

STATE OF NEVADA

ANNUAL REPORT

OF THE

ATTORNEY-GENERAL

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1896

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JAMES R. JUDGE, ATTORNEY-GENERAL



CARSON CITY, NEVADA:  
STATE PRINTING OFFICE, : : : J. G. MCCARTHY, SUPERINTENDENT  
1897

REPORT OF ATTORNEY-GENERAL

STATE OF NEVADA,  
OFFICE OF ATTORNEY-GENERAL,  
CARSON CITY, December 31, 1896.

REPORT.

STATE OF NEVADA,  
OFFICE OF THE ATTORNEY-GENERAL,  
CARSON CITY, December 31, 1896.

To His Excellency REINHOLD SADLER, Governor of Nevada:

SIR: In accordance with law I have the honor to submit herewith my annual report of the business transacted in the office of the Attorney-General for the year ending December 31, 1896, respectfully calling attention to the report for the year ending December 31, 1895, prepared and submitted by the late Attorney-General, Robert M. Beatty, who administered the business and affairs of the office with marked ability from the 8th of January, 1895, to the time of his death, December 10, 1896.

On December 21, 1896, under appointment from your Excellency, I entered upon the discharge of the duties of the office.

JAMES R. JUDGE,  
Attorney-General.

## REPORT OF ATTORNEY-GENERAL.

STATE OF NEVADA,  
OFFICE OF ATTORNEY-GENERAL,  
CARSON CITY, December 31, 1896. }

To His Excellency REINHOLD SADLER, Governor of Nevada:

SIR: I herewith submit a synopsis of the various cases considered and decided by the Supreme Court, since the last report rendered from this office, to which the State was a party and in which the people of the State generally have an interest:

- 1—The State of Nevada ex rel. J. H. Sutherland, relator, vs. Henry A. Nye, County Auditor of Storey county, respondent. Application to Supreme Court for a writ of mandamus requiring respondent to audit, allow and draw his warrant upon County Treasurer of Storey county for a certain claim allowed by the Board of County Commissioners of said county in favor of Company A, First Regiment Nevada National Guard, in the sum of \$75, rent of Armory for said Company for month of April, 1895. Application denied.
- 2—The State of Nevada, appellant, vs. John I. and S. H. Wheeler, respondents. Appeal from District Court, Elko county. Action by the State of Nevada against John I. Wheeler and Samuel H. Wheeler, partners, to recover \$350 license money due upon 7,000 head of sheep, and for the sum of \$25, statutory penalty under an Act of the Legislature, Stats. Nev. 1895, page 53, approved March 12, 1895. Judgment for defendants affirmed on appeal.
- 3—The State of Nevada, respondent, vs. John O'Keefe, appellant. Appeal from District Court, Storey county. The defendant was indicted for the crime of robbery, tried and convicted. Upon appeal the judgment of District Court was affirmed.
- 4—The State of Nevada, respondent, vs. Alfred Vaughan, appellant. Appeal from District Court in and for Lander county. Appellant was convicted of the crime of murder of the first degree. Upon appeal the judgment of the District Court was reversed and a new trial granted.
- 5—The State of Nevada ex rel. H. C. Cutting, Superintendent of Public Instruction, relator, vs. C. A. LaGrave, State Controller, respondent. Application to Supreme Court by relator, as Superintendent of Public Instruction, for writ of mandamus to compel the State Controller to draw a warrant in favor of relator for the sum of \$200 salary due him for month of November, 1895, claiming that his salary as fixed by law was \$2,400 per year. Respondent based his refusal to draw warrant upon the ground that relator's salary, as fixed by the law, was only \$1,000 per year. Upon the hearing, writ denied.
- 6—Reinhold Sadler, plaintiff and respondent, vs. The State of Nevada, defendant and appellant. Appeal from District Court, Ormsby county. Action by plaintiff, as Lieutenant-Governor of Nevada, to recover \$136 as compensation for seventeen days' services rendered by him during the month of November, 1895, as Acting Governor of the State of Nevada, during the absence of the Governor from the State. Judgment for plaintiff affirmed on appeal.
- 7—The State of Nevada ex rel. Reinhold Sadler, relator, vs. C. A. LaGrave, State Controller, respondent. Application to Supreme Court for writ of mandamus requiring respondent to draw his warrant in favor of relator for the salary of Governor from April 11th to April 30th, both dates inclusive, relator setting forth in his petition that by reason of the death of Governor Jones on April 10, 1896, the powers and duties of the office devolved upon him, the Lieutenant-Governor, for the residue of the term for which Governor Jones had been elected, and the powers and duties of the office of Governor having been imposed upon him by the Constitution of the State, he was entitled to the salