in your office for reference in case you need it.

Since the Silver State Construction Company is the low bidder on each job by a total amount of \$5,607.08, the question has been raised: Are we within our rights to (1) waive as a technical error the fact that Mr. Drumm inadvertently used on his bids a rubber stamp belonging to the Silver State Construction Company, Incorporated, instead of one owned by the Silver State Construction Company, and to (2) award the contracts to the Silver State Construction Company, a qualified bidder of record in this office, after first securing prior concurrence from the Public Roads Administration? By so doing, the State will take advantage of a saving of \$5,607.08.

Sincerely yours,

ROBERT A. ALLEN,
State Highway Engineer.

STATEMENT OF FACTS RELATIVE TO THE PREQUALIFICATION OF THE SILVER
STATE CONSTRUCTION COMPANY, A. D. DRUMM, JR., SOLE OWNER.

October 25, 1938. Statement of financial condition filed by Silver State Construction Company, Inc.

November 2, 1938. Prequalification Board of the Department of Highways qualified the corporation known as "Silver State Construction Company, Incorporated," to bid on highway projects until November 2, 1939.

October 24, 1939. Said qualification extended to and included January 16, 1940, pursuant to request contained in letter from A. D. Drumm, Jr., President of the Silver State Construction Company, Incorporated, dated October 20, 1939, and giving as the basis for the request the fact that the fiscal year of the corporation ends on December 31, and it would be more convenient to file a financial statement after the books are closed each year.

January 9, 1940. Notice sent by the Prequalification Board to the Silver State Construction Company, Incorporated, that its qualification would expire on January 16, 1940. The letter concluded with the usual statement that a new statement of financial condition must be

made if the corporation wished to be prequalified.

February 8, 1940. Letter from J. C. Tranter, C. P. A., asking on behalf of his client, the Silver State Construction Company, Incorporated, whether any change in the status of relationship with the Highway Department would result from the reorganization of Mr. Drumm's method of doing business, to wit: the selling of the corporate assets of the Silver State Construction Company, Incorporated, to A. D. Drumm, Jr., as an individual and carrying on business as an individual, rather than a corporation. It was explained that lower income tax payments would be due from an individual than from a corporation.

February 10, 1940. Mr. Tranter's letter was answered by this Department to the effect that no difference in status would result from such a reorganization, but it would be necessary for A. D. Drumm, Jr., to prequalify as an individual, and his application as such individual would have to be presented and acted upon by the Prequalification Board before he could bid on highway projects. On the same date a similar letter was sent to the Silver State Construction Company, Incorporated, and therein contained was an extension of qualification permitting bidding on the Carlin job which was to come up in February.

March 5, 1940. Official notice was sent by the Prequalification Board to the Silver State Construction Company, Incorporated, that its qualification had expired, and a new statement must be filed if it wished to be requalified.

March 6, 1940. The statement mentioned in our letter of March 5 was forwarded by F. H. Wildes, but was submitted by the Silver State Construction Company. The statement contained a certificate setting forth that, pursuant to section 4450, et seq., Nevada Compiled Laws 1929, A. D. Drumm, Jr., was doing business under the fictitious name of Silver State Construction Company. A. D. Drumm, Jr., was designated as the "Owner-Manager" and F. H. Wildes as the "Office Manager" of the so-called Silver State Construction Company. In the prior statement dated October 25, 1938, A. D. Drumm, Jr., was designated as "President," and F. H. Wildes as "Secretary-Treasurer" of the Silver State Construction Company, Incorporated. The statement filed November 6 was signed "A. D. Drumm, Jr.," and no title was appended to his name. As an individual, A. D. Drumm, Jr., made the affidavit as to the truth of said statement. In said prior statement the corporate form of acknowledgment had been used.

March 8, 1940. Notice was given by the Prequalification Board to the Silver State Construction Company that the Prequalification Board had acted upon the matter and held the company as an individual, not a corporation, qualified to bid on highway construction projects for the period of one year, ending March 8, 1941.

New letterheads have been printed and are used by the Silver State Construction Company. They differ only from the letterheads formerly used in correspondence from A. D. Drumm, Jr., and F. H. Wildes, in that the letters "Inc." are now omitted.

On May 28, 1940, proposals to bid on the highway construction projects designated as F. L. H. 12-C(2), F. A. S. 150-A(2) and F. A. S. 134-E(2) were submitted by A. D. Drumm, Jr. By

a rubber stamp, the name of the bidder was inserted in the proposal form as "Silver State Construction Company, Inc." A rubber stamp was also used to insert the words "Fallon, Nevada," and to designate the position of the person signing for the bidder as "President." It is the claim of A. D. Drumm, Jr., and F. H. Wildes that the use of the corporation's stamp was inadvertent and without intention to involve the corporation in the bidding; that through habit of many years the corporation stamp was used and that there was no intention on the part of A. D. Drumm, Jr., to bid other than as he was qualified to bid, to wit, as an individual. Were the abbreviation "Inc." and the word "President" stricken from the proposals, there would be no justification for the questing of the validity of the bids submitted.

Section 3.1 of the Standard Specifications provides that the right is reserved to waive technical errors as may be deemed best for the interests of the State.

SECTION 3--AWARD AND EXECUTION OF CONTRACT

3.1. *Consideration of Proposals.* After the proposals are opened and read, the total amount of each shall be obtained from unit bid prices and approximate quantities, and these total shall be immediately made public. Until the final award of the contract, however, the right is reserved to reject any and all proposals and to waive technical errors, as may be deemed best for the interests of the State.

This is to certify that the above is a true and exact copy of section 3, paragraph 3.1, as taken from the Standard Specifications of the State of Nevada, Department of Highways, Adopted October 20, 1937.

C. V. MELARKEY.
Office Engineer, Nevada Department of Highways.
Notary Public, County of Ormsby, State of Nevada.

May 29, 1940.

STATE OF NEVADA)
) SS.
COUNTY OF ORMSBY)

On this 29th day of May, 1940, I, A. D. Drumm, Jr., being first duly sworn, depose and say as follows: That I am the principal owner of the corporation known as the Silver State Construction Company, Incorporated; that on or about the 15th day of February, 1940, pursuant to the provisions of section 4450, et seq., Nevada Compiled Laws 1929, I filed, a certificate stating that I was conducting and carrying on business under the name of Silver State Construction Company, and that I am the sole owner and manager of such company; that on March 8, 1940, I was qualified to bid on highway construction jobs to the extent of \$250,000 by the Prequalification Board of the State of Nevada, Department of Highways, as an individual doing business under the name of Silver State Construction Company; that on the 28th day of May, 1940, as such individual, I submitted my proposal for constructing highway projects F. A.

the affiant, to bid on said projects as the Silver State Construction Company, Incorporated; that in the event the contract or contracts awarded on the above-named projects are awarded to the bidder submitting proposals stamped by error with the rubber stamp of the Silver State Construction Company, Incorporated, and inadvertently signed "A. D. Drumm, Jr., President," the highway contract or contracts will be entered into and signed by the Silver State Construction Company, A. D. Drumm, Jr., Owner-Manager, and will not be executed by the Silver State Construction Company, Incorporated, of which I am the Secretary-Treasurer.

F. H. WILDES.

Subscribed and sworn to before me this 29th day of May, 1940.

H. D. MILLS,

Notary Public in and for Ormsby County, State of Nevada.

SYLLABUS

295. Highway Department--Right to Waive Error of Contractor in Bidding on Contracts.

Highway Department is within rights to waive inadvertent error of A. D. Drumm, Jr., in bidding on three contracts and award each of said contracts to A. D. Drumm, Jr., doing business under fictitious name of Silver State Corporation Company upon receipt of prior concurrence thereof by Federal Public Roads Administration.

CARSON CITY, May 31, 1940.

TO MR. ROBERT A. ALLEN, State Highway Engineer, Heroes Memorial Building, Carson City, Nevada.

I have your letter of 29th instant in which you call my attention to a certain inadvertent error made by A. D. Drumm, Jr., doing business under the fictitious name of Silver State Construction Company, pursuant to the provisions of Nevada Compiled Laws 1929, sections 4450, et seq., and in which you ask my official opinion as Attorney-General of this State as to whether the Highway Department is within its "rights to (1) waive as a technical error the fact that Mr. Drumm inadvertently used on his bids a rubber stamp belonging to the Silver State Construction Company, Incorporated, instead of one owned by the Silver State Construction Company" (the proper fictitious name under which said A. D. Drumm, Jr., is doing business), and to "award the contracts (mentioned in your letter) to the Silver State Construction Company, a qualified bidder of record" in the Highway Department office, "after first securing prior concurrence from the Public Roads Administration." In other words, you ask whether the inadvertence mentioned in your letter and occurring in the three bids of A. D. Drumm, Jr., doing business under the fictitious name of Silver State Construction Company, as aforesaid, is of such a nature as to vitiate his bid on each of the three highway construction jobs for which bids were

opened on 28th instant, he being the low bidder on each of said jobs or sections of the highway, *i.e.*, Highway projects F. A. S. 134-E (2), F. A. S. 150-A (2), and F. L. H. 12-C (2).

You attach to your letter the affidavit of A. D. Drumm, Jr., and also the affidavit of F. H. Wildes, subscribed and sworn to by each of them, respectively, before H. D. Mills, a Notary Public in and for the county of Ormsby, State of Nevada, and dated May 29, 1940. These affidavits show conclusively, in my opinion, that said affiants owned all of the capital stock of the old corporation, Silver State Construction Company, "Incorporated." That old corporation is the agency through which A. D. Drumm, Jr., and Mr. F. H. Wildes, the only other stockholder of said corporation, did a highway construction business with the State of Nevada and its Department of Highways for several years as a corporation. It was qualified to do such construction business as a corporation by the "Prequalification Board of the Department of Highways" under its corporate name Silver State Construction Company, "Incorporated" as late as January 16, 1940. Sometime thereafter, and prior to the furnishing of bid-forms for bidding on the construction of the three sections of the highway mentioned in your letter of 29th instant, said A. D. Drumm, Jr., and said F. H. Wildes changed the nature of the entity under which they were to operate thereafter in constructing highways from that of a corporation to that of a fictitious person by complying with the provisions of said section 4450, et seq., Nevada Compiled Laws 1929, and dropped the word "Incorporated" from the name of the new entity so that the latter would be known thereafter as "Silver State Construction Company."

Under the new arrangement and entity, said A. D. Drumm, Jr., became the sole owner and manager of Silver State Construction Company, whereas he had theretofore been "President" of the corporation and, as such, had theretofore bid on highway construction jobs and signed highway construction contracts awarded to his said corporation; and, under said new arrangement, said F. H. Wildes became the "office manager" of said Silver State Construction Company, the fictitious name under which said A. D. Drumm, Jr., was conducting and carrying on his said business as a highway contractor and in highway construction.

The undisputed facts are that the above-mentioned affidavits and the records of the Highway Department show that, as such corporation, "Silver State Construction Company, Incorporated," owned and used a rubber stamp bearing that name; that said Prequalification Board of the State Highway Department had on March 8 qualified said new entity, A. D. Drumm, Jr., doing business under the fictitious name of Silver State Construction Company (not as a corporation) to bid on highway construction projects for a period of one year, ending March 8, 1941, and said new entity was, therefore, duly qualified to so bid on highway construction projects on May 28, 1940, the day bids for the construction of said three sections of said highway were opened and up to which time such bids were to be submitted, but that said old corporation "Silver State Construction Company, Incorporated," was not at that time qualified to bid on said State highway construction, or any other State highway construction in this State.

Said affidavits also show conclusively that, through inadvertence and excusable neglect, said new entity, "Silver State Construction Company," used in designating the bidder named in each of said proposals or bids for said three sections of State highway the rubber stamp of said old corporation "Silver State Construction Company, Incorporated"; that it was then and still is

the intention of the bidder in each of said proposals or bids to be the one qualified by said Prequalification Board of the Department of Highways, *i.e.*, A. D. Drumm, Jr., an individual doing business under said fictitious name of "Silver State Construction Company," and not the said old corporation; that said use of said rubber stamp containing the name of said corporation and designating the officer thereof as the person so ostensibly signing or submitting said bids for that corporation was and constituted inadvertence and excusable neglect; that it was never the intention of said bidder to submit either of said bids as the bid of said corporation and that the act of said bidder in submitting each of said bids was the act of said A. D. Drumm, Jr., doing business as an individual under the fictitious name of Silver State Construction Company.

All of the foregoing facts are undisputed and conclusively shown by your said letter and by said affidavits of A. D. Drumm, Jr., and F. H. Wildes, a copy of all of which are hereto attached and made a part hereof, and by the "Statement of Facts Relative to the Prequalification of the Silver State Construction Company, A. D. Drumm, Jr., Sole Owner," and are supported by the records of the Department of Highways of the State of Nevada, a full and correct copy of each of which is attached hereto and referred to and hereby made a part hereof.

Under section 3 "Award and Execution of Contract," paragraph 3.1, "Consideration of Proposals," taken from the standard specifications adopted by the Department of Highways of this State in 1937, the Highway Department has reserved the right "to waive technical errors, as may be deemed best for the interests of the State," a full and correct copy of which is attached hereto and hereby referred to and made a part hereof.

From the foregoing, it is the unqualified opinion of this office that the Highway Department has the right to waive as a technical error the above-named inadvertence and to award each of the said three contracts to A. D. Drumm, Jr., doing business under the fictitious name of Silver State Construction Company, upon receipt of prior concurrence thereof by the Federal Public Roads Administration.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

A-65. Full Train Crew Law.

Full train crew law applies to part of general railway system, although such part is usually referred to as a "branch law" and is only about 20 miles in length, especially when it is owned by the same company operating an entire railway system of 95 miles or more.

CARSON CITY, June 15, 1940.

HONORABLE PAUL RALLI, Deputy District Attorney, Las Vegas, Nevada.

DEAR MR. RALLI: I have your letter of June 12 wherein you inquire if, in my opinion,

there is a violation of section 6321 Nevada Compiled Laws 1929, by reason of the operation of the train on the branch line some twenty miles in length manned by a flagman that has had less than one year's actual experience in train service. The branch line being a part of the Union Pacific Railroad System.

Section 6322 Nevada Compiled Laws 1929 provides that the provisions of the Full Train Crew Act shall not apply to or include any railroad company of any line of railroad in this State less than ninety-five miles in length, nor to any line of railroad in this State on which but one train a day is operated each way. Your letter states that the train makes two trips daily, but sometimes one trip. As stated above, the distance traveled on the branch line is about twenty miles.

It may be that the section of railroad over which the train operates is a branch line. It probably is a branch line. But this, in my opinion, does not constitute such branch line a line of railroad within the exemption provided in section 6322. This branch line of railroad is a part of the railroad system. Branch is defined by Webster as "any arm or part connected with the main body of a thing, such as a branch of a railway." So for this reason we conclude that the branch line in question is not a separate line of railroad within the meaning of the statute but constitutes a part of the whole system within the State of Nevada which, as you know, is more than ninety-five miles in length.

It is my opinion that the operation of a train on the branch line in question manned by a flagman who has had less than one year's actual experience in train service does constitute a violation of the Full Train Crew law.

Yours very truly,

W. T. MATHEWS, Deputy Attorney-General.

A-66. Old-Age Assistance Law.

Nevada old-age assistance law as affected by State law requiring relatives within certain degrees to support their indigent relatives under the "State Poor Law." Nevada poor laws are not repealed or amended by Nevada old-age assistance law; and the provision of the former apply in determining the eligibility of applicants for old-age assistance, and if an applicant has relatives in this State able to support him within the degree of relationship specified in said "Poor Law," then he is not entitled to old-age assistance. Old-age assistance law is not a pension law, its application depending not only upon age but also upon need, amount of need, citizenship, residence, and several other elements. The amount of support received by applicant from such relatives should be taken into consideration, however, in determining the sufficiency of such support and the right of the applicant to receive, under the old-age assistance law the amount such support from relatives is short of the amount necessary for the support of the applicant in order to enable him to live decently.

CARSON CITY, June 25, 1940.

MR. HERBERT H. CLARK, Supervisor, Division of Old-Age Assistance, Nevada State Welfare Department, Reno, Nevada.

DEAR MR. CLARK: Your department has requested an official opinion from this office on the following questions:

Under the provisions of the Nevada Old-Age Assistance Act, page 129, 1937 Statutes of Nevada, is one who fulfills the qualifications for eligibility as therein stated barred from assistance because of the existence of a financially responsible brother.

What connection do sections 5138 and 5139 of the Nevada Compiled Laws of 1929, which refer to the responsibility of relatives to support or contribute to the support of relatives in need, have to the Nevada Old-Age Assistance Act, chapter 67 of the 1937 Statutes?

OPINION

In our opinion one who fulfills qualifications for eligibility set forth under the 1937 Nevada Old-Age Assistance Act may be barred from assistance if he has a brother financially able to support him and, providing further, that the applicant's poverty is not due to intemperance or other bad conduct.

Likewise, it is our opinion that the 1861 Act relating to the support of the poor, being sections 5137-5147 of Nevada Compiled Laws 1929, which, among other things, provides that certain relatives are responsible for the support of poor persons who are unable to earn a livelihood in consequence of body infirmity, idiocy, lunacy, or other cause, is not repealed by implication by the Nevada Old-Age Assistance Act of 1937, and that these two Acts can and should be read in pari materia.

The Old-Age Assistance Act of 1937 was adopted by the State of Nevada for the purpose of giving assistance to the aged needy in cooperation with the United States Government. Therefore, we believe that the Nevada Act must be read in conjunction with the Federal Act in order to arrive at a correct interpretation.

In this connection, it is to be noted from the case of State v. Brandjord, a Montana case, reported at 92 P. (2d) 273, that the court held:

The statute governing old-age assistance must be construed not as an independent Act but in conjunction with the Federal Act, and the two Acts must be administered together as a unified code of laws for the complete and comprehensive control of the subject.

With this general statutory principle in mind, it appears to us that we should likewise look to the various steps in the enactment of the statutes for the purpose of settling or resolving any

ambiguity. Worcester v. Quinn, 23 N. E. (2d) 463.

The Old-Age Assistance Act is not a pension Act, for it does not specifically provide that one shall be entitled to benefits based on age alone. State v. Borge (N. D.), 283 N. W. 521.

The Federal Social Security Act, being sections 301-306 of title 42, U. S. C. A., specifically refutes any intention to make an outright pension, in that it is there stated that the assistance shall be to the aged, needy individuals. It is true that there is no definition in the Federal statute as to the exact meaning of the word needy, but we find that in the adoption of the Social Security Act, pursuant to Report No. 628, Calendar 661 of the United States Senate, the Chairman of the Senate Finance Committee, in recommending the passage of the Act, stated as follows:

Of all men and women over 65 at least one-half are financially dependent upon others. A great majority of these are now being assisted by their children, other relatives, or friends. We think that children who are able to do so should continue to support their aged parents, and the legislation which we are proposing is framed with this thought in mind.

We believe that the State Legislature knew the purpose and the object in mind of the Federal legislators in enacting the Social Security Act. Nevada had on its books at the time of the enactment of the Old-Age Assistance Act of 1937 an Old-Age Pension Act of 1925, and a Support of the Poor Act of 1861. Significantly enough, the State Legislature, although expressly repealing the Old-Age Pension Act of 1925, made no mention whatever and no repeal of the 1861 Act providing for the support of the poor. It is true that in enacting the 1937 Old-Age Assistance Act the Legislature did not specifically incorporate as a qualification that the applicant must have no child or other person responsible under the laws of the State for his support, and able to give such support.

It should be noted, however, that section 3 of the 1937 Act sets out the following measure of need:

The amount of the old-age assistance which any person shall receive under the provisions of this Act shall be determined with due regard to the resources and necessary expenditures of the individual and the conditions existing in each case, and shall, in any event, be sufficient, when added to all other income and *support of the recipient*, to provide such person with a reasonable subsistence compatible with decency and his or her needs and health. (Italics ours.)

In view of the fact that the 1861 Act for the support of the poor has not been repealed, we are not aware of any other Nevada statute requiring support of the aged which could be referred to by this section. We believe that the use of this phraseology is not meaningless, and that the State Legislature intended to require the support of applicants by legally responsible relatives who had the ability to do so before granting old-age assistance to needy, aged persons. The law of our State has clearly established that repeals by implication are not favored, and occur only

where there is such an irreconcilable repugnancy or conflict that the two Acts cannot stand together. Insofar as the 1861 Act requires the support of aged, needy persons over 65 years of age by responsible relatives, it is our opinion that there is no irreconcilable repugnancy or conflict with the 1937 Old-Age Assistance Act, and we therefore conclude that the two Acts must be read together in placing the responsibility for support upon certain designated relatives.

We have devoted considerable time to your questions and we believe that we have exhausted all the cases reported on the subject of old-age assistance.

It has been called to our attention that the Supreme Court of the State of Missouri, in the case of *Price v. State Social Security Commission*, 121 S. W. (2d) 298, and *Moore v. State Social Security Commission*, 122 S. W. 391, has held that the mere fact that a father received help and support from his daughter did not bar him from old-age assistance. We feel that these cases are distinguishable from the problem before us because the Supreme Court of the State of Missouri, in *Moore v. State Social Security Commission*, supra, specifically held that “no court or law writer so far as our research has disclosed has ever said that an indigent person whose only support is contributions made by one who is under no legal duty to make them has means of support. The law enforces rights which are legal and none others.”

It is our contention that the State of Nevada does have a law making it the legal duty for certain named relatives to contribute to the support of their kin, and that such support is not a mere donation or a contribution but a legal obligation.

Our attention has likewise been called to the Washington case of *Conant v. State*, 84 P. (2d) 378, in which by a 6 - 3 opinion the Supreme Court held that the Old-Age Assistance Acts were intended to relieve charitably disposed relatives, strangers, societies, and other agencies of the burden of providing relief for the aged needy. It is to be noted in reading this Washington case that the State of Washington had in operation a law practically identical with our 1861 Act providing for the support of the poor. The Washington Legislature in adopting the Old-Age Assistance Act specifically repealed this statute requiring support from relatives. As we have stated before and reiterate now, the Nevada Legislature did not repeal its 1861 statute in enacting the Old-Age Assistance Act. Even with the repeal of the Act for relative support by the Washington Legislature, the minority wrote a vigorous dissenting opinion holding that in spite of the repeal a child who was able must, under the Old-Age Assistance Act, support a needy, aged parent. And, although of no particular legal value, it is interesting to note that the State of Washington amended its Old-Age Assistance Statute in 1939 and specifically provided that sons and daughters of legal age who resided within the State and who were financially able must contribute to the support of the applicant.

For each of the reasons noted above, we are of the opinion that the 1937 Old-Age Assistance Act and the 1861 Act providing for the support of the poor must be read together, and that a financially able brother is responsible for the support of his pauper brother, unless such brother's poverty is due to intemperance or other bad conduct.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By ALAN BIBLE, Deputy Attorney-General.

A-67. Liquor Stamp Law.

State liquor stamp law as effected by county ordinance for licensing, taxation, and regulations of the sale or disposal of certain liquors. Although ordinance is inartistically drawn, it provides for county license and fee in the nature of a business license and fee, for engaging in the liquor business as distinguished from the purpose of the State liquor stamp law, i.e., chapter 160, 1935 Statutes of Nevada, as amended, and is not in conflict with it, and may be legally enforced.

CARSON CITY, June 29, 1940.

HONORABLE JOHN W. BONNER, District Attorney, Ely, Nevada.

DEAR SIR: Reference is hereby made to your letter of June 12 requesting an opinion on whether a White Pine County ordinance providing for the licensing, taxation, and regulation of the sale or disposal of beers, wines, or other liquors applies to wholesale dealers of such beverages.

A reading of section 4 of the ordinance discloses that for a retailer's license where the quantity sold does not exceed five gallons at any one time or at any one sale specifically refers to a retailer, and by reason of the limitation of the quantity to be sold at any one sale, we are of the opinion that that particular portion of section 4 relates to retailers only. A retailer is defined as follows:

A merchant who buys articles in gross or merchandise in large quantities, and sells the same by single articles or by small quantities. Black's Law Dictionary.

It would seem that the first paragraph of section 4 is limited to retailers only.

However, the next paragraph of section 4 by specific language is not limited to retailers, but apparently provides a license for any person who sells in quantities exceeding five gallons of beverages at any one time or in any one sale. This would imply that it was the intent of the Liquor Board to differentiate between the license provided for the sales of liquor in small quantities and those sold in large quantities and, as custom decrees, it is the retailer who sells in small quantities and the wholesaler who sells in large quantities. It is common knowledge that a wholesaler sells in large quantities. We find the definition of wholesale to mean

To sell by wholesale is to sell by large parcels, generally in the original packages and not by retail. Black's Law Dictionary.

We conclude that section 4 of the ordinance in question provides a license fee for retailers and also a license fee for wholesalers.

We might suggest, however, that the ordinance is somewhat inartistically drawn and probably food for thought that it was not intended as a wholesalers' ordinance although, as pointed out above, the language does include those engaged in wholesale pursuits. We would suggest that the ordinance be redrawn, and, if redrawn, that the authority for the sales of liquor be referred to as the laws of Nevada in conformance with the Nevada liquor stamp law, the same being chapter 160, Statutes of Nevada 1935.

Yours very truly,

W. T. MATHEWS, Deputy Attorney-General.

OPINIONS "B-1" TO "B-96"

The following are a few of the many written opinions of the Attorney-General, of somewhat general interest and application, furnished by way of letters rather than by formal written opinions:

B-1. County Liquor License.

County Liquor Board as created by chapter 184, 1933 Statutes of Nevada, is the proper board to enact liquor licenses for the town of Hawthorne, Mineral County, Nevada.

CARSON CITY, July 19, 1940.

HONORABLE MARTIN G. EVANSON, District Attorney, Hawthorne, Nevada.

DEAR MR. EVANSON: Reference is hereby made to your letter of July 18 with respect to a proposed liquor licensing ordinance to be enacted by your Board of County Commissioners. It is noted that your inquiry goes to the point of whether the Board of County Commissioners or the County Liquor Board should be the administrative board under the ordinance.

From the reading of the ordinance we assume that the town of Hawthorne comes under the old town government Act of 1881, the same being sections 1231-1247 Nevada Compiled Laws 1929. If this were the only law on the subject the Board of County Commissioners would be the proper licensing Board and also the proper board which enacts such an ordinance. However, in 1933, the Legislature revised section 3681 Nevada Compiled Laws 1929, by first amending such section at page 176 of the 1933 Statutes. A reading of this amendment discloses that the Legislature in that Act created or rather brought to life again the old County Liquor Board composed of the County Commissioners, the District Attorney and the Sheriff, and provided specifically in such Act that it was to be applicable to the entire county excepting

incorporated cities or towns. Apparently the Legislature tumbled to the fact that section 3681 Nevada Compiled Laws 1929 was probably repealed by the enactment of the State Prohibition Act in 1919 and, having such implied repeal in mind, enacted chapter 184, Statutes of 1933 as a separate and distinct Act which is in effect the same as the 1933 amendment at page 175. It is our opinion that chapter 184 of the 1933 Statutes is now effective and that it is, in effect, an amendment of the Town Government Act insofar as intoxicating liquors are concerned and we think your ordinance should be enacted by the Liquor Board provided for in chapter 184 and thereafter administered by such board.

Trusting this will answer your inquiry, I am,

Yours very truly,

W. T. MATHEWS, Deputy Attorney-General.

B-2. Appropriation Limited to Purposes for Which Made.

Expenses of the Indian band to Golden Gate International Exposition cannot be lawfully paid out of the moneys appropriated in chapter 143, 1939 Statutes of Nevada, page 181, worthy and beneficial as that might be to the State, for the reason that the moneys so appropriated may be used only for the purposes specified in chapter 184, 1937 Statutes of Nevada, page 397, which purposes are so limited that they do not cover the same.

CARSON CITY, July 22, 1940.

MR. W. W. HOPPER, Chairman, Nevada Commission Golden Gate International Exposition, First National Bank Building, Reno, Nevada.

DEAR MR. HOPPER: Answering your letter to me of 19th instant, I have to say that chapter 143, 1939 Statutes of Nevada, page 181, provides that the money therein appropriated shall be used for the purposes specified in chapter 184, 1937 Statutes of Nevada, pages 397-398. Section 6 of said chapter 184 specifies that the money so appropriated "shall be devoted to the conduct of an exhibit of the *State's resources* at the said Golden Gate International Exposition * * *" and to pay the salaries and expenses of "Superintendents, Directors, Clerks, and other persons" and to pay the necessary transportation and other expenses of installing the exhibits selected to advertise the resources of the State. The Stewart Indian School and the "Indian Band" at that institution are not a part of the "State's resources," as they were established and are supported and maintained by the Federal Government.

Much as I would like to have this Indian band make the trip to Treasure Island and participate in the parade and furnish the music on "Nevada Day" at the Golden Gate International Exposition, and as I believe the \$500 it would require to pay the expenses thereof would be money well spent and good advertising for the State. I believe, like you, that this enterprise does not fall within the purposes of the appropriation as specified in said chapters 143 and 184.

Yours very truly,

GRAY MASHBURN, Attorney-General.

B-3. Corporations--Annual Meetings.

Regular annual meetings of all corporations, including nonprofit corporations such as the State Farm Bureau, are to be held in the manner and at the time or times specified usually in the bylaws of such corporations, and such bylaws may be amended as specified therein.

CARSON CITY, July 24, 1940.

MRS. FLORENCE BOVETT, Secretary-Treasurer Nevada State Farm Bureau, Extension Building, University of Nevada, Reno, Nevada.

DEAR MRS. BOVETT: I have just received your letter to me of 22d instant, and am somewhat surprised that you expected an opinion from this office before you had sent a written request for such official opinion. The law provides that the Attorney-General shall furnish legal advice and official opinions to such State Officers, Boards, Commissions, Departments and Institutions, only upon their written request therefor. My recollection of the matter is that, when you were in my office a few days ago and asked for the official opinion of this office as to whether the law provides a definite date for the annual meeting of the Board of Directors of the Nevada State Farm Bureau. I called your attention to the above-mentioned provision of the law and asked you to write me and request the official opinion of this office on the point or points you had in mind, and that you promised to do so. I have, therefore, been waiting since you were here in my office for such a written request. I am sorry this misunderstanding came up.

I have somewhat carefully examined the provisions of the law since you were in my office and again since receiving your letter today, and find no provision of the law specifying the definite date on which the annual meetings of the Board of Directors of the Nevada State Farm Bureau or the annual meetings of the Boards of Directors of the several County Farm Bureaus shall be held. I find, however, that section 353 Nevada Compiled Laws 1929 (section 6a of the Farm Bureau Act, approved April 1, 1919) does mention a "regular annual meeting" of the Board of Directors and that the above-quoted words are also mentioned in the 1935 amendment of that Section, which amendment you will find in 1935 Statutes of Nevada, page 223. I find nothing, however, in the statutory law of this State specifying any date or dates for such "regular annual meetings."

The law provides that the State Farm Bureau may incorporate as a nonprofit corporation and, if it does so, then it shall file its articles of incorporation in the office of the Secretary of State, as is required of all corporations operating in this State. Corporations should, and usually do, adopt bylaws and this is also provided for with reference to the State Farm Bureau and the various County Farm Bureaus. It is customary for corporations to provide, either in their articles

of incorporation or in their bylaws (rules and regulations) for the regular annual meetings of the directors thereof, and for such special meetings as it may be desired to have. Such bylaws (rules and regulations) of corporations are never filed in the office of the Secretary of State or in any other office than that of the particular corporation. I suggest, therefore, that you may find some provision in your bylaws, or rules and regulations, specifying the date or dates for the regular annual meetings of the Board of Directors of the State Farm Bureau and of the Boards of Directors of the various County Farm Bureaus. Your bylaws will also, no doubt, provide for the method by which they may be amended. That provision is usually fairly near the end of the bylaws of the corporations. If you find any such amendatory provision, it will no doubt specify exactly how you should proceed to amend your bylaws so as to provide the date or dates you desire for regular annual meetings of the Board of Directors of the State Farm Bureau and of Boards of Directors of your County Farm Bureaus. If you will follow that procedure, you will be within the law and may thereby legally change the dates for such regular annual meetings.

Hoping this information reaches you in time to serve your purpose, and with best wishes, I am,

Sincerely yours,

GRAY MASHBURN, Attorney-General.

B-4. Unemployment Compensation Division--State Board of Control Act.

State Board of Control Act, chapter 122, Statutes of 1935, applicable to expenditures of unemployment compensation division where the amount to be expended is over \$50.

CARSON CITY, July 24, 1940.

HON. ALBERT L. MCGINTY, Director Unemployment Compensation Division, Carson City, Nevada.

Attention: Mr. Frank B. Gregory.

DEAR SIR: Reference is hereby made to your letter of July 15, 1940, inquiring whether Chapter 122, Statutes of Nevada 1933, providing the duties of the State Board of Control, has application to the Unemployment Compensation Division and the Employment Service Division of this State with respect to the administration of the Unemployment Compensation Administration Fund.

Section 4 of the State Board of Control Act above mentioned provides, among other things, that: "No officer or department shall expend more than \$50 without authorization therefor first obtained from the Board of Control." There are several exemptions contained in said section but none apply to the Unemployment Compensation Division or the Employment Service Division.

Section 13a of the Unemployment Compensation Law, which said section provides for the Unemployment Compensation Administration Fund and the administration of such fund, contains the following language: “All moneys in this fund shall be deposited, administered, and disbursed, in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State Treasury.” It seems clear that the Legislature intended that the Unemployment Compensation Administration Fund should be administered and disbursed in the same manner as other special funds in the State Treasury. We think it is clear that special funds in the State Treasury, unless otherwise provided, are under the control of the State Board of Control with respect to amounts of \$50 or more, and that authorization for expenditures thereof must be obtained from the State Board of Control. It is, therefore, our opinion that the Unemployment Compensation Administration Fund is to be administered, with respect to authorization therefor, as it provided in chapter 122, Statutes of Nevada 1933.

Very truly yours,

W. T. MATHEWS, Deputy Attorney-General.

SYLLABUS

296. Vocational Education in Defense Work.

State of Nevada and its Department of Vocational Education may lawfully conduct courses in vocational training in cooperation with the Federal Government under Public Laws No. 668, 76th Congress, chapter 437, 3d Session, Title I, under the heading of “Office of Education,” approved June 27, 1940; and State Treasurer may lawfully receive, act as custodian and disburse, as trustee, the moneys allocated for use in the State of Nevada pursuant to that law upon warrants of the State Controller and pursuant to requisitions of the Nevada State Board of Vocational Education or its executive officer.

OPINION

CARSON CITY, August 3, 1940.

This opinion was not completed and used, for the reason that the request for the opinion of this office was made by J. W. Studebaker, United States Commissioner of Education, through Miss Mildred Bray, Superintendent of Public Instruction of the State of Nevada, and Executive Officer of the State Board of Vocational Education in this State, and the Attorney-General of this State is not the legal advisor of the United States Commissioner of Education, or of any other officer of the United States, or required to furnish official opinions to any such officer of the United States. In view of the fact, however, that the inquiry asked for a statement of the views of the Attorney-General of this State as to the authority of the State of Nevada, under its laws and through its Department of Vocational Education, to conduct such courses of vocational training as are required by Public Laws No. 668, 76th Congress, chapter 437, 3d session, title I, under the

heading of "Office of Education," approved by the President of the United States on June 27, 1940, and to comply in all respects with said law, and whether the State Treasurer of this State is authorized to receive, act as custodian of, and disburse, as trustee, upon the requisition of the State board which administers vocational education in this State, all sums of money which may be paid to the State pursuant to said law, and thereby to participate in the distribution and use of the sum of fifteen million dollars; and in view of the fact that the information so requested relates to and requires an interpretation and construction of the laws of this State by the Attorney-General, and it is for the benefit of said Department of Vocational Education and the people of this State, and it is essential to national defense that this State participate and assist in the courses of vocational training contemplated by said Federal law and obtain its share of said sum of fifteen million dollars so appropriated by Congress for said purpose, and said United States Commissioner of Education requested that the Attorney-General furnish him this information by air mail, and considerable delay was experienced in obtaining an authenticated copy of said Federal law after its approval by the President and of the rules and regulations governing the expenditure of said funds, it was decided that the information would be furnished by the Attorney-General of this State by letter directly to said J. W. Studebaker, instead of in the form of the usual formal official opinions of this office interpreting and construing State laws. This plan was adopted principally because of the fact that such formal official opinions are furnished only to State officers, boards, commissioner, departments, and institutions, and to the District Attorneys of the various counties of the State for whom the Attorney-General is the legal advisor--not to Federal officers or private persons or concerns.

Pursuant to this plan, the Attorney-General wrote a letter directly to Honorable J. W. Studebaker, United States Commissioner of Education, Federal Security Agency, Washington, D. C., on and dated August 3, 1940, containing the information so requested by Mr. Studebaker, in the following language, and sent a carbon copy thereof to Miss Mildred Bray, Superintendent of Public Instruction:

HONORABLE J. W. STUDEBAKER, United States Commissioner of Education, Federal Security Agency, Washington, D. C.

DEAR SIR: Miss Mildred Bray, Superintendent of Public Instruction and member and Executive Officer of the State Board of Vocational Education of this State, was absent from Carson City at the time your wire to her of 5th ultimo reached her office, but shortly thereafter her secretary brought it to my office, together with that portion of the congressional Act quoted or set forth in your mimeographed communication of 3d ultimo. Miss Bray's secretary was not familiar with the law or informed as to the details of the plan to be initiated through the Department of Vocational Education in the States in preparing for national defense. Mr. R. B. Jeppson, the man connected with her office and in charge of vocational education in this State, was also absent from the State at the time your wire reached Miss Bray's office, and did not return until less than a week ago. It has always been the policy of this office not to base an official opinion upon newspaper reports or upon what someone, not a trained and experienced lawyer, said was the law. I was entirely willing to accept your statement in your mimeographed communication of 3d ultimo that the language therein quoted constituted that particular section of the law. Your wire did not state, however, that that was the entire law relating to this subject

in the congressional legislation from which it was quoted, and, in fact, it was clear from your wire that it was merely an excerpt from the law, as indicated by your expression "Title One under the heading Office of Education." I have been engaged in the practice of the law and served as Attorney-General of this State too long to base an official opinion upon a portion or one paragraph of a law unless I knew that that portion or paragraph contained all the law in the enactment relating to the particular subject under discussion.

In fact, your wire undertook to set forth substantially what *my* opinion should be, quoting it, and we always write our official opinions ourselves; and in your statement of what my opinion substantially should be you indicated that you desired it to contain a statement that the State of Nevada is authorized, through its State board which administers vocational education, "to comply in all respects with said law," not merely with the portion or paragraph thereof quoted in your said mimeographed communication. Since the word "all" is as broad as the whole "law," not merely the portion or paragraph thereof quoted by you in said communication, and the word "law" is broad enough to include the entire congressional enactment, it was necessary for me to have the entire enactment before I could conscientiously say that the State Board of Vocational Education of this State is authorized to comply in "all" respects with that law or entire enactment. For this reason we wired for the congressional enactment as approved by the President, and there was some considerable delay in obtaining a copy of the law in its entirety.

The foregoing is not intended as any criticism, as I realize your word "substantially" indicates that your purpose in quoting substantially what my opinion should contain was merely to indicate what the substance of the opinion should be, to the end that it might be sufficient to justify or act as a basis for the allocation of Federal funds to this State to assist in vocational training in preparation for national defense.

You must realize, however, that we are a long way from Washington, D. C., where congressional legislation is enacted, and that it takes a long, long time for us to obtain copies of congressional legislation after it has been approved by the President. In fact, congressional legislation is not printed as approved by the President until after he approves it. The first printing of such legislation after the President approves it, of which we know, is the so-called "slip laws" printed by the Government Printing Office there; and this office has long been a subscriber to that service, in the hope of obtaining congressional legislation at the earliest possible moment after it has been approved by the President. We have not yet received this Public No. 668, even through that service, although the printed copy of the law we received from Miss Bray's office shows this law was approved June 27, 1940, more than a month ago, and indicates that it was printed by that service. My observation and experience convinced me many, many years ago that it was unsafe to accept, as a correct statement of the law, what newspapers and press services report as the law.

While waiting for a copy of the law in its entirety, other important and emergency matters came to my desk demanding my immediate official attention. This State is so small in taxable property and the revenues derived therefrom, that my office force is quite limited; and, inasmuch as schools do not open in this State for some time and vocational education could hardly be started in the schools until they open, I delayed answering your wire until after I had attended to the other important and emergency matters of official duty. I hope this will serve to excuse my

delay in answering the letter.

I have ascertained from a hurried reading of said Public No. 668, that the paragraph quoted by you in your "mimeographed communication of July" is the only portion of said congressional enactment which seems to refer to or deal with the question of vocational education as contemplated by your plan.

I am, therefore, writing to say that it is my opinion that the State of Nevada through its State Board of Vocational Education is fully authorized to conduct such courses of vocational training as promote "education in agricultural subjects, trade and industrial subjects, and home economics subjects," as required by Public No. 668, 76th Congress, chapter 437, 3d session, title I, subheading "Office of Education" under the heading "Federal Security Agency." It is also my opinion that the State of Nevada is so authorized to comply in all respects with said law as contained in said subdivision to comply in all respects with said law as contained in said subdivision or paragraph under said subheading "Office of Education," insofar as such training is "for the promotion of vocational education" in the subjects above enumerated. It is also my opinion that the State Treasurer of said State is authorized to receive and to act as custodian of all sums of money which may be paid to the State of Nevada pursuant to said law as expressed in said subdivision of said law, and to disburse the same, as trustee, upon the warrants of the State Controller of this State pursuant to the requisition or requisitions of the Nevada State Board of Vocational Education which administers such education under the laws of this State, acting as such board or through said executive officer thereof who has already been duly authorized to act for said board in such matters.

Hoping the foregoing opinion will be satisfactory to you and that we may, in this way, be permitted to cooperate in national defense, I am,

Sincerely yours,

GRAY MASHBURN,
Attorney-General of Nevada.

From the foregoing, it will be seen that we expressed it as our view that the State of Nevada is authorized to conduct such courses of vocational education as is contemplated in said Federal law, and to participate to the fullest extent in such national defense activities, and comply in all respects with said Federal law; that the State Treasurer of this State is authorized to receive and act as custodian of the money to be paid to the State of Nevada pursuant to said law, and to disburse the same, as trustee, upon the warrants of the State Controller of this State pursuant to requisition or requisitions of the Nevada State Board of Vocational Education; that this is the board which administers such vocational education under the laws of this State; and that said board by board action is authorized to act in said matter, and that the said executive officer thereof is also duly authorized to act for said board in such matters.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

SYLLABUS

297. Motor Vehicle Registration Law.

1. Nonresident motor carriers entitled to five days in which to comply with registration requirements of section 17b.

2. Failure of nonresident motor carrier to apply for nonresident permit within five days after entering State forfeits right thereto; only one five-day period allowed in any one year.

3. Nonresident motor carrier only entitled to reciprocity in Nevada when the law of his home State extends same measure of reciprocity to a resident of Nevada.

4. Section 17, the nonresident exemption section, provides no distinction between nonresident motor carriers engaged in interstate and those engaged in intrastate carriage.

5. Conditions in registration law of home State of nonresident motor carrier must be coextensive with those imposed by Nevada law before reciprocity may be extended.

6. Exemptions from licensing provisions of motor carrier licensing law contained in section 3 thereof are not applicable to exemptions provided in section 17 of the motor vehicle registration law.

7. Motor vehicle used in the carrying or towing of another motor vehicle in motor convoy service occupies same status as any other motor carrier vehicle under section 17.

8. Foreign corporation doing business in Nevada not entitled to nonresident exemption from registration of its motor vehicle stationed and used in this State.

INQUIRY

CARSON CITY, August 1, 1940.

1. Is the five-day period provided in section 17(a) of the motor vehicle registration law of 1931, as amended, within which nonresidents may apply for nonresident permits, applicable to nonresident motor carriers which are not entitled to exemption under section 17(a), but which are subject to registration and exemption under section 17(b), and permit such carriers to operate during such five-day period without registration?

2. May a nonresident motor carrier vehicle which is entitled to exemption from

registration under said section 17, avoid the necessity of securing the permit provided for therein by operating in the State for a part of the five-day period, leaving the State before the expiration of such period, later returning for a brief period and operating without securing such permit; in brief, does each entry into the State initiate a new five-day period within the current year?

3. Does the failure to secure a nonresident permit under said section 17 by an operator entitled thereto within the five-day period work a forfeiture of the right thereto?

4. Where another State exempts only one class of nonresident motor carrier vehicles from registration and requires the registration of other classes of such carriers falling into either one or both of such classes as defined in the Nevada Motor Carrier Licensing Act of 1933, as amended, does the language of subdivision b-2 of said section 17 authorize only the exemption of the class exempted by the other State, or does it require the exemption of all classes of the other State comparable to the classes defined in the Nevada law?

5. Does said section 17 apply alike to nonresident motor carriers engaged in interstate carriage and nonresident motor carriers engaged in intrastate carriage?

6. Where a State exempts from registration a nonresident motor carrier of farm produce only purchased in that State, but requires the registration of all other nonresident motor carriers, does said section 17 require that all motor carriers from such State operating in Nevada be granted the nonresident permits authorized by such section, or only require the granting thereof to motor carriers of farm produce from such State operating in this State.

7. Before permits may be issued to a nonresident motor carrier pursuant to said section 17, must the conditions in the law of the home State of such carrier relating to the registration of nonresident motor carriers be coextensive with the conditions contained in said section 17, b-2, of the Nevada law with respect to (1) the period of time such nonresident may operate in Nevada, and (2) the exemption from payment of any registration fees?

8. Are nonresident motor carriers falling within the exemption clauses of section 3 of the Motor Carrier Licensing Act of 1933, as amended by chapter 156 Statutes of Nevada 1939, entitled to the exemptions there provided when applying for permits under section 17(b) of the motor vehicle registration law?

9. Does a motor vehicle used in the carrying or towing of another motor vehicle in "motor convoy carriage" as defined in sections 2(g) and 18(3) of the Motor Carrier Licensing Act of 1933, as amended by chapter 152 Statutes of Nevada 1937, occupy the same status as any other motor carrier vehicle with respect to the reciprocity granted by section 17 of the motor vehicle registration law?

10. Does the fact that a foreign corporation, qualified to do business in this State, owning and operating motor vehicles stationed in this State and used in the carrying on of its business in this State entitle it to reciprocity under said section 17, where the law of the domicile of such corporation requires the registration of such motor vehicles used in such State by foreign

corporations?

11. Does the qualification in this State of a foreign corporation pursuant to law relating thereto of this State render its motor vehicles operated wholly or partly in this State, subject to resident motor vehicle registration?

NOTE--The following opinion is not to be construed as an opinion on the Motor Carrier Licensing Act administered by the Public Service Commission, except insofar as it may be necessary incidentally to apply it to such Act in construing section 17 of the Motor Vehicle Registration Act.

OPINION

Answering Query No. 1. Section 17(b) of the motor vehicle registration law of 1933, as amended at 1937 Statutes, page 332, provides that all nonresident operators of the motor carriers there mentioned “may, upon compliance with the provisions of sub-paragraph ‘(a)’ of this section, operate said motor vehicles upon the highways of this State without *obtaining* the registration license or license plates and paying the fees required by this Act,” upon the conditions thereafter set forth in section 17(b) (1 and 2). Section 17(a) provides “that the nonresident owner of such vehicles shall, within five days after commencing to operate or causing or permitting it to be operated within this State, apply to the department, or a duly appointed assistant, for the registration thereof on an appropriate official form,” which application leads to the granting of the nonresident permit. The foregoing quoted language of section 17(b) and 17(a) is clear. The nonresident operator of a motor carrier vehicle is by section 17(b), provided the conditions set forth in subdivisions 1 and 2 of sub-paragraph (b) are met, directed to comply with sub-paragraph (a) of section 17. The time in which such nonresident operator must so comply is expressly stated in sub-paragraph (a). It is clear that the nonresident seeking reciprocity under section 17(b) has the same time in which to comply with the law as the nonresident seeking reciprocity under the provisions of section 17(a).

Answering Query No. 2. Section 17(a) of the motor vehicle registration law requires the application for a nonresident motor vehicle operator’s permit to be applied for within five days after commencing to operate in this State. Such section limits such operations to the then current year. Sections 17(b) and 17(b-1) contain the same requirements, either expressly or by the most evident implication. A failure to apply for such permit within the time provided in the law will, in our opinion, forfeit such operator’s right to such permit. The requirement to apply for such permit within the statutory time is mandatory and is one of the conditions that must be met in order to satisfy the statutory conditions providing for registration reciprocity. It was not and is not the legislative intention that a nonresident motor carrier operator could nullify this express provision of the statute by initiating a new five-day period of exemption from the application of the law during a current year by coming into and operating in the State for a period of time less than the five-day period, then leaving without complying with the law, then returning during the same year and then claiming an additional five-day period within which to comply with the mandatory provisions with respect to the time element. To do so would be to do indirectly what such operator could not do directly. The law, in our opinion, provides for only one entry into the State during a current year under the five-day period of grace, and provides a time limit after such

entry within which to perfect the reciprocal exemption provided in said section 17. This office so held in an analogous situation under a prior carrier licensing Act. Opinions Nos. 76 and 81. Report Attorney-General 1931-1932.

Answering Query No. 3. It is clear from the answer to Query No. 2 that Query No. 3 be answered in the affirmative.

Answering Query No. 4. The language of subdivision 2 of said section 17(b) provides the conditions that must appear in laws of the State of the domicile and registration of the nonresident motor carrier operator seeking a permit to operate his motor vehicle in this State. We think such language is all inclusive and requires that the law of such home State of the nonresident operator shall extend the same measure of reciprocity to a Nevada operator as the Nevada law provides for such nonresident in a like situation and *for like carrier services*, and that if one of the classes of motor carriers defined in the Nevada law is denied reciprocity in registration by such home State, a nonresident motor carrier from such State coming within such classification is not entitled to a nonresident permit under the law of this State.

Answering Query No. 5. Section 17 contains no language drawing a distinction between nonresident motor carriers engaged in interstate carriage and nonresident motor carriers engaged in intrastate carriage. It is our opinion that both come within the statute.

Answering Query No. 6. The answer to Query No. 4, above given, is applicable to Query No. 6.

Answering Query No. 7. Section 17 in its entirety certainly provides for a period of time coextensive with the portion of the current year remaining after application for the nonresident permit. There is no limitation. Such section provides that no license fees shall be paid by the nonresidents coming within its terms. Subdivision 2 of section 17(b) contains the express provisions that must appear in the law of the home State or the State of the principal place of business of the applicant before he may invoke section 17 in his behalf. Those provisions are (1) that the laws of such State "do not require registration of such motor vehicle therefor from residents of this State," and (2) do not require "payment of fees therefor from residents of this State," where residents of this State engage in like carrier services in the State of such nonresident. It is clear that the conditions imposed by the above Nevada law must be met by the law of the applicant's home State before the Nevada law will apply to the applicant. There is no exception contained in the Nevada law permitting of a deviation from its explicit requirements as to reciprocity. The inquiry is answered in the affirmative.

Answering Query No. 8. The language providing the exemptions in section 3 of the Motor Carrier Licensing Act is "None of the provisions of *this act* shall apply to," then follows the specifically named carriers and services. Section 3, Carrier Act, as amended at 1939 Statutes, page 227. The exemptions thus provided pertain only to the operation of the statute in which they are incorporated. Such exemptions do not apply or pertain to motor carrier vehicles as mentioned in section 17(b) of the motor vehicle registration law. That section relates to such vehicles as *defined* in the Motor Carrier Licensing Act, not to them as excepted in such Act.

Such vehicles are not entitled to exemption under section 17(b) if they do not otherwise come within its terms.

Answering Query No. 9. A motor vehicle used in the carrying or towing of another motor vehicle in motor convoy service or carriage, as such carriage is defined in section 2 and as amplified in section 18 of the Motor Carrier Licensing Act of 1933, as amended at 1937 Statutes, pages 337, 341, in our opinion, occupies the same status as any other motor carrier vehicle covered by such Act with respect to the application of section 17(a) and (b) of the motor vehicle registration law in the matter of reciprocity.

Answering Query No. 10. A foreign corporation, qualified to do business in this State, owning and operating motor vehicles stationed in this State and used for purpose of carrying on its business in this State as well as in other States, is, in our opinion, to be deemed a resident within the meaning of the said section 17(a) or 17(b). Foreign corporations may be domiciled in one State and resident of another. Its legal domicile in the State of its creation presents no impediment to its residence in a real and practical sense of its business activities. *International Mill Co. v. Columbia Transp. Co.* 292 U. S. 511.

It may be said of a foreign corporation that the term may relate to it as a resident of the State of its incorporation, but the general rule of law is that for certain purposes a practical residence within a jurisdiction may be and is considered apart from legal residence or domicile of the corporation, and that a foreign corporation and nonresident corporation are not synonymous terms, and that a foreign corporation may so establish its business within a State so as to acquire a special or constructive residence so far as to be charged with taxes and kindred obligations under the laws of a State other than the State of its domicile, 23 Am. Jur. 47, sec. 36.

Under the conditions disclosed by the instant inquiry we conclude that such foreign corporation is not entitled to the reciprocity provided in section 17(a) or section 17(b).

Answering Query No. 11. The mere qualification of a foreign corporation under the laws of this State does not render its motor vehicles subject to registration and the payment of fee therefor. Such corporation, in our opinion, must go further and establish its "doing of business" within the State with its motor vehicles so as to constitute a constructive residence within this State. See answer to Query No. 10 above.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

MALCOLM McEACHIN, Secretary of State, Carson City, Nevada.

Primary election law requires instruction on primary ballot of "vote for one" for the office of District Judge or Justice of the Peace.

CARSON CITY, August 5, 1940.

HONORABLE JOHN W. BONNER, District Attorney, Ely, Nevada.

DEAR MR. BONNER: Reference is hereby made to your letter of August 1, 1940, requesting an opinion upon the question of whether the primary election ballot relating to the office of Justice of the Peace and the office of District Judge should contain in the "instructions to voters" the designation "vote for one" or the designation "vote for two."

An examination of the primary election law discloses that in section 2415, Nevada Compiled Laws, 1929, as amended at 1935 Statutes, page 14, it is provided that in the instructions to voters printed upon the ballot, the designation "vote for one or vote for two or more, according to the number to be elected to such office at the ensuing general election." This language clearly means that at the primary election voters voting for a candidate for the office of Justice of the Peace or for District Judge shall vote for one of the candidates to be elected at the ensuing general election. We think the law is clear in this respect and that the instructions to voters with respect to the above-designated officers should contain the instruction "vote for one."

Yours very truly,

GRAY MASHBURN, Attorney-General.

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

B-6. Unemployment Compensation Law--Employment Service Division.

Labor Commissioner may consolidate reports of administrative officers of the department with respect to the Unemployment Compensation Division and the Employment Service Division. Labor Commissioner may not consolidate the fund accounts of the two divisions but must maintain the administrative funds thereof separately and earmark each fund for the purposes of its particular division.

CARSON CITY, August 13, 1940.

MR. R. N. GIBSON, Labor Commissioner, Carson City, Nevada.

Re Unemployment Compensation Administration Fund, Nevada State Employment Service Fund.

DEAR SIR: Reference is hereby made to your letter of August 9 inquiring whether,

under the Nevada Unemployment Compensation Law, you may consolidate as of July 1, 1940, all expenditure accounts, reports, and matters of a similar nature as they effect the Unemployment Compensation and Employment Service Divisions of the State of Nevada, providing such procedure meets with the approval of the office of the State Controller, and whether you may consolidate the fund accounts of the two divisions.

With respect to reports and matters of like nature required to be made to the proper Federal Bureau, I beg to advise that as to these matters we think the consolidation thereof lies wholly in the discretion of the administrative heads of the respective divisions, and particularly with you as Labor Commissioner where you find such consolidation to be practicable.

With respect to the consolidation of fund accounts of the two divisions, we think a different rule is applicable. A reference to section 13a of the Unemployment Compensation Law with respect to the administration of the Unemployment Compensation Fund, it will be found that the Legislature requires that all moneys in this particular fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State Treasury. Unless the law provides to the contrary, a special fund in the State's Treasury must be expended solely for the purpose for which it was created and no part of such fund can be expended for any other purpose and neither may the books of account show expenditures for any other purpose other than that for which the fund was created.

A reference to section 12b of the Unemployment Compensation Law shows that the Legislature has provided a special employment service account, which account, it is true, is created in the Unemployment Compensation Administration Fund. However, a reading of the particular section shows that this particular service account and, of course, the moneys therein is to be used for employment services only. In this particular employment service account are placed all moneys received by Nevada under the Wagner-Peyser Act. A reference to section 13b of said law discloses that in addition to the moneys received by this State under the Wagner-Peyser Act there shall be paid into the account all moneys appropriated by the State of Nevada for employment service as well as grants to the State under Title III of the Social Security Act. Thus the Legislature has by law earmarked moneys going to make up the employment service account and we think by so doing has, in fact, created a separate fund account from that of the unemployment compensation administration fund, and that the two funds are in effect to be kept separate and apart and each fund fused only for the designated purposes, which purposes are, in brief, unemployment service purposes payable only from the unemployment compensation administration fund, and employment service purposes payable only from the employment service account.

We conclude that the above-cited law does not permit of the consolidation of the fund accounts of the two divisions.

With respect as to whether expenditure accounts covering the Unemployment Compensation Administration fund and the employment service fund, we think that this is an administrative matter and that a single accounting system with respect to the expenditure of the

two funds may be had provided that if a single accounting system is provided, that each of the funds, or rather the expenditures therefrom, be properly earmarked so that no moneys in one fund or appropriated for one fund will be used for purposes of the other fund. In brief, that the accounting system be so arranged as to in fact show that expenditures for Unemployment Compensation division purposes are taken from that particular fund and that expenditures for Employment Service purposes are taken from the Employment Service Fund. And further, that such system show beyond question the appropriations made for each division from time to time as such appropriations are made. Of course, such accounting system as may be provided should meet the approval of the State Controller and, we think, also the approval of the State Auditor.

Yours very truly,

GRAY MASHBURN, Attorney-General.

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

B-7. Elections--Declaration of Candidacy.

Declarations of candidacy for office, nonpartisan and otherwise, must actually reach the office of the County Clerk before the time specified in the law expires in order to constitute a lawful filing of such candidacy. Mere deposit in the United States post office by the candidate prior to the expiration of that time, or even its arrival at the post office in the county seat prior to that time does not constitute a lawful filing for office or declaration of candidacy.

CARSON CITY, August 16, 1940.

HONORABLE MARTIN G. EVANSON, District Attorney, Hawthorne, Nevada.

DEAR MARTIN: Your mother has just brought me your letter of 16th instant addressed to "Attorney-General," and in which you ask for the written opinion of this office as to whether a candidate for the nonpartisan office of Justice of the Peace who deposited his declaration of such candidacy in the United States Post Office at a post office not at the county seat of the county on Friday before the time for filing such declaration with the County Clerk of the county ended at noon the immediately following day (Saturday), but his declaration of candidacy was not received by the County Clerk at his office in the county seat until the next succeeding Monday, which was after the time for the filing of such declaration had fully expired, is legally entitled under the law of this State, to have his declaration of candidacy for that office filing, although not received by the County Clerk until after the time for filing of such declarations had closed, and, in such a case, to have his name placed upon the official ballot for that office.

Much as I regret to do so, I am compelled by the law and the facts as stated above and by you in your letter to me of 16th instant, to hold, as I have already held in my telephone conversation with you, that it is the unqualified official opinion of this office that the declaration received in the office of the County Clerk after the time for filing such declarations had expired,

as above stated, cannot be legally filed or the candidate's name legally placed upon the ballot. When the law says that such declarations shall be filed with the County Clerk, or in the office of the County Clerk, within the time specified by law, it means exactly what it says. The place of filing is the office of the County Clerk, not the deposit of the declaration in the United States Post Office anywhere, *i.e.*, either in some other post office or even in the post office in the county seat. If it actually arrives in the office of the County Clerk after the expiration of the time of filing, then it cannot legally be filed or the candidate legally placed upon the ballot. Like all other candidates for nomination or office, this particular candidate had many, many days within which to make up his mind and actually file his declaration of candidacy in the office of the County Clerk. If he failed to do so, then the fault was his own, not the fault of the law and not the fault of the County Clerk or any other officer. The rule of law is well settled that, when a person deposits a thing, no matter what kind of a thing, in the United States mail, he makes the United States mail his own agent, not the agent of the County Clerk. In fact, it is fundamental that no other person can appoint some other person's agent. In other words, the County Clerk alone has the power to select his own agents, or to make other persons or means his agent or agencies.

Hoping this will serve your purpose and with best wishes, I am,

Sincerely yours,

GRAY MASHBURN, Attorney-General.

SYLLABUS

298. Fish and Game Law--Fee for Nonresident Larger Than Fee for Resident--False Representation Violates Law.

Fee for nonresident license is larger than for license to residents of State; and securing resident's license to hunt by false representation that applicant is resident of Nevada and paying the smaller fee required therefor by false representation is violation of State law, and is punishable as such.

STATEMENT

CARSON CITY, August 21, 1940.

Pursuant to your telephone request for the official opinion of this office on point of law to be presented to me in person by Mr. J. C. Savage, I am writing to give you the official opinion of this office on the point involved relating to the fish and game law of this State, particularly as to whether a nonresident who signs an application for a hunting license in which he states positively that he is a resident of this State and thereby secures a hunting license as a resident and at the smaller fee charged to nonresidents therefor, has violated the laws of this State. The particular instance involved as stated to me by Mr. Savage relates to the case of State of Nevada v. J. H. Cawley, in the Justice's Court at Winnemucca, Nevada.

INQUIRY

The particular question, as I understand it, on which you desire the opinion of this office is, in effect, as follows:

Is it a violation of the fish and game law of this State for a nonresident to secure a license to hunt in this State as a resident thereof, by falsely representing in his application therefor to the person issuing such license that he is a resident of this State and, by such false representation, obtain his license by paying the fee therefor which the law prescribes shall be paid by residents of this State, and which is much smaller than the fee charged nonresidents of this State for hunting licenses, the applicant being over the age of 14 years and not a person entitled to hunt or fish without first obtaining a license therefor?

OPINION

The fish and game law of this State expressly prohibits any person over the age of 14 years and not otherwise exempted from obtaining such a license, from hunting or fishing without a license therefor, and makes such hunting or fishing without a license a misdemeanor, as provided for in Nevada Compiled Laws 1929, section 3089. It further provides that such licenses shall be issued and delivered to the applicant by the County Clerks of the counties of this State or by any agent or agents designated by such County Clerks or by the County Fish and Game Warden or the Deputy Fish and Game Wardens "*upon application*" made by such proper applicants, as provided for in Nevada Compiled Laws 1929, section 3087, as amended by chapter 98, 1939 Statutes of Nevada, pages 103-104. In other words, the law requires that an *application* be made by the applicant for the license, and implies that said application be in writing. In fact, there is a printed form of application on the back of such hunting and fishing licenses to be signed by the applicant. That form of application so printed on the back of such licenses so issued and delivered to applicants who are residents of this State expressly states that the applicant is a bona fide resident of this State. In this particular case, the applicant signed that express statement that he was at the time he made the application a bona fide resident of this State. Nonresidents of this State are required to state in their applications for such licenses to be issued and delivered to them that they are not residents of this State. These statements as to residence or nonresidence in this State, as the case may be, constitute express representations made by applicants to persons issuing hunting and fishing licenses to guide such persons as to the fees to be charged for hunting and fishing licenses in this State.

Nevada Compiled Laws 1929, section 3088, as amended in 1933 Statutes of Nevada, pages 284-285, expressly provides that the fee for a fishing license so issued and delivered to a resident of this State shall be \$1.50, and the fee for a hunting license so issued and delivered to a resident of this State shall be \$2.50; and the same section also provides that the fee for a fishing license so issued and delivered to a nonresident of this State shall be \$3 and for a hunting license so issued and delivered to a nonresident of this State, \$10. From the foregoing, it will be seen that the fee for such a license issued and delivered to a nonresident of this State is much larger

than the fee to be charged residents of this State for similar licenses. By signing the statement of representation that he was a bona fide resident of this State, the applicant in the particular case obtained his hunting license for much less than he would have had to pay for it if he had truthfully and correctly represented that he was a nonresident of this State at the time the license was issued to him. In other words, by misrepresenting or falsely representing to the person issuing his license that he was a resident of this State as signed by him on the back of the license so issued and delivered to him, he defrauded the State and the Fish and Game fund thereof out of the difference between the statutory fee to be charged for licenses issued to residents and those issued to nonresidents.

There is no evidence in this case that the applicant could not read and write. In fact, his signature on the blank line on the back of the license under the false representation that he was a bona fide resident of this State at the time he applied for the license and it was so issued to him shows conclusively that he can write and is evidence that he can also read. The signing of any instrument or representation by a person who can read and write is conclusive evidence that he knew what he was signing, and that, if such an instrument or representation is in fact false or untrue, he knowingly, intentionally, and maliciously misrepresented the fact in the statement or instrument so signed by him.

From the foregoing it follows that, if the applicant, J. H. Cawley, or any other applicant for such a license misrepresented or falsely represented himself to be a bona fide resident of this State as shown by the statement signed by said Cawley on the back of the license so issued to him when he was making his application for such a license, when, in fact, he was not such a resident of this State at that time, but was a nonresident of this State, and by such a misrepresentation secured a license as a resident of this State at the fee provided by law for bona fide residents of this State, then he knowingly, intentionally, and willfully violated the fish and game laws of this State and should be punished as provided for in said section 3089.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

MRS. LOIS JOHNSON, Secretary Nevada Fish and Game Commission, P. O. Box 678, Reno, Nevada.

B-8. Foreign Insurance Companies--Tax on Insurance Premiums.

Foreign insurance companies authorized to do business in Nevada are subject to the tax provided in chapter 88 and chapter 187 of the Statutes of 1933.

CARSON CITY, September 9, 1940.

HONORABLE HENRY C. SCHMIDT, State Controller and Ex Officio Insurance Commissioner, Carson City, Nevada.

Re Prudential Insurance Company--Tax on Premiums.

Dear Henry:

Reference is hereby made to the letter of Byron D. Ehlers, Assistant Solicitor of the above-named insurance company, relative to the payment of taxes on insurance premiums under chapter 88 or chapter 187, Statutes of 1933.

This letter was submitted for the purpose of ascertaining whether Mr. Ehlers' position was correct in that under the 1933 Acts the insurance company would not have been or is not now liable for the tax in such acts provided. We note the objection is based upon the language in such Acts reading as follows:

A tax of one and one-half percent upon the amount of the gross premiums received upon its business done in this state.

It is noted that the company makes no objections to payment of the tax required under the 1939 Act, the same being chapter 64, 1939 Statute, wherein the relevant part of the law reads:

A tax of two percent upon the total premium income from all classes of business covering property or risk located in this state during the next preceding calendar year.

We are inclined to the view that the company is liable for the tax provided under the 1933 Acts. We base this view or opinion upon the case of Equitable Life Assurance Company v. Pennsylvania, 238 U. S. 143, wherein the Supreme Court held in an analogous case that a State may tax life insurance companies upon business done within the State and measure the tax upon the premiums on policies of residents of the State; and in estimating the amount of premiums, those paid by residents to foreign insurance companies outside of the state may be included without depriving such companies of their property without due process of law. The court further held that the Pennsylvania Act of 1895, levying a tax of two percent on gross premiums of life insurance companies received for business done within the State, does not amount to taxing property beyond its jurisdiction as to the premiums paid directly to a corporation outside of the State.

The Supreme Court of the United States reiterated this holding in a later case, to wit: *Compania De Tabacos v. Collector of Internal Revenue*, 275 U. S. 87, wherein the Court held that a foreign corporation doing business in the Philippine Islands, insuring goods in the Islands against fire, is a foreign insurance company, which was licensed to do business in the Islands, and the premiums paid are subject to taxation by the Philippine Government, even though the policy was executed and payments made in a foreign country where the assured had its headquarters.

We think the insurance company here became liable under the 1933 Acts.

Yours very truly,

W. T. MATHEWS, Deputy Attorney-General.

B-9. Radio Station Property and Franchise Taxable.

Although radio station KOH, Reno, Nevada, is engaged in interstate commerce, the Nevada Tax Commission may lawfully levy and collect nondiscriminatory taxes on its property and franchise as distinguished from the power to regulate it, as it does on interstate railroads and other public utilities engaged in interstate commerce.

The Nevada Public Service Commission may not, however, lawfully charge and collect a license fee from KOH for engaging in interstate commerce as it does, as that field has already been covered by the Federal Communications Commission and it has complete jurisdiction.

CARSON CITY, September 13, 1940.

MR. C. B. SEXTON, Chairman Public Service Commission of Nevada, Carson City, Nevada.

DEAR SIR: I received on 9th instant your letter to me of 7th instant to which you attached the letter of Mr. Wallie D. Warren, Manager, Station KOH, Reno, Nevada, to you of 6th instant, and to the latter of which he attached a written opinion of Honorable Alex Ashen, attorney for McClatchy Newspapers, dated 5th instant and addressed to Mr. Howard Lane, Business Manager, McClatchy Broadcasting Company and The Bee, Incorporated, in which opinion Mr. Ashen expresses his view that Station KOH is engaged in interstate commerce in transmitting messages by radio over and across State lines.

Mr. Ashen cites two somewhat recent cases so holding, one by the United States Supreme Court entitled Fisher's Blend Station v. Tax Commission, 297 U. S. 650; 80 L. Ed. 956, and the other by the United States District Court of the Eastern District of Kentucky entitled Whitehurst v. Grimes, 21 Fed. (2d) 787. I have examined and studied these cases so cited by Mr. Ashen, and am quite in accord with his opinion that such radio stations are engaged in interstate commerce; and, since Congress has covered the field by the former Federal Radio Communications law (now the Federal Communications Commission law), 44 Stat. at L. 1162, chapter 169, and the rules and regulations adopted by said Federal Commission completely covering and governing the situation, and KOH has a license from the Federal Communications Commission, the Public Service Commission of Nevada has no jurisdiction over Station KOH insofar as the business of transmitting messages, information, etc., by radio is concerned, as distinguished from its physical property and franchise (right to do business). This situation does not, however, prevent the Tax Commission of this State from levying nondiscriminatory taxes on the property and franchise of Station KOH, just as the Tax Commission assesses and levies taxes upon the property and franchises of interstate railroads and other public utilities engaged in interstate commerce.

The first above-mentioned case decided by the Supreme Court of the United States, *i.e.*,

Fisher's Blend Station v. Tax Commission, supra, arose originally in the State of Washington and related to the radio station maintained and operated by and under the name of "Fisher's Blend Station." It involved a tax levied by the Tax Commission of the State of Washington; and the tax so levied was what is commonly called an "occupation tax" measured by or based upon the *gross* receipts of Fisher's Blend Station from radio broadcasting from station to station within the State of Washington, and from stations outside of that State to or through Fisher's Blend Station, and from the latter to and through stations situated outside of that State, a business quite similar to that carried on by Station KOH. In fact, Fisher's Blend Station, like Station KOH, sold its radio time to local customers, political, commercial and otherwise, to broadcast over that station; and, also like Station KOH, it was of sufficient strength or power for its broadcasts to be heard outside of the State of Washington. The Supreme court of the United States dealt with the situation as if the time and radio service given by that station were commercial commodities, and the transportation thereof by radio as the transportation of commercial and other commodities by railroads operating in more than one State. The holding of the courts would, no doubt, be the same with reference to a similar business or transportation by Station KOH, and to the effect that Station KOH is engaged in interstate commerce.

The term "occupation tax" is quite similar in meaning to the usually accepted term "license," inasmuch as both the tax and the license fee are for the privilege of carrying on the business. The argument made by counsel for the Tax Commission of the State of Washington in that case was quite ingenious, and presented the question as ably, I believe, as it would be possible to present it. For the foregoing reasons, we are of the unqualified opinion that a fee imposed by the Public Service Commission for a license or certificate to Station KOH would be unconstitutional and void, inasmuch as that station is engaged in interstate commerce, as held by the United States Supreme Court in the Fisher's Blend Station case, and the field is fully covered by the Federal law, and that station has been licensed by the Federal Communications Commission to carry on that business, and any attempt by the State to regulate it through the Public Service Commission of this State, or otherwise, by requiring it to obtain a State license or certificate would constitute a possible conflict of jurisdiction in a matter which the Constitution of the United States leaves solely to the Federal Government through the Federal Communications Commission. If both the Federal and State Governments have a right to license or regulate any enterprise, they would both have the right to deny the license or to grant it. If one should grant the license or certificate and the other deny it, there would certainly be a conflict of jurisdiction; and while such a conflict would probably never arise, the law and decisions of the court are based upon the possibility that any conflict which could arise would, in fact, arise, and that it is the duty of the courts to prevent any such possibility of conflict.

While the Fisher's Blend Station v. Tax Commission case, supra, is almost directly in point, it is not so perfectly in point with our situation concerning Station KOH as is the case of *Whitehurst v. Grimes*, supra. The later case involves solely the question of the right of a State or a political subdivision of a State to require such a radio station to obtain a license and pay the license tax or fee imposed by ordinance for the operation of a radio station in the State or a municipality thereof. While the *Whitehurst* case was decided by Federal District Court, it follows so closely the reasoning in the Fisher's Blend Station case that it is unquestionably exactly in point with our situation relating to Station KOH, inasmuch as it deals solely with the

question of the right of the State or its political subdivisions to license the radio business and require the payment of a license fee therefor. It deals not only with commercial radio broadcasting stations, but also with amateur broadcasting, and holds expressly that “radio communications are all interstate.” It further holds that “this is so, although they may be intended only for intrastate transmission” basing its holding in this regard upon the fact that “interstate transmission of such communications may be seriously affected by communications intended only for intrastate transmission.” *Such communications admit and require a uniform system of regulation and control throughout the United States, and Congress has covered the field by appropriate legislation. It follows that the ordinance is void, as a regulation of interstate commerce.*”

Both cases, however, hold, either expressly or by strong implication, that the property (including the franchise or right to do business) of radio stations, situated within a state, are subject to nondiscriminatory taxation upon the same basis and to the same extent as are other public utilities operating in and through a State and out of or into another State, such as interstate railroads. It is clear from both cases that the Tax Commission of this State has jurisdiction to assess and levy and to require the collection of such nondiscriminatory taxes as are paid by other public utilities engaged in interstate commerce in the State. In the Whitehurst case, *supra*, the court expressly calls attention to the fact that the license fee, attempted to be imposed and collected in that case, was not a tax on the property of the radio operator, in the following language:

The tax provided (in that case) is not on the *property* of the radio operator, but on the *business* of radio broadcasting.

In the Fisher’s Blend Station case, *supra*, the United States Supreme Court commented upon its holding in the case of Utah Power and Light Company v. Post, 286 U. S. 165; 76 L. Ed. 1038, and used this language with reference to the question involved and the basis of the United States Supreme Court’s decision in that case:

This court held (in the Post case) that the operation *generating* electrical power, although virtually simultaneous with its *transmission*, is so distinct and severable from the operation of *transmission*, in interstate commerce, as to be the appropriate subject of a state tax.

In that case, the court held that the local generation of electrical power within the state, including the *generating property*, was subject to state taxation. While the United States Supreme Court declined to pass upon that question in the Fisher’s Blend Station case, *supra*, inasmuch as it was not involved in that case, it used the following language:

Whether the state could tax the *generation* of such energy, *or other local activity* of appellant as distinguished from the gross income derived from its business, it is unnecessary to decide.

But, as the Supreme Court had held that such local property and operation of generating

equipment, as distinguished from transmitting equipment was subject to State taxation in the Pfof case, it simply held in the Fisher's Blend Station case, that it was unnecessary, therefore, to decide the question in the latter case.

I assume that, if a small radio station should be established in Austin which was not powerful enough to transmit messages beyond the borders of the State, and it was unable to pick up radio messages transmitted from some other State and transmit them to its customers, the Public Service Commission would, in that event, have jurisdiction to license and regulate it and to issue the usual certificate of public necessity and convenience to it; but that question is not involved in dealing with Station KOH; and I doubt very much whether it would be possible to establish, maintain, and operate such an inefficient radio station.

You have referred me to section 7 of the Public Service Commission Act (Public Utility Law) which is section 6106 of Nevada Compiled Laws 1929 as amended by 1925 Statutes of Nevada, page 243, and 1928 Statutes of Nevada, page 58, giving the Public Service Commission jurisdiction over radio and broadcasting stations. The Legislature of this State could no more confer legal and constitutional jurisdiction upon your Commission to regulate radio broadcasting stations engaged in interstate commerce or interstate transmission of radio programs, information, etc., than it could legally confer jurisdiction on your Commission to regulate interstate railroads engaged in interstate commerce. Any attempt of your Commission to so regulate either would simply be, in my opinion, an unconstitutional act and beyond the powers of the State Commission.

You may use this letter as the official opinion of this office until such time as we have prepared and presented to you a formal official opinion of this office on the point involved.

Yours very truly,

GRAY MASHBURN, Attorney-General of Nevada.

B-10. Special Election Not a General Election.

Recall elections are special elections and should not be held as a part of a regular election, no matter whether such regular election be a quadrennial general election or a biennial election.

CARSON CITY, September 17, 1940.

HONORABLE JULIAN THRUSTON, District Attorney, Pioche, Nevada.

DEAR JULIAN: Your air mail letter to me of 11th instant reached my office on 13th instant; and I note you desire to know whether a recall election is a special election or may be had at the time of a regular election.

Recall elections are provided for in the constitution of this State, *i.e.*, article II, section 9.

which is section 50 of Nevada Compiled Laws 1929. Throughout that section of the Constitution, the election for the recall of public officers is referred to as a “special election.” The expression “special election” is used in that section at least five times; and, in fact the framers of that constitutional amendment seemed to be particularly anxious to make it as emphatic as possible that such recall elections shall be “special” elections, as I do not find the word “election” used anywhere in that section except as connected with the word “special” or in connection with the word “said,” which refers back to the expression “special election” theretofore used in that section. Not only are such recall elections referred to in said section of the Constitution as “special elections,” but there is absolutely no express provision in that section which provides either by express language or by implication, that a recall election may be held at the time of the regular election or at any other time except as a “special election.” It must be evident to all who are familiar with constitutional or statutory construction that, if the Legislature in proposing the amendment or the people in adopting it had intended that such recall elections might be legally had at any other time than as “special” elections, the section would have so provided.

Said section 9 of article II of the Nevada Constitution is in the following language:

Every public officer in the State of Nevada is subject, as herein provided, to recall from office by the qualified electors of the state, or of the county, district or municipality, from which he was elected. For this purpose not less than twenty-five per cent (25%) of the qualified electors who vote in the state or in the county, district, or municipality electing said officer, at the preceding election, for justice of the supreme court, shall file their petition in the manner herein provided, demanding his recall by the people; they shall set forth in said petition, in not exceeding two hundred (200) words, the reasons why said recall is demanded. If he shall offer his resignation it shall be accepted and take effect on the day it is offered, and the vacancy thereby caused shall be filled in the manner provided by law. If he shall not resign within five (5) days after the petition is filed, a *special* election shall be ordered to be held within twenty (20) days after the issuance of the call therefor, in the state or county, district or municipality electing said officer, to determine whether the people will recall said officer. On the ballot at said election shall be printed verbatim as set forth in the recall petition, the reasons for demanding the recall of said officer, and in not more than two hundred (200) words, the officer’s justification of his course in office. He shall continue to perform the duties of his office until the result of said election shall be finally declared. Other candidates for the office may be nominated to be voted for at said *special* election. The candidate who shall receive the highest number of votes at said *special* election shall be deemed elected for the remainder of the term, whether it be the person against whom the recall petition was filed, or another. The recall petition shall be filed with the officer with whom the petition for nomination to such office shall be filed, and the same officer shall order the *special* election when it is required. No such petition shall be circulated or filed against any officer until he has actually held his office six (6) months, save and except that it may be filed against a senator or assemblyman in the legislature at any time after ten (10) days from the beginning of the first session after

his election. After one such petition and *special* election, no further recall petition shall be filed against the same officer during the term for which he was elected, unless such further petitioners shall pay into the public treasury from which the expenses of said *special* election have been paid, the whole amount paid out of said public treasury as expenses for the preceding *special* election. Such additional legislation as may aid the operation of this section shall be provided by law.

In addition to and pursuant to the above-quoted section of the Constitution of the State, the 1913 session of the Legislature of this State enacted, and the Governor approved on March 26, 1913, a law supplementing and implementing said constitutional provision, 1913 Statutes of Nevada, page 400, which has now been compiled in and constitutes Nevada Compiled Laws 1929, sections 4864-4874, both inclusive, entitled "An Act to provide for the recall of public officers in the State of Nevada." In that Act the Legislature of this State definitely and expressly provided that such recall elections should be "*special*" elections. That law consists of the above-mentioned 11 sections, and in every section the recall elections provided for therein are referred to as "special" elections. In many of those sections the recall election provided for therein is referred to in every instance as a "special election." In fact, several times in each of several of said sections--in one of them at least four times. The only time the expression "general election" is referred to in the entire law seems to be in the last section thereof, *i.e.*, section 4874, which simply provides that the general election laws of the State shall apply to all such special elections insofar as they are applicable. This simply means that the law as to the regular election laws of the State, insofar as registration, the establishment of voting places, the number of election officers and the other machinery set up in the regular election laws for those purposes shall apply except where inapplicable.

There is absolutely nothing in either the Constitution or laws of this State which indicate or even hint that recall elections may be had at the regular elections held in this State or at any other election than "special" elections.

There are many differences between regular elections, either biennial or general, and "special" elections. There is a distinction between the two classes of election which is clearly recognized throughout the decision of the courts. They are both defined in the decisions of the courts and in textbooks and other authorities dealing with the general subject of elections. For a definition of each of these classes of elections, I refer to and quote from that very fine publication "American Jurisprudence," quite a recent publication on American Jurisprudence, as follows:

General Election Defined--A regular or general election is one which recurs at stated intervals as fixed by law; it is one which occurs at stated intervals without any superinducing cause other than the efflux of time. 18 American Jurisprudence, page 181, section 5; Robb v. Tacoma, 28 Pac. (2d) page 327. (Washington case); 91 A. L. R. 1010; Marsden v. Harlocker, 85 Pac. (Ore.) 328; 120 Am. St. Rep. 786.

Special Election Defined--A special election, on the other hand, is one that arises from some exigency or special need outside the usual routine, such as to fill a vacancy in office, or to submit to the electors a measure or proposition for adoption

or rejection. (Such as the recall of public officers.) *People v. Berkeley*, 102 Cal. 298, 36 P. 591, 23 L. R. A. 838; *Kelso v. Cook*, 184 Ind. 173, 110 N. E. 987, Ann. Cas. 1918E, 68; *Robb v. Tacoma*, 175 Wash. 580, 28 P. (2d) 327, 91 A. L. R. 1010; *State ex rel. Hunt v. Tausick*, 64 Wash. 69, 116 P. 651, 35 L. R. A. (N. S.) 802; *Kelso v. Cook*, 184 Ind. 173, 110 N. E. 987, Ann. Cas. 1918E, 68.

The Constitution and laws of this State relating to recall elections, definitely provide as follows:

After one such petition and special election (recall election) no further recall petition shall be filed against the same officer during the term for which he was elected, *unless such further petitioners shall pay into the public treasury from which the expenses of said 'special election' have been paid, the whole amount paid out of said public treasury as expenses for the preceding special election.* (italics ours.) Constitution of Nevada, article II, section 9, Nevada Compiled Laws 1929, section 4871.

Certainly the last above-quoted language from said article II, section 9 conclusively indicates that there is to be an expense attached to recall elections, and mandatorily requires that, if any second recall election be called during the term of office of any public officer, those signing the petition for the second recall election shall pay into the public treasury all of the expenses of the first recall election or any former recall elections. Certainly, it would be impossible to segregate the expenses incident to the recall election from the expenses incident to the regular election. Since that would be impossible, then it would be impossible to determine how much the petitioners petitioning for the second election or later elections should be required to pay into the public treasury for the privilege of filing the petition or petitions therefor.

Assuming that the successor of the officer to be recalled is also to be elected at the recall election, it should be kept in mind that such a situation would require 50% of the qualified electors, 25% of the qualified electors for the recall of the public officer and another 25% of such qualified electors on the petition nominating his successor, making a total of 50% of the qualified electors, inasmuch as Nevada Compiled Laws, section 4872 provides, in such a situation, as follows:

that no elector shall be qualified to sign any such nominating petition who shall have signed any petition for the recall of such officer for said special election.

This office has often held that bond elections were special elections and should not be held at the same time general elections for public officers are held. For the foregoing reasons, this office is of the unqualified opinion that recall elections (elections for the recall of public officers) are special elections and should not be held as a part of a regular election, whether general or biennial election.

Yours very truly,

GRAY MASHBURN, Attorney-General of Nevada.

B-11. Elections--Residence--Withdrawal of Party Nominee.

Absence alone without intention to remain permanently absent from place of former legal residence is not sufficient to show abandonment of such legal residence.

Abandonment of legal residence consists of both physical absence and an intention to live elsewhere permanently. Until such abandonment is shown by both these elements, a party nominee may not lawfully withdraw his or her candidacy for office.

CARSON CITY, September 17, 1940.

HON. ROLAND H. WILEY, District Attorney, Clark County, Las Vegas, Nevada.

DEAR MR. WILEY: I thank you sincerely for your letter of 12th instant concerning Miss Mazie Martin, and her attempt to withdraw her candidacy as the sole Republican nominee for Assemblyman in Clark County, and expressing your tentative views with reference to her right to withdraw, and with which you enclose a copy of her letter to County Clerk Lloyd S. Payne, of 10th instant.

I note that her reason for attempting to withdraw is stated in the following language: "This inability (to run for the office) is due to the fact that I (she) am now making my (her) residence in Washoe County and shall thereby become a disqualified elector of Clark County before the November election." I note also your statement as to her "abandonment" of her residence in Clark County to the effect that she "now resides" in Reno, Nevada, and that a vacancy exists "created by the abandonment of the nominee's residence in Clark County" and cite as the reason why you assume that she has abandoned her residence in Clark County that she is "physically present in Reno where she is now employed" (by the State) and the fact that she "now resides" in Reno.

I am still convinced that the evidence presented is not sufficient to establish the fact that there is a "vacancy in the Republican nomination," as distinguished from the office of Assemblyman. My reason for my opinion to that effect is that it is universally recognized that there are always two essential elements of residence, both of which must exist at the same time and during the entire time of the establishment of residence. It is also universally recognized that, in order to abandon residence there must be both absence from the former place of residence and also an intention to permanently make the home and residence of the party away from that place of former residence. Both the absence for the necessary time and such permanent intention not to return to the place of former residence, and to make the home and residence of the party in some other place must coincide and be co-existent for the entire period of time. It is quite universally held that a person continues to be a resident of the place where he or she has formerly established residence until he or she becomes a resident of some other place. There is no legal evidence that Miss Martin has established a legal residence for voting purposes in Washoe

County or at any other place than in Clark County. "Abandonment" of residence is just as much a question of law, governed by the facts, as is the question of the establishment of residence. Both such "abandonment" and such "establishment of residence" are questions for the Court, not for laymen, and not even for lawyers or District Attorneys, or the Attorney-General. Both "legal residence" and "abandonment of residence" are judicial questions which can be determined only by courts after having heard the evidence presented under oath. I am sure that Miss Martin is at least as intelligent and well informed as is the ordinary person; but it is a recognized fact that laymen do not know the essential elements of either the "establishment of residence" or the "abandonment of residence." I do not know how long Miss Martin has been absent from Clark County but doubt whether her use of the word "residence" in the second paragraph of her said letter to Mr. Payne was advisedly made and whether she really understood the significance of the word "residence" as used by her, especially in view of the fact that she said that she was then "making" her residence in Washoe County. I am quite impressed with the idea that she simply meant that she then resided, or lived, in Reno at the time, and there is a very pronounced difference between merely residing in a place and being a resident of that place. The word "reside" simply implies actual presence, probably temporary presence in the place, it does not even imply an intention to remain at that place permanently or for at least an indefinite period of time.

In view of the fact that the question of "abandonment of residence" is a judicial question which can be determined only by a Court of competent jurisdiction and in a proper proceeding, we cannot take Miss Martin's statement alone as determinative of that point, no matter how intelligent or well informed as a layman she may be. Even if she had stated positively that she had "*abandoned*" her residence in Clark County, that statement might not have been made by her with a full understanding of the importance of intention to abandon or to be a permanent resident of and make her home at some other place than Clark County. She might not have known the importance of searching her mind and determining from such a search whether there was in her mind a definite and absolute intention to become a permanent resident of Washoe County, or as the Supreme Court has said in the somewhat fictitious residence established for the purpose of a divorce, for "at least an indefinite period of time." I am sure, we are all agreed that residence for the purpose of voting is an entirely different matter from the somewhat unsubstantial element of "residence" for the purpose of suing for divorce. Residence for the purpose of voting is of quite a substantial and permanent nature, while that for the purpose of suing for divorce, as we use the word "residence" in that connection, is of quite an unsubstantial frail nature.

On the point that intent is to be determined from the acts of the voter rather than his or her words, I cite you to the following language from Ruling Case Law, Permanent Supplement, page 2589, section 47, paragraph 10, "INTENT AS GOVERNING.--The intent which is a factor in deciding where is the proper voting residence is intent as manifested by the voter's acts" not as manifested by what the voter herself may say. *Nelson v. Gass*, Ann. Cases 1915 C (N. D.) 796.

Also, to this language immediately following the above-quoted language: "The voter's own declarations are not result in loss of residence. I cite you again to *Nelson v. Gass*, supra.

While I do not like to volunteer my opinion to District Attorneys on points of law, I

thought that the situation was of sufficient importance, especially since I have been asked for it by telephone, to give the inquirer orally my view on the matter and since you had written me indicating you desired my opinion before I gave that opinion, although I did not receive your letter until after I had given that opinion orally on the point, I think it entirely proper that I give you my views in writing.

With best wishes, I am

Sincerely yours,

GRAY MASHBURN, Attorney-General.

B-12. Power Districts--Bond Required.

The law requires Colorado River Commission to require a good and sufficient indemnifying bond of power districts for the faithful performance of their contracts; and the commission may lawfully take into consideration in determining the sufficiency thereof the question of whether the property belonging to such districts is free from mortgages, liens or other encumbrances.

CARSON CITY, September 28, 1940.

ALFRED MERRITT SMITH, Secretary Colorado River Commission, State Engineer's Office, Heroes' Memorial Building, Carson City, Nevada.

DEAR MR. SMITH: I have just received your letter to me of today asking the official opinion of this office as to whether a bond of \$1,000 is a good and sufficient bond to be required of Overton Power District No. 5, in view of the fact that the Federal Rural Electrification Administration which financed the project has insisted upon section or article 9 of the tentative proposed contract between the State and the district be eliminated from that contract, because of the fact that the Federal agency insists that it have a first lien on the property of the district for repayment of the money advanced by it to the district, instead of the State or commission having a first lien on the property of the district to secure payment of the electrical energy furnished the district as provided for in said section or article 9.

Your letter states that the amount of electrical energy now being used by the district and furnished by the State from Boulder Dam Power Plant is "approximately \$450 per month," and that "For the month of August their payment was \$472.29, for 103,341 kilowatt hours for electrical energy" so furnished and used. It indicates that the reason the commission required so small a bond, *i.e.*, \$1,000, was that it had a lien on the property of the district as provided for in said section or article 9.

In the conversation which I have just had with you, you informed me that the amount of energy now being taken by the State from its generating agent, the City of Los Angeles,

Department of Water and Power, is sufficiently large that, in order to release the State from taking and paying for the amount of energy now being furnished by the State to the district, it would require a notice of six months before the State could require said generating agency to release it from paying for the amount of energy so being furnished to the district. In other words, if the district should cease to take energy from the State, then the State would have to continue to pay for the energy now being furnished the district for a period of six months before it could require said generating agency to take back that amount of energy and be released from paying for it, under the provisions of the State's contract with its generating agent. Probably a simpler statement of this situation is that, under said contract and the situation with reference to the district, a six month's notice of relinquishment could be required of the State by the generating agency before the State could compel its generating agency to take back the amount of energy now being furnished the district and thereby relieve itself of the obligation to pay its generating agency for it. Lawyers, in furnishing legal advice, such as the Attorney-General does in giving his official opinions on points of law, must always assume that the worst that could legally happen might happen, and give their legal advice and opinions accordingly. In other words, if the district should cease to take electricity without giving the commission six month's advance notice of its intention to do so, and if the State's generating agency should insist upon six month's notice of relinquishment from the State before releasing the State from its obligation to pay for such electricity, then the State would be legally bound to pay its generating agency, upon the basis of the present consumption of electricity by the district, \$450 per month for six months, making a total of \$2,700, or upon the basis of the district's August consumption of electricity, \$472.29 for six months, making a total of \$2,833.74, unless the State disposed of that electricity to some other consumer. At the same time, the State would not have any lien upon the property of the district after said section or article 9 is stricken from the State's contract with the district; and its recovery would, therefore, be limited to the amount (penalty) of the bond, *i.e.*, \$1,000. During that period of six months after the district ceased taking electricity, it would not be selling energy to its producers or consumers, or receiving any income from which it could pay even its average monthly payment, for the very simple reason that it would have no electrical energy to sell to its patrons or consumers. Since the Rural Electrification Administration would have a lien on all the property of the district and the district would not be receiving any income from electricity sold to its patrons or consumers, as above indicated, it seems that about the only protection the State would have would be the district's bond at present in the sum of \$1,000, unless the officers or patrons of the district would voluntarily, without any legal obligation to do so, contribute to the State through the commission the amount it had to pay each month to its generating agency. From this situation the members of the commission can very readily determine whether \$1,000 is a good and sufficient bond to require of the district.

The law of this State requiring that power districts such as the Overton Power District No. 5, and other consumers of electrical energy furnished by the State through the Colorado River Commission, insofar as applicable to such situations, is contained in chapter 71, 1935 Statutes of Nevada, page 150, section 7, and reads as follows:

Said commission shall hold and administer all rights and benefits pertaining to the distribution of the power in this act mentioned for the State of Nevada, and is hereby empowered to lease, sublease, let, sublet, contract or sell the same on such terms as

such commission shall determine; *and provided further*, that every applicant for power to be used within the State of Nevada shall, before said application is approved, *provide an indemnifying bond* by a corporation qualified under the laws of this state, or other collateral, approved by the state board of examiners, payable to the State of Nevada *in such sum and in such manner as the commission may require, conditional for the full and faithful performance of such lease, sublease, contract, or other agreement.*” (Italics mine.)

The language used in laws requiring the giving of bonds and designating the nature and amount of the bond, is usually to the effect that any bond required shall be a “*good and sufficient*” bond. In this particular instance, the language employed is to the effect that the bond required shall be an “indemnifying bond” and that it shall be “for the full and faithful performance” of the contract. It is my opinion that the language employed with reference to the bond required, as above quoted, *i.e.*, “indemnifying” and “full and faithful performance” requires the same kind of a bond and in the same amount as it would require if the language employed was “good and sufficient bond.” Certainly, everyone familiar with the purpose of requiring bonds will concede that a “good and sufficient bond” is a bond in which the surety is financially sound and able to respond in damages sustained to the extent of the bond and that the amount (penalty) of the bond shall be ample to cover all loss or injury which might possibly be sustained by a failure of performance of the obligation in the particular case. It is my unqualified opinion that the language above quoted making it mandatory that the commission require a bond before furnishing electrical energy to a contractor, *i.e.*, “indemnifying bond” and “for the *full* and faithful performance” of the contract requires the giving of the same kind of a bond and in the same amount or penalty which would be required if the language used were “good and sufficient bond”; or in other words, that the language used, as above quoted, makes it mandatory that the commission require the district to give a good and sufficient bond for the *full* and faithful performance of the contract. In determining the amount of the bond to be required, the commission should consider the situation which would arise if the district suddenly ceased to take electrical energy and the generating agency required six month’s notice of relinquishment before releasing the State from its obligation to pay for the electricity furnished the district at the rate and in the amount contracted for by the district and the State through the commission was unable to dispose of that electricity elsewhere during said period of six months.

It is not for the Attorney-General to determine what the amount of the bond which the commission should require the district to give should be. That is a matter of policy for the commission itself to determine. The Attorney-General can only advise the commission as to what the law is on the subject. On this point, it is my unqualified opinion that the bond required should be good and sufficient and ample to protect the State against any loss it might possibly sustain. What is good and sufficient and ample is a matter of policy to be determined by the commission upon a careful consideration of the above-mentioned conditions.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

B-13. School Trustees--Duty to Furnish Instruction.

It is the duty of local school boards to furnish instruction to children in the seventh and eighth grades who have reached those grades in the course of their education and who reside in their school districts.

CARSON CITY, October 4, 1940.

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

DEAR MISS BRAY: I have your letter to me of the first instant asking the opinion of this office as to whether a board of school trustees of an elementary school district may legally limit the number of grades to be taught in that school so as to eliminate the seventh and eighth grades, or other grades coming within that classification of schools when there are pupils in the district coming within the grades sought to be eliminated and who, with their parents, desire to attend school in that district and receive instruction in such grades.

Your letter states that the children to be taught in the school district involved are all Indian children, and that the board of trustees deem it for the best interests of the pupils to limit the school in that particular district to the first six grades and send the seventh and eighth grade pupils to a nearby Government Indian school where they will be housed, clothed, fed, and taught at no expense at all to the school district in which the children actually reside and where they could receive "more practical instruction along the lines of vocational education than the local school district could offer"; and that some of the parents residing in that school district who have children of compulsory school age in the seventh and eighth grades "requested" that their children be given instruction in those grades in the local district school rather than have them sent to the Government Indian school, as they desire to have their children at home.

As stated to you orally by telephone two or three days ago, it is my unqualified opinion that if the parents of these children *insist* that their children attend the local elementary school at home, it is the duty of the local school district board to furnish instruction to them in the seventh and eighth grades at the local elementary school, especially since it would seem that in a small school, such as the one involved, instruction in the seventh and eighth grades could be furnished these particular children at little or no extra expense to the school district. In addition to this, the elementary school district would receive more school money with which to support the school, as the amount of such money is based, to some extent, upon the daily attendance of pupils.

As a matter of policy, however, it does seem that it would be of considerable advantage to these particular children and to their parents for the children to be sent to the Government Indian school as they would there be "housed, clothed and fed" and furnished instruction in vocational education not provided in the local elementary schools. I suggest, therefore, that as a matter of policy and the welfare of the children, the members of the local school board discuss this matter thoroughly and in a friendly manner with the parents of these seventh and eighth grade pupils.

Yours truly,

GRAY MASHBURN, Attorney-General.

B-14. Initiative Petition and Legislation--Number of Electors Required.

The Constitution and statutory laws of this State require only that such petitions be signed by qualified electors equal in number to 10 percent of the whole number of votes cast for Justice of the Supreme Court at the immediately preceding general election.

CARSON CITY, October 4, 1940.

HON. JOHN DAVIDSON, Legislative Assemblyman, Reno, Nevada.

DEAR MR. DAVIDSON: I received on the second instant your letter to me of the first instant asking the official opinion of this office on this question:

How many signatures are required to place a bill in operation under the Nevada Compiled Laws 1929, sections 2570 to 2580, both inclusive?

The above-mentioned sections constitute the statutory law of this State relating to "initiative legislation." The constitutional provisions for such initiative legislation are contained in Nevada Compiled Laws 1929, sections 205-207, both inclusive; and the provisions of the said statutory law accord quite closely with the provisions of the above-mentioned constitutional provisions. I assume you mean by your expression "to place a bill in operation," to authorize the initiative bill to be filed with the Secretary of State and placed initially before the Legislature. Upon that assumption, your question is, in effect, as follows:

How many signatures of qualified electors of this State are required on a petition, or petitions, for an initiative law before the same may be legally filed with the Secretary of State and transmitted by him to the next succeeding Legislature of the State?

Your reference to, and quotation from said section 2570 and your reference to the fact that said section 2580 contains "a qualification," indicates that you believe there is at least the inference of an inconsistency or contradiction in the qualification in said section 2580 with the quoted provisions of said section 2570. It is the unqualified opinion of this office that there is no inconsistency in the provisions of the two sections. It might be considered that the language of said section 2570, quoted by you, when taken alone, might mean that "at least 10 percent of the qualified electors" of the entire State, as determined by the official register of the qualified voters of the entire State, or as determined by the number of qualified voters voting for some State officer, without designating the particular officer contemplated, is required. To avoid the confusion which might result from the lack of a measuring stick by which said 10 percent of the qualified electors should be calculated, the Legislature of this State, in said section 2580,

provided that measuring stick by saying that said 10 percent shall be based upon, or measured by, the “whole number of votes cast for justice of the supreme court” at the general election last preceding the filing of any (the) initiative petition. In other words, the legislature of this State made it definite and certain that the 10 percent of the qualified electors necessary to propose state legislation by initiative petition or petitions mentioned in said section 2570, shall be 10 percent of the “whole number of votes cast for Justice of the Supreme Court” at the last preceding general election. In view of the fact that the number of votes cast for state officers in any election always varies, said section 2570, when considered alone, would present a somewhat uncertain and indefinite basis for the calculation of the 10 percent of the qualified electors required on such a petition or petitions. It was evidently for that reason that the Legislature selected the number of votes cast for one certain State officer, *i.e.*, the Justice of the Supreme Court upon which to base the said 10 per cent of the qualified electors necessary to initiate such legislation. You will observe that practically all of the constitutional and statutory provisions requiring any certain percent of the qualified electors as the basis for action, mentions the number of votes cast for some particular State officer, usually justice of the Supreme Court or Congressman, as the basis upon which that percentage is to be calculated; otherwise, there would be difficulty in determining the basis of such percentage calculation and confusion would result.

It is a fundamental rule of construction that, in construing statutory provisions the whole Act must be considered and the construction must be such that every provision of it must be reconciled, if possible, and given effect. When this rule of construction is applied to the whole initiative Act, said sections 2570 to 2580, both inclusive, we find no inconsistency or contradiction between the provisions of said section 2570 and section 2580, one stating the percentage of votes required and the other the officer upon whose vote that percentage shall be calculated or based. In other words, the 10 percent of qualified electors mentioned in said section 2570 is 10 percent of the “whole number of votes cast for Justice of the Supreme Court” at the last preceding general election.

The Supreme Court of this State has passed upon the identical question involved in a consideration of this question in the case of State v. Brodigan, 44 Nevada, 306, from which I quote as follows:

It is conceded by all that a petition signed by qualified electors who in number equal ten per centum of the whole number of votes cast for justice of the supreme court entitles the same to be filed by the secretary of state. Of the correctness of this view there seems to be no doubt. State v. Brodigan, 44 Nevada, 312.

The syllabus, paragraph two, while not the decision of the Supreme Court, was probably prepared by a member of the Supreme Court, and is somewhat more explicit than the above-quoted language from said page 312.

May I also call your attention to the express language of said section 207, which is section 3 of article XIX of the Nevada Constitution, as follows:

The whole number of votes cast for justice of the supreme court at the general

election last preceding the filing of any initiative petition shall be the basis on which the number of qualified electors required to sign such petition shall be counted.

Certainly, no one will contend that even the Legislature has constituted authority by statutory enactment alone to legally amend, change, or alter the express provisions of the Constitution. In fact, said article XIX of the Nevada Constitution is quite as full, complete, and specific as is the statutory initiative law; and the above-quoted language certainly makes it definite and certain that the basis of the calculation of 10 percent of qualified electors is the "whole number of votes cast for Justice of the Supreme Court" at the last preceding election.

From the foregoing, it is the unqualified opinion of this office that the names of qualified electors of this State, sufficient in number to amount to 10 percent of the "whole number of votes cast for Justice of the Supreme Court" at the last general election is sufficient to authorize the legal filing of said initiative petition, or petitions, and to place the same before the Legislature of this State at its 1941 session; and that that percentage of such qualified electors so voting is required for such filing and presentation to the Legislature.

You may consider this letter as the official opinion of this office, but we reserve the right to prepare and file a more formal opinion later if we believe it advisable to do so. I have adopted this method of handling it by letter because of the fact that letters require less time than to prepare a formal official opinion and you have asked for our opinion as soon as conveniently possible.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

B-15. Motor Vehicle Carriers.

Exemption statutes must be strictly construed against the person claiming the exemption and in favor of the public. Under set of facts in inquiry, claimant does not come within the exemption of section 3, chapter 153, States of Nevada 1939.

CARSON CITY, October 17, 1940.

Public Service Commission of Nevada, Carson City, Nevada.

GENTLEMEN: You recently requested an opinion of this office on the following problem:

Peterson Brothers own ranch property in Star Valley Nevada. They purchase bull calves from midwestern States and transport them to Star Valley where they are kept for two to six months at which time they are offered for sale among Elko and White Pine County stockmen. Peterson Brothers likewise exchange and trade livestock, and also haul livestock sold on their

ranch to their various customers, and in many instances, they repurchase their stock. The brothers claim that although they haul these cattle for their customers, they do it without profit to themselves and simply as an accommodation.

Under this set of facts, are the Petersen Brothers exempt from the payment of a private carrier's license to the Public Service Commission?

In our opinion, under this set of facts, the Petersen Brothers are not exempt from payment of a private carrier's license. The Motor Vehicle Carrier Act, as amended by chapter 156 of the 1939 Legislature, provides for the following exemptions insofar as pertinent to the problem before us:

SECTION 3. None of the provisions of this act shall apply * * * to the transportation of livestock and/or farm products to market by the producer thereof, or such producer's employee, or merchandise and/or supplies for his own use in his own motor vehicle; * * *

This exemption was upheld and declared constitutional in the case of Ex Parte Iratacable, 55 Nev. 263. At the outset, we should bear in mind the general rule as to the construction of statutory exemptions.

Those who seek shelter under an exemption law must present a clear case, free from doubt, as such laws being in derogation of the general rule must be strictly construed against the person claiming the exemption and in favor of the public. 17 R. C. L. 522; 27 C. J. 237; Erie Railway Co. v. Pennsylvania, 21 L. Ed. 595.

Under the above-mentioned set of facts, it appears to us that although the Peterson Brothers are farmers, once they engage in the business of buying and selling and once they make it a practice to haul cattle after sale from their place to the customers; and once they engage in repurchasing cattle, it appears very clear to us that they are not operating within the exemption. It is true that Peterson Brothers claim that their hauling activities are simply as an accommodation and without expense to the customers, but it seems to us that to allow this practice would be to permit them to do indirectly what they are forbidden to do directly. The mere fact that no direct charge is made for the hauling does not prevent the seller from considering such service in his sale price with the resulting escape from the necessity of purchasing a private carrier's license.

It is likewise to be noted that the exemption in question provides that the transportation of the livestock must be by the producer thereof. Strictly speaking, Peterson Brothers cannot be considered to be the producers of cattle purchased in a foreign State, hauled to their Nevada ranch and allowed to remain there for a period of two to six months. Therefore, in addition to the reasons noted above, we feel that Peterson Brothers cannot bring themselves clearly within the exemption and must therefore purchase a private carrier's license if they desire to continue their present practices.

Sincerely yours,

ALAN BIBLE, Deputy Attorney-General.

SYLLABUS

299. Elections--Method of Voting for Presidential and Vice Presidential Candidates.

The placing of two (2) crosses inside of the single square opposite the names of the Presidential and Vice Presidential candidates on the ballot, instead of one cross in that square, does not invalidate the ballot, although one cross in that square is sufficient; and the mere use of two (2) such crosses so placed does not necessarily constitute such a distinguishing mark as would render the ballot illegal. This is particularly true in view of the fact that the voters do not vote directly for the party nominees for President and Vice President, but only for their electors; and the placing of the names of the candidates for President and Vice President on the ballot is evidently for the purpose of distinguishing the electors for the particular party nominees for those offices.

INQUIRY

CARSON CITY, October 26, 1940.

Would it invalidate a ballot voted at or for the election in this State on November 5, 1940, if the voter voting it placed two crosses (X) in the single square opposite the names of the presidential and vice presidential candidates?

OPINION

Our answer to this question, without further qualifications, is definitely "no." The two crosses so placed would not alone necessarily make the ballot illegal at this time. It should be counted.

The proper and better method of voting for such presidential electors, however, is to put only one cross in the single square opposite the names of both such candidates. In other words, the one cross in the single square opposite the names of the candidates of the particular political party (Democratic or Republican) for president and vice president would be a vote by the voter for all three presidential electors of that particular party which immediately follow the names of the presidential and vice-presidential candidates of that party. That is the method of voting and of counting the votes for such electors contemplated by the 1939 Legislature of this State, as indicated by the following language quoted from said chapter 171, 1939 Statutes of Nevada, pages 252-253:

To vote for all of the electors of a party stamp a cross (X) in the square opposite the names of the presidential and vice-presidential candidates of that party. A cross (X)

stamped in the square opposite the name of a party and its presidential and vice-presidential candidates is a vote for all of the electors of that party, but for no other candidates.

The above words “a cross” is an expression which is in the singular number and indicates only one cross in the single square opposite the names of the candidates of the particular party for president and vice president. It is the clear intention of the Legislature, from the language used, that only one cross in each square (although the square be by the side of two names) is sufficient, and requires the election officers to count such a ballot as a vote for all three electors of the particular political party which they represent. It is true that this 1939 law request the voting in a group for all the electors of the particular political party. This fact alone should not render the 1939 law objectionable for this group method of voting for presidential electors has existed in this State for many years. (See Nevada Compiled Laws 1929, section 2473.)

The fact that one cross in the single square is sufficient does not necessarily mean, however, that two crosses in such a single square, one by the side of the name of the candidate for president and the other by the side of the name of the candidate for vice president, would in itself alone invalidate a ballot, or preclude its being legally counted as a vote for each and all of the three presidential electors for that particular political party; *provided*, there was no other mark on the ballot which would fall into the classification of a “distinguishing mark.” This is especially true at this particular time, because of the fact that said chapter 171 is a new law and sets up a new method of voting for presidential electors, and voters are accustomed to putting a cross in the square after the name of each candidate they intend to vote for. Many voters will, no doubt, believe they are voting directly for president and vice president and, since they desire to vote for both, will innocently place a cross (X) beside the name of each in the single square. Said chapter 171 amends a part of the so-called “Australian Ballot Law.” The Chief purpose of the Australian ballot law of this State is to safeguard the secrecy of the ballot and to prevent coercion, bribery, and fraud in elections by providing such a method of voting that other persons would not know from the face of the ballot how or for whom a particular voter cast his vote.

There will, no doubt, be so many ballots cast in this election under this new and peculiar method of voting by placing two crosses in said single square, and there are so many other and better “distinguishing marks” or methods of distinguishing his vote, and the chances are so remote that such a method would be adopted as the “distinguishing mark” for a particular ballot, that the mere fact that two crosses are placed in the same square, one beside the name of each of the candidates for president and vice president, would certainly not necessarily brand a vote so marked as a fraudulent vote or invalidate it. This is all the more true because of the fact that this law and method of voting is so new that many voters at the November election, will, no doubt, so mark their ballots, no matter how much instruction they may have not to do so. Certainly, such innocent mistakes, entirely devoid of fraud, should not invalidate such ballots and the consequent loss of such innocent voters’ rights to vote.

The question of what constitutes distinguishing marks has come before the Supreme Court of this State many times, particularly in the following cases: Dennis v. Caughlin, 22 Nev. 452, 29 A. L. R. 731, 58 Am. St. Rep. 761; Sweeney v. Hjul, 23 Nev. 409; State v. Sadler, 25

[Nev. 163](#), 83 Am. St. Rep. 573; [Lemaire v. Walsh, 27 Nev. 258](#); [Strosnider v. Turner, 29 Nev. 347](#); [Strosnider v. Turner, 30 Nev. 155](#), 133 Am. St. Rep. 710; [State v. Baker and Josephs, 35 Nev. 300](#); [James v. Stern, 44 Nev. 430](#).

The Supreme Court of this State in the above-named cases has pointed out many things which constituted, in those particular cases, distinguishing marks and invalidated the ballots containing such distinguishing marks, and also many things which did not, in those cases, constitute distinguishing marks and which did not invalidate the particular ballots. In *State v. Sadler*, supra, the Supreme Court stated the purpose of our Australian ballot law in the following language:

The chief purpose and object of the enactment of our Australian ballot law were to prevent fraud and corruption at elections;

and that purpose undoubtedly seems to have been the motivating influence in all of said decisions on the point since the enactment of that law. In *State v. Baker and Josephs*, supra, the court allowed as good certain questioned ballots upon the express ground that there was nothing on the fact of the ballots “indicating an intention to identify the ballot”; or, in other words, the irregularities involved were not such as to constitute identifying marks and thereby destroy the secrecy of the ballot as to persons other than the voter.

In striving to find some rule which is somewhat fixed and unvariable, we find the Supreme Court of this State, as well as the courts of last resort, refusing to adopt any such rule. In *James v. Stern*, supra, the Supreme Court declines to adopt a fixed and definite rule with reference to these matters in the following language:

It is conceded, or must be conceded, that no fixed or definite rule can possibly be prescribed for determining such question. (Page 434.)

At the top of the same page, the court uses this language:

A distinguishing mark, as contemplated by the law, has been declared by this court to be that, if an unauthorized mark is inadvertently placed upon a ballot by a voter, and is not of a character to be used readily for a corrupt purpose, the ballot should be counted, but that, if it is made deliberately and may be used as a means of identification, the ballot should be rejected. [Dennis v. Caughlin, 22 Nev. 447](#), 41 Pac. 768, 29 L. R. A. 731, 58 Am. St. Rep. 761, and note; 47 L. R. A. 824, note.

Then the court makes this comment and lays down this rule:

From this authority it follows that what constitutes a distinguishing mark is generally a question of fact for the trial court or jury, according as the trial may be had. It being a question of fact, we are of the opinion that, unless the marking is so apparent or conclusively identifying that we may say as a matter of law that the mark may be used for that purpose, the finding of the trial court upon such question is conclusive

on appeal.

On page 435 of *James v. Stern*, supra, in discussing a so-called “double cross in the square opposite the name” of a single candidate, the court said:

There is nothing about the particular mark that definitely shows it was intentionally made in such manner as to enable a third person to determine from an inspection of it, without further aid, that the same was deposited by a particular person. There is nothing about the marking to show that it was in fact used for corrupt purposes, or could be used readily for such purpose. The ballot was properly counted for Stern. (Pages 435, 436.)

From the foregoing the Supreme Court has definitely adopted the rule that the questioned mark on a ballot must not only have been “intentionally made” but must also have been made for the corrupt purpose or in such a manner as to “enable a third person to determine from an inspection of it (the ballot itself) *without further aid*” that the ballot was so intentionally marked “*to show that it was in fact used for corrupt purposes,*” or could readily have been so used.

In view of the fact that there will not doubt be many ballots cast at the November election, under this new law and new method of voting for presidential electors, which will have two crosses in the single square opposite the names of the candidates for president and vice president of each party (Democrats and Republicans alike), one beside the name of the candidate for president and the other beside the name of the candidate for vice president, the mere fact that two crosses are so used, without other distinguishing marks, certainly does not invalidate such ballots and certainly should not result in the loss of the right of such votes to vote and have their votes counted for presidential electors. Such ballots should certainly be counted by the election officers if otherwise regular.

It must be conceded that the Supreme Court of this State, out of an abundance of precaution against the invasion of the secrecy of the ballot and against corruption in elections, has laid down quite a strict rule in the above-mentioned cases; but the fact remains that all of said cases except *James v. Stern*, supra, were decided by the Supreme Court of this State prior to the enactment and approval of the 1913 election law of this State, which, among other things, requires a less harsh and strict construction of the law. In considering the effect of this amendment made in the 1913 law, it must be kept in mind that the case of *State v. Baker and Josephs*, supra, was decided in 1912, and that the Legislature of this State, at its very first session thereafter, made this amendment requiring a less harsh or strict construction of our Australian ballot law. This was done by adding the following language to what was then section 26 of chapter 5, Australian ballot law, but which is now compiled as Nevada Compiled Laws 1929, section 2486:

But nothing in this act shall be construed as grounds for the rejection of a ballot where the intention of the voter is clear and where marks on the ballot cannot be definitely shown to be distinguishing marks, characters, or words.

The above-quoted language having been added to our Australian ballot law so soon after the case of *State v. Baker and Josephs*, supra, certainly indicates that the Legislature intended the result thereof to be a less harsh construction of that law than had theretofore been given to it. It definitely and expressly prohibited the rejection of any ballot “where the intention of the voter is clear *and where marks on the ballot cannot be definitely shown to be intentional distinguishing marks, characters or words.*” This language definitely and expressly places the burden upon the election officers of ascertaining and determining that marks on a ballot were intentionally placed upon it by the voter as “intentional distinguishing marks” before they are authorized or justified in rejecting the particular ballot. The marks, characters, or words must have been placed on the ballot in question not only intentionally, but also for the express purpose of making them “intentional distinguishing marks.”

It is also interesting to note that as late as 1935 the Legislature of this State amended section 36 of our Australian ballot law, which is now compiled as Nevada Compiled Laws 1929, section 2473, by adding thereto this language:

Intent of Voter Recognized. Provided, however, that nothing in this act shall be construed to permit the throwing out of any ballot because the elector has marked X after the names of such candidates for president and vice president, though no space has been placed for such mark.

The last above-quoted language further evidences an intention on the part of the Legislature to require the application of a less harsh rule than had theretofore been expressed in the above-mentioned decisions of the Supreme Court of this State.

Although it has not been claimed that this new 1939 law violates any provision of the Constitution of the United States, it may be of interest to note that such a question of unconstitutionality could hardly be effectively raised, in view of the fact that the Congress of the United States has left the entire matter as to how, as distinguished from when, presidential electors should be selected solely to the various States. Constitution of the United States, article II, section 1, clause 2, *McPherson v. Blacker*, 146 U. S. Rep. 1, particularly pages 27 and 35, et seq.

The last above-mentioned case is the leading question on the subject, and is also reported in 36 L. Ed. 869; 16 L. R. A. 475; 31 Am. St. Rep. 587. See, also, 18 Am. Jur. Sec. 8, page 186, under the subject of elections.

Summarizing the foregoing opinion on the direct question asked in the inquiry, we are of the unqualified opinion that the placing of two crosses (X) in the single square beside the names of the candidates for president and vice president of a political party does not, in itself and without other fatal irregularities or distinguishing marks, invalidate a ballot so marked; and that such ballots should be counted by the election officers.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

HONORABLE MYRON R. ADAMS, Assistant District Attorney of Washoe County, Reno, Nevada.

B-16. Tax Exemptions.

In our opinion, minerals and whatever rights the State had in them are waived by the deeds and patents from the State and Federal Government and by the State and Federal laws authorizing the conveyance thereof, although the decisions of the courts are conflicting on this point.

CARSON CITY, November 1, 1940.

HONORABLE WAYNE McLEOD, Surveyor General and State Land Register, Carson City, Nevada.

DEAR WAYNE: I have had your letter to me of 25th ultimo under my personal consideration since it reached my office about 27th ultimo. Mr. Mathews having been too busy with a very important brief involving the right of this State to tax certain property in the State claiming exemption from taxation, all the time since your letter reached my office, and still being busy on that brief; and Mr. Bible having been out of the office giving legal advice to the members of the Colorado River Commission in their conferences with other interests in Los Angeles, for several days, and in Elko on a right of way suit for the Highway Department, since your letter arrived.

It is exceedingly important and pressing that we maintain the right to tax the above-mentioned property, as it would wreck the whole tax structure of the State and both your ability and mine to collect our salaries, unless we sustain that right, or adopt the aggravating policy of nuisance taxes which exist in all of the other States except Nebraska; and Mr. Mathews has therefore been working on the two briefs in this matter, both of which had to be filed today and had to be very long because of the exceedingly long briefs filed by opposing counsel, every minute of his time for the last month, except when people interrupted him without my knowledge to answer questions of little importance to the State as compared with the question on which he was working. It was just as important and pressing to sustain our position with reference to the Colorado River water and the power generated at Boulder Dam power plant, the matter in which Mr. Bible was engaged in Los Angeles, as that will bring to the State from the contracts being worked on there \$900,000 in taxes immediately and \$300,000 per annum for the next 47 years; and principally because of the fact that seven States and the interests of their water users are involved in the water question, and many, many times more are involved in the electrical energy matter. These conferences have required many, many months ranging over a period of almost six years. Everyone of these interests is fighting hard to obtain every advantage possible for themselves and their water and power users. We have already established, and they have admitted, our right to the \$900,000 in lieu of taxes as soon as new contracts made necessary by the recent Boulder Dam Power Adjustment Act to replace the old contracts have been whipped

into shape and signed by the interested parties. This is a matter not only of great importance to the State but of much pride to me, because I have personally conducted these negotiations on behalf of this office and the State for these payments to the State of Nevada in lieu of taxes, until I became so injured that I could not further attend these conferences and, therefore, had to substitute Mr. Alan Bible, Deputy Attorney-General, in my place. The contracts are under way and will soon be complete, but it is necessary to devote every moment of the time possible to these contracts, in order to have them completed as soon as possible, for the very simple reason that the State does not get the \$900,000 immediately or the \$300,000 each year for the next 47 years, until these contracts have actually been signed.

For the foregoing reasons, I have been trying to keep State officers and employees and others asking less pressing and important questions out of their offices for the past month, and attend to such matters myself, personally. I am sure you will readily understand from the foregoing how important and pressing it is that both Mr. Mathews and Mr. Bible devote all their time to the above-mentioned pressing matters. When the law and rules of court and court orders give a lawyer only a certain period of time within which to file briefs, they *must* be filed within that time, no matter if they have to work both day and night to get their briefs filed within that time. Otherwise, it is just too bad for the clients of the lawyer so failing to get their briefs filed within the time so given them. Of course, it is important that the State maintain its rights in both of these matters, and it is absolutely up to this office alone to do so.

For the foregoing reasons, I have been giving your letter of 25th ultimo my own personal attention; and I have to inform you that the questions presented are not easy ones by any means. They are questions that have been bothering the Courts ever since minerals were discovered within the boundaries of what is now this State. There are literally many decisions of the Supreme Court of this State and of the other States where mining is carried on, and all the Federal Courts in those States and even the Supreme Court of the United States. The decisions on the questions involved are exceedingly conflicting; and it is difficult to reconcile them in such a way as to get any steadfast, definite, and invariable rule out of them.

In fact, the matter was referred to this office three or four years ago by the Department of the Interior and Honorable Nathan R. Margold, Solicitor (lawyer) of that Department. After laboring over the matter for some time, we gave him an opinion based upon the last law of Congress, coupled with the last law of this State on the subject, in which it was held that the United States waived all its rights to minerals within the land when it issued patents or deeds for them, and the State also waived its rights to minerals within the land when it deeded the lands granted it by the United States to purchasers thereof. We backed up our quotations of these congressional and State laws by decisions of the courts to that effect. Mr. Margold, however, was inclined to a different view and feared that such a waiver of minerals did not exist by virtue of such deeds or patents. In fact, he doubted the right of either the Federal Government or State to make any such valid waiver, and cited a decision of the Federal Court; I believe it was a decision of the Supreme Court of the United States, expressing a different view from that expressed by us in our opinion to him.

His inquiry arose by reason of the fact that the Federal Government desired to establish a

bird refuge on some land (formerly a lake bed) in Elko County, on which there was a mining claim which had been located, in or near the lake bed at such a point that it would be covered by water after the bird refuge had been established, under the Federal and State laws governing such mining locations, and the locator had kept up his work since that time, and probably had obtained a patent to the mine.

I will have to look up this correspondence and read the cases cited both by us and by Mr. Margold at that time before I can write you a formal and dependable opinion on the points of your inquiry. The correspondence is somewhat old and we shall probably have to look it up in the basement, and this may take some time and the girls are exceedingly busy in the office on the above-mentioned two briefs.

Probably it will be sufficient for your purpose at present for me to say that we held to our former opinion as given Mr. Margold to the effect that such minerals and mineral rights were so waived by such deeds or patents. I assure you, however, that I shall prepare a more formal opinion and furnish it to you just as soon as we can look up this correspondence and examine the cases referred to in our correspondence with Mr. Margold and such other cases as we may find relating to these matters. In the meantime, we shall furnish you a copy of our correspondence with Mr. Margold, as soon as we find it and can make copies of it; and hope this letter and that correspondence will be sufficient, temporarily, to serve your purposes.

Very truly yours,

GRAY MASHBURN, Attorney-General.

B-17. Motor Vehicle Carriers.

Motor vehicle carriers engaged in business of hauling or transporting ore for hire are not town or city draymen so as to bring themselves within the exemption of section 3, chapter 156, Statutes of Nevada 1939.

CARSON CITY, November 12, 1940.

Public Service Commission, Carson City, Nevada.

GENTLEMEN: This is in answer to your letter of October 29, 1940, requesting an opinion as to the construction of section 3, chapter 156, Statutes of Nevada 1939.

This section, insofar as pertinent to your inquiry, reads as follows:

None of the provisions of this act shall apply * * * to city or town draymen and private motor carriers of property operating within a five-mile radius of the limits of a city or town; * * * nor to the transportation of contractor's own equipment in his own motor vehicle from job to job, nor to the transportation of ore or minerals or

mining supplies in the producer's own vehicle; *provided, however*, only one vehicle having an unladen weight not exceeding 15,000 pounds, or three vehicles whose combined unladen weight does not exceed 15,000 pounds shall be exempted for the transportation of ore or minerals or mining supplies * * *.

You state that in certain mining centers there are trucks engaged in the business of hauling ore and minerals for hire to mills within a five-mile radius of the town without first having secured a permit from the commission. Motor vehicle carriers claim that they are not required to secure a permit because they are exempt as city or town draymen.

In our opinion motor vehicle carriers engaged in the business of hauling or transporting ore for hire are not town or city draymen. The word "draymen," as we understand its use in the common and popular sense, is limited to the hauling of trunks, baggage, and miscellaneous freight around town and within a five-mile radius thereof. Formerly, draying was carried on in wagons drawn by horses. With the advent of the motor vehicle, such hauling was and is often done in small trucks. The Supreme Court of this State, in construing this exemption in the case of Ex Parte Iratacable, [55 Nev. 263](#), held as follows:

What we have said as to the taxicab exemption applies to a great extent to this class. In this connection, the Legislature no doubt took into consideration that usually there is quite a population just outside the city limits reached by public ways not a part of the public highway system, a few of whom occasionally have need of a drayman operating a light vehicle, who finds it convenient to use the public highways to a limited extent. Why should it be an arbitrary discrimination to exempt such and not exempt the Nevada Packing Company's fleet of heavy trucks which use the public highways every business day?

Obviously, the Supreme Court construed the word "drayman" in its generally accepted sense, and, by using the words "a drayman operating a light vehicle," did not consider it to mean heavy trucks hauling ore and minerals. In addition to the reasons noted above, the fact that the Legislature specifically allowed a 15,000 pound weight exemption to a vehicle hauling ore or minerals when it was operated by the producer himself, gives further insight to the legislative intent not to include the words "ore and mineral haulers" within the meaning of the word "draymen."

We accordingly hold that motor vehicle carriers transporting ore and minerals for hire within the five-mile limit of a city or town are not town or city draymen within the statute and are, therefore, not to be exempt.

Sincerely yours,

ALAN BIBLE, Deputy Attorney-General.

B-18. Easements--Vacation of Dayton Streets and Alleys.

Town of Dayton and county of Lyon did not acquire the ownership of the land utilized for streets and alleys in the town of Dayton but only acquired an easement therein; upon the vacation of such streets and alleys the easement was lost and the abutting owners acquired absolute dominion over the land covered by such easement for streets and alleys.

CARSON CITY, November 19, 1940.

HONORABLE RICHARD R. HANNA, District Attorney, Yerington, Nevada.

Re: Vacation of Dayton Streets and Alleys.

DEAR MR. HANNA: Reference is hereby made to your letter of November 15, 1940, concerning the vacation of certain streets and alleys in the town of Dayton, Lyon County, Nevada. It is noted that you particularly desire an opinion of this office as to whether the county of Lyon is entitled to be reimbursed for the streets vacated, that is to say, whether the fee is in the county and that the county has absolute ownership of the land now within the boundaries of the streets and alleys to be vacated.

We may say briefly that we think the petition submitted to the Board of County Commissioners requesting the vacation of the therein described streets is in proper form and complies with the law.

We have examined the authorities submitted in your memorandum with respect to the vacation of streets and alleys and also particularly as to the ownership of the land covered by such streets and alleys. After an examination of such authorities and other authorities by us, as well as the statutory law of this State, we are inclined to the view and here state that the town of Dayton and the county of Lyon never acquired the ownership of the land heretofore utilized for streets and alleys, but that all that was acquired was an easement thereon. Under the general law on the subject there seems to be no question but that when streets and alleys are vacated and an easement was only acquired by the State, county, or municipality, that upon such vacation, the abutting owners acquire absolute dominion over the land covered by streets and alleys when vacated.

It seems that the case of Shearer v. City of Reno, 36 Nevada 443, states the rule in this regard, and we think there has been no change in the law of this State since that decision, certainly not by statutory enactment.

Very truly yours,

GRAY MASHBURN, Attorney-General.

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

B-19. County Commissioners--Vacancy in Office--Person Elected to Fill Vacancy.

A person elected to fill the vacancy in the office of County Commissioner takes office on the first Monday in January following the November election at which he was elected to fill the vacancy.

CARSON CITY, November 19, 1940.

HONORABLE ERNEST S. BROWN, District Attorney, Reno, Washoe County, Nevada.

DEAR MR. BROWN: Reference is hereby made to your letter of November 15, wherein you advise a person was elected County Commissioner in Washoe County to fill the vacancy in the unexpired term of a deceased County Commissioner. WE note that your query is: When does the newly elected County Commissioner, *i.e.*, the person elected to fill the vacancy in the office, take office?

After due consideration of the statutes of this State on the question, we are of the opinion that it is covered by section 1935, Nevada Compiled Laws 1929. The last sentence of that section reads as follows: "Any vacancy or vacancies occurring in any board of county commissioners shall be filled by appointment of the Governor, and such appointee or appointees shall hold his or their office until the first Monday in January following the then next general election, except as provided otherwise in this act."

It would seem that the Legislature has specifically fixed the time in which a person elected to fill a vacancy in the office of County Commissioner shall take office, or in other words, the Legislature has fixed the time in which the appointee shall surrender the office in the event of the election of another person. We do not find any other statute which in our opinion qualifies the foregoing quoted provision of the law. We think that the person elected to fill the vacancy here is not entitled to take office until the first Monday in January, 1941.

Very truly yours,

GRAY MASHBURN, Attorney-General.

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

B-20. United States Senator, Number of Vacancies in Office of Where Death Occurs After General Election but Before Expiration of Current Term.

Where a person is elected United States Senator at the general election and dies prior to the beginning of his new term of office on the third day of the next succeeding January, two vacancies are created by such death, one for the term ending at the end of the current term of such decedent United States Senator on the third day of the first succeeding January following such election, and the other for the term beginning on said third day of January and ending at the first succeeding biennial or quadrennial general election held thereafter and the ascertainment and certification of the person so then elected.

Both such vacancies are filled by temporary appointments by the Governor. The vacancy for the remainder of said original new term of United States Senator so deceased shall be filled by election at such succeeding biennial or quadrennial election.

NOTE--Since my letter opinion of November 25, 1940, to Governor Carville not only supplements but also covers all the essential points dealt with in my letter opinion to him of November 14, 1940, except this language from the Twentieth Amendment of the Constitution of the United States, section 1:

SECTION 1. The terms of the president and vice president shall end at noon on the 20th day of January, and the terms of senators and representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

We are omitting the latter from our report and publishing only the former which is as follows:

CARSON CITY, November 25, 1940.

HONORABLE E. P. CARVILLE, Governor of Nevada, Carson City, Nevada.

DEAR GOVERNOR CARVILLE:

SUPPLEMENT TO OUR OPINION OF NOVEMBER 14, 1940

Supplementing our opinion of November 14, 1940, on the question of the filling of the vacancies created by the death of Senator Key Pittman in the office of United States Senator for his present term ending at noon on January 3, 1941, and for the new term of six years beginning at noon on January 3, 1941, and ending at noon on January 3, 1947, to which he was, no doubt, elected at the regular election this year, we desire to add the following, although we believe said opinion as originally written is both correct and complete in every particular, and we have had no occasion since that time to change our views as expressed in that opinion.

As on all other occasions, this office is concerned solely with the question of what is the law, not what it ought to be, nor with the question of whether it embarrasses anyone or whether it satisfies anyone at all, although naturally we always desire to please and to satisfy our people by our opinions when this can be done without any sacrifice of principle or any departure from the Constitution and law as written. We are not at all concerned with policy, but only with a determination of what the law actually is as written.

The purpose of this opinion is to comply with the promise implied in the last paragraph of my letter to you constituting my opinion of the 14th instant, to the effect that we would make a further research "and then advise you of our views and opinion in this matter," which is so important to our people. We have made such a further research and, as we believe, an exhaustive research, and have carefully studied the Constitution of the United States and the Constitution of

the State of Nevada, and all the laws on the points involved and all the cases of courts of last resort which we can find dealing with these points, both State courts and Federal courts, including the Supreme Court of the United States, as well as many of the contests for the office of United States Senator conducted in the United States Senate, and the Congressional Record relating to the seating of United States Senator Charles B. Henderson when he was appointed by Governor Boyle, of this State, to fill the vacancy created by the death of United States Senator Newlands of this State. We are still of the opinion that the only vacancy now existing is that in the present term of United States Senator Pittman, especially since the result of the election has neither been canvassed nor certified. We are also of the opinion that a vacancy in Senator Pittman's new term as United States Senator will exist at noon on January 3, 1941, and not until that time, and that such vacancy in said new term will continue thereafter for the entire term of six years, unless and until filled by temporary appointment by the Governor of this State at least until the next regular election held in this State for the election of State and other officers in November 1942, and possibly by election of the people at that time for the remainder of said new term from and after that election, a point which we shall discuss later.

That there will be a vacancy in the new term beginning at noon on January 3, 1941, cannot be questioned. The law is well settled on this point. We have examined many cases dealing with the subject and find that the rule is as stated in *Dobkins v. Reece*, 17 S. W. (2d) 81, that, where an officer was reelected but died before the expiration of his original term, and before qualifying for the second term, one appointed to fill the vacancy held only for the remainder of the unexpired term, when a new vacancy existed for the term to which the incumbent was elected, which the County Commissioners were authorized to fill by appointment.

The foregoing rule of law was expressly stated and followed in *Maddox v. York*, 54 S. W. 24; *Stocking v. State*, 7 Ind. 327; and many other cases in which *Maddox v. York* was followed with approval.

The Supreme Court of Nevada in *State v. Irwin*, [5 Nev. 111](#), passing upon the question of an anticipatory vacancy in office had occasion to define the word "vacant" and did so in the following language, which is supported by many more recent cases cited in note to that case in Nevada Digest, pages 133-135, inclusive:

There is no technical nor peculiar meaning to the word "vacant," as used in the constitution. It means empty, unoccupied; as applied to an office without an incumbent, there is no basis for the distinction urged, that it applies only to offices vacated by death, resignation or otherwise. An existing office without an incumbent, is vacant, whether it be a new or an old one. A new house is as vacant as one tenanted for years, which was abandoned yesterday.

Adopting the Court's illustration, certainly the new term for which the late Senator Pittman was elected will be a new house at noon on January 3, 1941. It will then be just as vacant as the old house is at this time, and under the law must be filled by a new inhabitant as of that date.

A more recent decision (March 17, 1927) of the Supreme Court of this State which sustains said decision of the Supreme Court of this State in *State of Nevada v. Irwin*, supra, as to what constitutes a vacancy in a new office or term of office, is the case of Ex Rel. Williamson v. Morton, 50 Nev. 145; 254 Pacific, 147, from the syllabus of which we quote as follows:

There being no constitutional provision authorizing county assessors to hold over until their successors are elected and qualified, under Const. art. 15, sec. 11, providing that the legislature shall not create office, tenure of which shall be longer than four years, office of county assessor becomes vacant at expiration of four years, even though no successor is elected and qualified.

As stated in my opinion of November 14, 1940, there is now a vacancy in the old or present term of the late Senator Pittman that may be filled immediately by appointment, which appointment if made will be for the remainder of the present term and only up to noon on January 3, 1941; and that there will be a vacancy in the new term beginning at noon on January 3, 1941. With respect to the filling of the vacancy in the new term, we have made exhaustive search of the authorities and find the following conclusions are unquestionably to be drawn therefrom:

That the Governor of Nevada is and will be legally empowered to appoint a suitable person to temporarily fill the vacancy in the new term of the late Senator Pittman, under and by virtue of the provisions of section 2593, Nevada Compiled Laws 1929. Said section 2593 is a part of an Act of the Legislature of this State expressly enacted by it in 1915 pursuant to the permissive power granted the Legislature by the Seventeenth Amendment to the United States Constitution, for the very purpose not only of providing a law for the election of United States Senators, but also to provide for the filling of vacancies temporarily in such offices when necessary. Section 2593 being enacted by express permission of Congress as expressed in the Seventeenth Amendment, we think it most necessarily follows that said section must be construed in the light of the language contained in such amendment, and not construed in the light of expressions of the Supreme Court of Nevada in cases dealing with purely local and State offices governed by the Constitution of Nevada. The Seventeenth Amendment, as quoted in my opinion of November 14, provides that the Legislature may empower the executive of any State to make "temporary appointments until the people fill the vacancy by election as the Legislature may direct." Any expression in a State law authorizing its executive to appoint a United States Senator, we think, must be qualified and limited by the term "temporary appointments."

It must be clear that the chief purpose (practically the only purpose) of the Seventeenth Amendment to the Constitution of the United States, a part of which was quoted on page 2 of my opinion of 14th instant, was and is to provide for the *election* of United States Senators, instead of the *selection* thereof by State Legislatures as had been theretofore required, for the entire term of six years as provided in the Constitution of the United States, and to require the issuance of writs of election by the Governor of the particular State for such elections. It is true that the proviso in said paragraph of said section 17 so quoted empowers the Legislatures to authorize the Governor of the States in which vacancies in the office occur to make "*temporary appointments*" thereto "until the people fill the vacancy by election as the Legislature may direct." Upon an intensive study, and a reasoning out of this situation and said language quoted from said

Seventeenth Amendment, and upon an exhaustive research, as hereinafter indicated, we are convinced, and are of the positive opinion, that the above-quoted word “temporary” relating to such appointments of the Governor limits the term of such appointments, and that said language does not delegate to the Legislature of this State the authority to authorize the Governor of this State to make an appointment for the entire new term. Certainly such an appointment would not be consistent with the word “temporary” as used in said quoted portion of the Seventeenth Amendment. We are, therefore, of the opinion that the Governor of this State can legally appoint a person to fill the vacancy in Senator Pittman’s new term of office only for the term beginning at noon on January 3, 1941, and ending at the next regular election to be held in this State for the election of State and other officers in November 1942, and that the term of such an appointee should be limited to that time, especially as there is absolutely no constitutional or statutory provision sufficiently authorizing the Governor of this State to call a special election to fill said vacancy, or to call a special election for the election of any other officer.

The Constitution of the United States provides:

Each house shall be the judge of the elections, returns, and qualifications of its own members * * *. Art. I, Sec. 5.

The Supreme Court of the United States in *Reed et al. v. County Commissioners*, 72 L. Ed. 924, said:

The United States Senate is the judge of the elections, returns, and qualifications of its members. *It is fully empowered and may determine such matters without the aid of the House of Representatives, or the Executive or Judicial Department.* (Italics ours.)

That the Committee on Privileges and Elections of the United States Senate, in the case of the seating of Honorable Gerald P. Nye, as a United States Senator, in a case “on-all-fours” with the instant case, construed the Seventeenth Amendment to the United States Constitution and the North Dakota statute in question there, under which Mr. Nye was appointed, in the same manner as we have hereinabove noted, is shown beyond question in the report of the proceedings of the Senate hearing on the matter. Such report is set forth in full at pages 265 to 275, inclusive, in the recent publication entitled “Senate Election Cases, 1913-1940,” the same being Senate Document No. 147, 76th Congress, 3d Session. We quote briefly from the Committee Report, where the committee referring to the North Dakota Act, which Act was simply the reenactment of a Dakota statute enacted long prior to the adoption of the Seventeenth Amendment, said:

Nowhere is express reference made to the Constitution of the United States, and, nowhere in said act does the language used indicate that the Legislature of the State of North Dakota had the seventeenth amendment to the Constitution of the United States in mind when the act of March 15, 1917, supra, was passed. Certainly the reasonable presumption is that if the Legislature of North Dakota had intended to incorporate into the act of March 15, 1917, supra, the provisions of the seventeenth amendment to the Constitution of the United States, it would have given the

executive of that State the power, as the seventeenth amendment provides, to make a *temporary appointment* only, until the people should fill the vacancy by election. (Italics ours.)

The report of the Nye case, supra, also shows that the then committee recognized that the Nevada Legislature had enacted suitable legislation conforming to the Seventeenth Amendment. It said:

It is interesting to note that 46 States have passed laws expressly recognizing by the language used the seventeenth amendment to the Constitution. Two States--Kansas and North Dakota--have omitted to recognize the amendment by any direct or express reference. The power to make temporary appointments has been conferred by 41 States upon their respective executives. * * *

Nevada is shown by said report of the Nye case to be one of said 46 States which has passed laws expressly recognizing said Seventeenth Amendment; and the law of this State, which includes said section 2593 so enacted and approved in this State in 1915, is included in said Senate Election Cases, 1913-1940" as a law which is recognized by the United States Senate as complying with said Seventeenth Amendment.

No one can escape the conclusion that the Nevada Act will unquestionably be construed by the Committee on Privileges and Elections of the United States Senate as providing the Governor of this State the power to make a temporary appointment to fill the new term of the late Senator Pittman until the remainder of such term can be filled by an election by the people according to law.

It is also to be noted that the foregoing view is concurred in by the United States Senate Legislative Counsel and the United States Senate Parliamentarian in telegrams dated November 18 and 22, 1940, a copy of which was furnished your office on those dates.

Further, a precedent for such temporary appointment is found in this State. It must be borne in mind that section 2593 Nevada Compiled Laws 1929 was approved March 6, 1915. The records in the archives of the office of Secretary of State show that on January 12, 1918. Honorable Charles B. Henderson was, by the Governor, appointed United States Senator to fill the vacancy caused by the death of Senator Francis G. Newlands, whose term had some three years yet to run. Senator Henderson received the following certificate of appointment, omitting the formal parts:

This is to certify that, pursuant to the power vested in me by the Constitution of the United States and the laws of the State of Nevada, I, Emmet D. Boyle, the governor of said State, do hereby appoint CHARLES B. HENDERSON a Senator from said State to represent said State in the Senate of the United States until the vacancy therein caused by the death of FRANCIS G. NEWLANDS is filled by election, as provided by law.

The record shows that Senator Henderson filed for election for the *remainder* of the *unexpired* term at the November 1918 election, was elected at such election and served the *remainder* of such term. This is a sufficient precedent.

It would seem, therefore, that there is and can be no question as to your authority to appoint a suitable person to temporarily fill the vacancy in the new term of the late Senator Pittman beginning on and as of the 3d day of January 1941 at 12:00 o'clock noon on that day.

Further, in view of the authorities hereinbefore cited and the views hereinbefore set forth, although there is no express statutory period definitely fixing the time the appointment is to run, we are of the opinion that the appointment should not be made for the entire new term of six years; and since there is no provision in our law for a special election to fill such a vacancy, it is our opinion that the appointment should be temporary and only until the next regular election of State and other officers in November 1942.

It is our further opinion that, since the said appointment of Honorable Charles B. Henderson as United States Senator to fill the vacancy caused by the death of Senator Newlands, as quoted on page 7 hereof, has been recognized and accepted by the United States Senate as in proper or sufficient form, it might be wise to follow the language of that certificate of appointment, with such changes as may be necessary to make the certificate accord with the present case.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

B-21. Motor Vehicle Registration Law.

A motor truck mounted on two axles, each axle of which is equipped with two wheels mounted with dual tires, and the truck equipped with a caterpillar tread arrangement, may operate on the highways of this State when properly registered, provided the caterpillar tread arrangement is not used in propelling the truck on the highway.

CARSON CITY, December 9, 1940.

HONORABLE MALCOLM McEACHIN, Ex Officio Motor Vehicle Commissioner, State Capitol, Carson City, Nevada.

DEAR MR. McEACHIN: Reference is hereby made to your letter asking the official opinion of this office on the matter referred to you by Linn Manufacturing Corporation, of Morris, New York, in its letter to you dated September 17, 1940, wherein such corporation requests from you information as to whether a certain truck manufactured by it known as Model No. C-5 would come within the weight limitations contained in the laws of Nevada with respect to the allowable load limit on the public highways of this State. In brief, whether by reason by

reason of the construction of the Model C-5, it could be legally operated on our highways.

The delay in furnishing this opinion is due to the fact that we have had to obtain some information as to the mechanics or mechanical features of the construction of this particular unit, which you so kindly later furnished us through your own organization, although we had assumed it could be more readily furnished us by the Public Service Commission through its inspectors, and which we had, therefore, requested it to furnish us.

From a description of the truck as contained in the above-mentioned letter and the prospectus of such truck which accompanied such letter, it appears that the truck in question is mounted on two axles and that each axle is equipped with two wheels mounted with dual tires. Apparently the only difference in the wheel arrangement of this truck from most other trucks is the equipping of the same with dual tires in front. The truck is also equipped with a tractor arrangement having a caterpillar tread. This arrangement is so attached to the truck that it may be dropped to the roadway when occasion for its use arises. Otherwise, the truck has the appearance of being simply a four-wheeled motor truck. In fact, the manufacturing corporation in its letter as well as in its prospectus describes the truck as a two-axle truck equipped with dual tires on four wheels.

The foregoing description certainly places the truck in the category of trucks provided for in chapter 81, Statutes of 1931, relating to the allowable load permitted to be transported on the public highways of this State. The language of the statute in this respect is:

No vehicle shall be operated nor moved upon any public highway which has a total weight, including vehicle and load, in excess of twenty-five thousand (25,000) pounds when such vehicle is equipped with four wheels running on the highway.

We note that the manufacturer thinks that by reason of the fact that the truck is equipped with eight tires, each tire having a channel base width of 8.25 inches that such fact in itself would permit the operation of the truck on the public highways of Nevada with a load together with the unladen weight of the truck far in excess of the 25,000 pound load limit provided in the law for four-wheeled vehicles. This thought is based upon the provisions of the law in question relating to the load limitation as expressed in the latter part of said chapter 81 wherein no load may be transported over the public highways in excess of 600 pounds per inch of channel base width of tire. However, it is our opinion that this latter provision in the statute is a qualifying provision relating back to the load and weight limitations thereinbefore provided in the statute, and, we think, relates only to the size and width of tire and its load capacity and limitation, in brief, such provision means that the vehicles thereinbefore mentioned may carry and transport the maximum weight mentioned as to each class mentioned in the statute provided the tire capacity or area conforms to this requirement of the statute. However, such provision does not detract from or change the maximum standard of weight or the axle and wheel arrangement provided in the statute.

As mentioned hereinabove, the truck and prospectus of the manufacturer shows that the truck in question is equipped with only two axles and four wheels. It may be that each wheel is equipped with dual tires, or it may be that it is thought the wheels are dual wheels. But the description of the truck shows that if the wheels are dual, nevertheless they are in effect, and for all practical purposes are to be considered as single wheels. The wheel units are bolted together and operate as one wheel. The law not providing for dual wheels or dual tires on vehicles having only two axles, except on passenger carrying vehicles, not the truck in question, we think the truck with respect to the weight loaded limitation must be considered a four-wheeled vehicle and limited to a weight when loaded of not to exceed 25,000 pounds.

We note that the truck in question is equipped with a tractor or caterpillar attachment, to be used when the truck encounters adverse weather and tractive conditions. This attachment, we think, cannot legally be operated on any public highway in this State, unless indeed it be equipped with the metal band provided for tractors and caterpillars of this type as well as other types in said chapter 81, which, of course, would destroy the effectiveness of the caterpillar attachment. Nevertheless, such provision of the law was and is for the protection of the highways. Whether any violations of the law would be had by any operator of a truck so equipped we do not assume. However, it is food for thought and no doubt, should receive the consideration of the Legislature.

Subject to the weight limitations hereinbefore stated, and with cautions and warnings as to the use of the tractor or caterpillar attachment, it seems such truck could be operated on the public highways of this State, provided, of course, proper registration be had.

Respectfully submitted,

GRAY MASHBURN, Attorney-

General.

By W. T. MATHEWS, Deputy

Attorney-General.

B-22. Motor Vehicle Carriers.

Exemption set forth in section 3 of Motor Vehicle Carrier Act of 1933, as amended in 1939, applies only where transportation of minerals is made in producer's own vehicles.

CARSON CITY, December 10, 1940.

Public Service Commission, Carson City, Nevada.

GENTLEMEN: You have submitted to this office an agreement whereby a mining company leases and rents two trucks and, by virtue of such agreement, claims to come under the exemption features of section 3 of the Motor Vehicle Carrier Act of 1933, as amended by the 1939 Legislature.

Section 3 of the Motor Vehicle Carrier Act of 1933, as amended in 1939, provides in part as follows:

None of the provisions of this Act shall apply to the transportation of ore or minerals or mining supplies *in the producer's own vehicle; provided, however, only one vehicle having an unladen weight not exceeding 15,000 pounds, or three vehicles whose combined unladen weight does not exceed 15,000 pounds, shall be exempted for the transportation of ore or minerals or mining supplies. (Italics ours.)*

We believe that this exemption is self-explanatory and that an exemption can apply only where the transportation of minerals is made in the producer's own vehicles. The agreement which you have submitted clearly indicates the mining company is not the owner of the vehicles used for transporting ore but simply rents or leases the same. We, therefore, conclude that the exemption does not apply.

It likewise appears from the agreement that possibly the mining company is attempting to bring itself within that part of section 3 which reads as follows:

None of the provisions of this act shall apply to * * * city or town draymen and private motor carriers of property operating within a five-mile radius of the limits of a city or town.

Section 2 of the Motor Vehicle Carrier Act, as amended, defines private motor carriers of property as follows:

Private Motor Carrier of Property. (d) The term "private motor carrier of property" when used in this act shall be construed to mean any person engaged in the transportation by motor vehicle of property sold, or to be sold, or used by him in furtherance of any private commercial enterprise, *but such term shall not be construed as permitting the carriage of any property whatsoever for hire. (Italics ours.)*

It is significant to note that the 1937 Legislature added the clause in italics.

Much of what we have said above applies to this attempted exemption, and by reading the entire exemption statute and construing the various sections thereof in pari materia, in our opinion it was the evident intent of the Legislature to permit the mining industry an exemption and as clearly expressed that exemption was to apply where the ores, minerals, or supplies were carried in the producer's own vehicle. No other exemption to the mining industry is found in section 3 and it is logical to

assume that no other was intended. It is therefore extremely doubtful if the mining company can convert itself into a private motor carrier of property by its agreement so as to come within the exemption of section 3.

In any event, however, the trucking company is renting its trucks (and one shovel) and by so doing it cannot set itself up as a private motor carrier of property so as to come within the exemption provisions of section 3. We are, therefore, of the opinion that the trucking company must comply with the terms and provisions of the Motor Carrier Act.

Yours very truly,

ALAN BIBLE, Deputy Attorney-

General.

B-23. Full Train Crew Law.

The use of a locomotive by a railroad company to push or tow a disabled locomotive over the main line of the railroad with a crew of only an engineer and a fireman violates the Full Crew Train Law of Nevada.

CARSON CITY, December 13, 1940.

HONORABLE ROLAND H. WILEY, District Attorney, Las Vegas, Nevada.
Attention MR. V. GRAY GUBLER, Deputy District Attorney.

DEAR MR. GUBLER: Reference is hereby made to your letter of December 10 requesting an interpretation of section 6322, Nevada Compiled Laws 1929 with respect to its application to the towing of a disabled locomotive by another locomotive manned with a crew consisting of an engineer and fireman. As we understand your inquiry, it is whether a railroad company may handle over its line of railroad outside of yard limits a disabled locomotive by towing or pushing it with another locomotive having for its crew only an engineer and fireman and no crew on the disabled engine, either an engine crew or a train crew in charge of both locomotives. In brief, a light engine is dispatched from a terminal to pick up a disabled locomotive and return it to the terminal or take it to some other terminal.

The portion of section 6322, supra, dealing with the question reads as follows:

* * * neither shall they apply to the operation of light engines and tenders when running as such outside the yard limits.

This language, it seems to us, is clear and expresses the intent of the Legislature that none

of the provisions of the full train crew law shall apply to the operation of light engines *when running as such* outside the yard limits. A disabled engine unquestionably is not running under its own steam. It is being towed or pushed by another engine. In such condition we think it constitutes nothing more nor less than a car because of its inability to move under its own power. The Legislature undoubtedly intended that a light engine which in common railroad parlance is an engine proceeding over the line of railroad without anything else attached to it, either locomotive or car, and contemplates an engine proceeding under its own power. The word "light" as used in connection with electrical railway motor means that it has not cars attached. *Buchanan v. Norfolk & Western Railway Company*, 135 S. E. 384.

Certainly, the same interpretation of the word logically follows when used in connection with a steam locomotive. We think that the foregoing analysis of the language of section 6322 is correct and that the Legislature never intended the law not to apply where disabled locomotives were being towed by another locomotive. Certainly, if the light engine were sent out from the terminal to pick up a disabled box car and tow it to the terminal the law would require the crew specified in section 6318 N. C. L. 1929. There is no reason to suppose that the Legislature intended a similar act on the part of the railroad to be beyond the purview of the law simply because a disabled locomotive is to be towed to a terminal instead of a car.

The Supreme Court of this State well said in State v. Nevada Northern Railway Company, [48 Nev. 436](#), that while the full crew law is penal in nature and to be strictly construed, the Supreme Court cannot so interpret it as to defeat the Legislature's obvious purpose. That purpose being to promote the public safety by requiring common carrier railroads to provide adequate crews. The public is just as interested in the safe operation of a railroad with respect to the towing of disabled locomotives as in any other operation having to do with the movement of trains. The handling of a disabled locomotive by the engine crew of the towing locomotive is in every way as hazardous to the public as it would be if such engine crew were required to handle one or more box cars without any additions to the crew for the purpose of protecting the movement of following or approaching trains.

We think that the towing or pushing of a disabled locomotive with another locomotive manned by a crew of only two men outside of yard limits constitutes a violation of the law.

Yours very truly,

W. T. MATHEWS, Deputy Attorney-General.

B-24. Old-Age Assistance--Residence in State Essential for Participation.

Under both the Federal Social Security Act and the State Old-Age Pension Act, actual residence in the State for a period of five years during the last nine years immediately preceding such application, one year of which five years must have been continuous and immediately preceding the making of the application. The residence required as to the one year at least is the actual, physical, and corporeal presence continuously for said period of one year, referred to in said laws as "actually reside."

CARSON CITY, December 17, 1940.

MR. HERBERT H. CLARK, Supervisor Division of Old-Age Assistance, Nevada State Welfare Department, Reno, Nevada.

DEAR HERBERT: Much as I regret to do so, I am compelled by the language of chapter 67, 1937 Statutes of Nevada, section 2, paragraph (b) to hold, in answer to your letter to me of December 16, that a person must "*actually reside*" in this State, among other things, continuously for a period of "*one year*" immediately preceding the making of such application for old-age assistance, and have all the other qualifications of eligibility specified in said section 2, in order for him or her to be entitled to old-age assistance under said chapter 67. While the person to whom you refer is unquestionably a legal "*resident*" of this State for voting purposes and for all other purposes, the status of the person for the last one year continuously and immediately before the person makes application for old-age assistance is based upon an entirely different theory from that of residence. The applicant must not only be a legal "*resident*" of the State, but must have "*actually resided in this State*" for five years or more during the last nine years immediately preceding the making of such application, and one year of such actual residing in this State must have been the year immediately preceding the making of such application. The words "*actually resided*" as used in said paragraph (b) simply means that the applicant actually lived or was physically and corporeally present in the State for said period of time, *i.e.*, five years during the last nine years, one year of which five years must have been continuous and immediately preceding the making of the application.

Under the law of residence of this and of practically every other State in the Union and of every other national of the world, a person after having once established residence by being actually present in the place where residence is claimed for the period required by law, with the intention during all of that time to make that place his or her home or residence for at least an indefinite period of time, may go away to some other State and still claim residence in the State where such residence was formerly so established by claiming it to be his or her residence and by going back to that place to vote and not exercising the right of franchise or other rights incident to residence in the State or Nation to which he or she moved for as long a period of time as he or she may desire. In other words, after once having established legal residence in a place, the person may retain residence in that place without being physically and corporeally present in it; but a person cannot "*reside*" in any place without being actually, physically, and corporeally present at that place. Said section 2 having used the words "*actually resided,*" simply requires that the applicant must have been actually, physically, and corporeally present in this State for at least a year immediately preceding the making of the application for old-age assistance.

I regret very much to have to so hold; but there is no sensible way of giving the expression "*actually resided*" any other legal meaning.

This would not apply, however, if the person to whom you referred in your letter had been granted such assistance while living here, the mere going to Portola, California, to work and as a matter of necessity, with the intention of returning to this State and continuing to make it her

home and residence would not necessarily take her off the list of recipients. The requirement of having “actually resided” in this State continuously for one year immediately preceding the making of the application applies only to *new applicants* or new recipients of old-age assistance.

Yours very truly,

GRAY MASHBURN, Attorney-General.

B-25. School Law--County Board of Education--Traffic Patrols.

County Boards of Education are not empowered by the laws of Nevada to provide for traffic patrols or the duties thereof by school children.

CARSON CITY, December 16, 1940.

HONORABLE JOHN W. BONNER, District Attorney, Ely, Nevada.

DEAR MR. BONNER: Further reference is hereby made to your letter of December 7 requesting an opinion as to whether the members of the Board of Education of White Pine County would be personally liable for injuries occurring to students assigned to traffic patrol duties during noon hours and other times. You stated in your letter that the Attorney-General of the State of Utah had rendered an opinion on a similar question in Utah. We advised you that we would secure a copy of the Utah Attorney-General's opinion and then advise you later our views in the matter.

Attorney-General Mashburn did obtain a copy of the opinion of the Attorney-General of Utah and briefly we may state that it concurs with your views in the matter in that the laws of Utah did not authorize Boards of School Trustees and Boards of Education to direct that school traffic patrols could be assigned to traffic patrol duties.

We concur with this opinion. A search of the laws of Nevada pertaining to schools and school children and also school boards and Boards of Education fails to disclose that such boards are authorized or empowered to provide for traffic patrols or duties thereof to be performed by school children. We think the general law is that if such traffic patrol activities are indulged in and an injury should result to one of the students, that personal liability might accrue to the members of the School Boards as individuals. It is said in 56 Cor. Jur. 854, section 1094 that “in the absence of statutory authority, a school district has no power to require pupils to serve in student patrols to protect the younger pupils at dangerous street intersections on their way to and from school.”

It may be that traffic patrols on the part of older pupils engaged in protecting the younger pupils is a very fine thing. However, it would seem that if such practices be indulged in, school boards should take measures to protect themselves from any liability, and just how this can be accomplished without specific legislation is somewhat hard to determine. Perhaps written

consent on the part of the parents might serve to accomplish this purpose. However, if school traffic patrols are very desirable, it would seem that the matter should be submitted to the Legislature.

Yours very truly,

W. T. MATHEWS, Deputy Attorney-General.

B-26. Gambling Law--Poker Games.

Unlawful for any person or persons to operate or carry on poker games in any building, whether such person or persons are owners of the building or operate the establishment, without a license to operate such games provided by the Nevada Gambling Law.

CARSON CITY, December 30, 1940.

HONORABLE C. B. TAPSCOTT, District Attorney, Elko, Nevada.

DEAR MR. TAPSCOTT: Reference is hereby made to your letter of December 28 requesting an opinion concerning the application of the Gambling Act of 1931 to the operation of a poker game, or any other game played with cards, within a barroom, poolhall, or gambling hall, without a gambling license, where the house or management receives no percentage from such game.

It is our opinion that the Gambling Act does not permit of the operation of any such card game, as mentioned above, even where the house or management receives no percentage from such game where such game is carried on for money, property, checks, credit, or any representative of value, without the obtaining of a license for such game by some person operating or playing in the game. To hold otherwise would be to, in effect, destroy the very purpose of the Gambling Act. We think the law is clear in this respect and that the only game that may be carried on without the obtaining of a license is the game or games permitted to be played by section 10 of the Act. This section provides that nothing in the Act shall be construed to prohibit social games played solely for drinks or cigars served individually. Under this section, a social game of cards may be played in any of the establishments where gambling is carried on or permitted without the necessity of a license so long as such games are played solely for drinks or cigars. In such a game, of course, checks or counters may be used redeemable solely in cigars or drinks.

It is to be noted that section 8 of the Act provides that any person or persons who shall knowingly permit any slot machines, games, or devices mentioned in section 1 of the Act to be conducted, operated, dealt, or carried on in any house or building owned by him or her, in whole or in part, except by a person who has received a license as provided for in the Act, or by his employee, shall be guilty of a gross misdemeanor. It seems to us that that section of the law alone requires the owner of a building or his employee to more or less supervise the gambling

carried on in his building, and if any gambling carried on therein without the proper license being secured, that such owner or employee charged with notice would be guilty of a gross misdemeanor.

You further inquire as to whether the statute permits the operation of the games above mentioned without a license, where the house sets aside a certain amount of the "pot" contributed by the players for the purpose of purchasing drinks, etc. We think this inquiry is answered above and that the statute does not permit of the operation of such games where actual gambling is carried on without a license on the part of some person to operate such game in some particular establishment. And further, it would seem that section 1 of the Act contains a prohibition as to this particular situation in that it provides that no gambling game in which any person, firm, association or corporation keeping, conducting, managing or permitting the same to be carried on, receives directly or *indirectly* any compensation or reward from such game.

Trusting that the foregoing will satisfactorily answer your inquiry, and with the compliments of the season, I am,

Yours very truly,

GRAY MASHBURN, Attorney-General.

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

B-27. State Officers and Employees--Vacations with Pay.

The right to vacations with pay of such officers and employees is limited to the particular calendar year in which the vacation is taken, i.e., between January 1 of each year and December 31 of the same year.

If not taken in any one calendar year when entitled thereto, such officer or employee may not take such vacation or leave with pay until he or she shall have served the State for a full period of six months in the next succeeding year. Vacations are not cumulative and if not taken within the year during which the officer or employee has served the State said period of six months, he or she loses such vacation; and only one vacation with pay may be taken during any one calendar year, consisting of fifteen working days.

CARSON CITY, December 31, 1940.

HONORABLE FRANK B. GREGORY, Attorney Unemployment Compensation Division,
Carson City, Nevada.

DEAR MR. GREGORY: Your stenographer has just delivered your letter to me of 30th instant in which you ask the official opinion of this office on two specific questions, as follows:

INQUIRY

1. Whether an employee in the service of the State on the first day of January of any calendar year, who has been in the service of the State for more than *six* months during the preceding calendar year, (and, according to my information, has received his 15 days annual vacation with pay for such preceding year) is entitled to 15 days annual vacation with pay as provided in Nevada Compiled Laws section 7279, even though there is no possibility whatever of his being in the service of the State for a period of as much as *six* months during the (current) year in which the leave with pay is requested is allowed (requested).

2. Whether such annual “*vacation*” leave with pay if granted, under the above-mentioned circumstances, is to be in addition to the “military leave” with pay provided for in Nevada Compiled Laws 1929, section 7191.

OPINION

1. As to the above question 1, it is the unqualified opinion of this office that, inasmuch as the 15 days annual vacation with pay provided for in said section 7279 is based upon the theory that such annual vacation is limited to and must be taken within the calendar year, and cannot be taken until after the employee has actually worked for the State in his employment for a period of at least six months, *each calendar year* must be taken and considered separately; and both the six months’ period of employment or “service” to the State and the annual vacation of 15 days with pay must occur within the same calendar year.

It has heretofore been held by one or more former Attorneys-General of this State since the enactment and approval of said section 7279 in 1911, that such annual vacations of 15 days were not cumulative, but each such vacation must be taken within the calendar year or not at all for that year; and that if not so taken within the particular calendar year, then it is lost altogether. Certainly, all will concede that the expression used in that section “calendar year” means the year beginning January 1 and ending December 31 of each year. Both the above-mentioned opinion of the former Attorneys-General of this office and even said section 7279 are clear and not subject to doubt to the effect that two such annual vacations of 15 days with pay cannot, under any circumstances, be had in any calendar year, *i.e.*, any year beginning January 1 and ending December 31 of that year. They are also plain and clear to the effect that such annual vacation with pay is based upon the fact that the employee has served the State within the calendar year involved a full period of six months.

From the foregoing, it follows that, since the employee mentioned in your letter had his annual vacation of 15 days with pay during the year 1940, he could not, under the plain terms of said section 7279, be entitled to another annual vacation of 15 days or for any other period of time with pay until after he has worked in State employment (“in the service of the State”) for another period of six months within the calendar year 1941.

It is, therefore, the opinion of this office that the employee mentioned is not entitled, under the circumstances set forth in your letter and in the above question, to any vacation at all

with pay for the calendar year 1941, inasmuch as it is contemplated that this State employment will cease in the month of January 1941 and he could not, therefore, have been in State employment at that time for a period of six months during said calendar year of 1941. No employee of the State is entitled to such annual vacation with pay unless and until he has been in the service of the State for a full period of six months within the particular calendar year in which such vacation is requested; or unless he served the State a portion of the preceding year (1940) without a vacation with pay and the portion of the preceding year added to the period of the current year so served (1941) make a total continuous employment in the two years of as much as six months; and even in that event, the employee would not be entitled to his vacation with pay until he had served said full period of six months continuously in the two years, and even then, he would be entitled to only one vacation period with pay for the calendar year 1941, the year involved in the inquiry.

2. As to said question 2, said section 7191 is a part of the State Militia Code under which the National Guard of this State is established and maintained, *i.e.*, Nevada Compiled Laws 1929, sections 7115 to 7261, both inclusive. The particular section upon which the inquiry is based, *i.e.*, section 7191, simply provides for military leave or military absences from State employment by members of the Nevada National Guard *while* serving as members of that particular State organization, for the express purpose of attending the “joint maneuvers of the United States Army and the National Guard” for a period of 15 days, without loss of pay, at such time as may be approved by the commanding officer and the Adjutant General of the State. The granting of such a leave of absence with pay is expressly based upon the fact that such absence is to enable the “*employee of the State of Nevada*” while serving as a member of the Nevada National Guard, to attend such joint maneuvers either in or out of the State without loss of his compensation as such State employee. This section of the law was evidently enacted and approved with the thought in mind that those who are both State employees and members of the State National Guard, while actually serving in both capacities, should have this opportunity of participating in the annual maneuvers at San Luis Obispo and other places where annual cantonments are established for that purpose. In other words, it was evidently based upon this custom, and the situation where the various National Guard units of the State would join in such training, not for the purpose of permitting one single person in an isolated instance, so employed in both capacities, to obtain a leave of absence from such State employment with pay, either to take military training himself or to attend a place where such joint maneuvers are carried on.

For the foregoing reasons, it is the opinion of this office that, inasmuch as no such “joint maneuvers” as are contemplated in said section 7191, in which the several joint Nevada National Guard units are to participate, and the employee mentioned is not to be an “employee of the State of Nevada” during the time any such “joint maneuvers” are to be held, he is not entitled to said military leave of absence with pay as an “employee of the State of Nevada.”

When a person involved is, at the time of such military leave of absence, both a State employee and a member of the National Guard and such joint maneuvers are being held and his unit in the Nevada National Guard is engaged in such maneuvers, then such employee and a member of the State National Guard would be entitled to such military leave of absence with pay; and such absence with pay would not preclude his also having the annual vacation with pay

during the calendar year as provided for in said section 7279, provided he had been in such State employment for a full period of six months during that calendar year. In other words, he would, under those circumstances, be entitled to both.

While this opinion is in the form of a letter, it is just as much the opinion of this office as if it were in the more formal form of an official opinion, and may be considered and used as such. We reserve the right, however, to file a formal official opinion on these matters later on if the conditions should justify it.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

B-28. State Grazing Act--Disposal of Funds Received from Sale of Hides Taken From Predatory Animals.

The State Grazing Act, chapter 67, Statutes of 1939, does not in fact authorize the district grazing board to deposit moneys received from the sale of hides taken from predatory animals, but which was deposited in the district grazing funds; recommended that such moneys be deposited in a safe place and that the law be amended to provide that the district grazing boards be empowered to enter into cooperative agreements with the Federal authorities so that such funds may be used by the District Grazing Board.

CARSON CITY, December 31, 1940.

HONORABLE C. B. TAPSCOTT, District Attorney, Elko, Nevada.

DEAR MR. TAPSCOTT: Reference is hereby made to your letter of December 28, 1940, requesting an opinion on chapter 67, Statutes of 1939, with respect to its application to a district grazing board and cooperative agreements with the Federal Government for the selling of hides of predatory animals taken within the board's district. It seems that the inquiry is directed to the point of what the district grazing board should do with the funds received from the sale of hides taken from such animals, *i.e.*, whether or not such funds revert to the funds of the district and thereafter used for destruction of predatory animals.

This same question was presented to this office informally some time back by some member of a district grazing board whose name we have forgotten, and our advice at that time was to the effect that moneys received from the sale of hides of predatory animals should be deposited in a safe place and earmarked and the matter presented to the coming Legislature. We are not so sure that cooperative agreements between the district grazing boards and the Federal Government relative to the destruction of predatory animals are authorized by the State Act. The Act is not clear on this particular point. Likewise, the Act is not clear as to the disposition of any such funds or, in fact, whether any such funds could be received by the district grazing boards. We agree that the destruction of predatory animals is undoubtedly a benefit to range conditions,

but we are skeptical of any power provided in the statute whereby district grazing boards could dispose of funds received from such a source. We are more inclined to this view by reason of the fact that in the 1939 Legislature a bill was introduced and enacted into a law providing for cooperative agreements between the State Board of Stock Commissioners and the Bureau of Biological Survey of the United States Department of Agriculture for the very purpose of providing for cooperative agreements for the destruction of predatory animals, and an appropriation of \$10,000 was made by the Legislature for this purpose, such law being chapter 139, Statutes of 1939.

Our recommendation at this time is that where cooperative agreements have been entered into by the district grazing boards for the destruction of predatory animals that moneys received from such sources be properly safeguarded, earmarked, and deposited in a safe place, and that at the next session of the Legislature a bill be introduced amending the present State Taylor Grazing Act so as to provide specifically for predatory animal control within the Taylor grazing areas and empowering the district grazing boards to enter into cooperative agreements with the proper Federal authorities and specifically permitting of the use of moneys received from the sale of hides.

Very truly yours,

GRAY MASHBURN, Attorney-General.

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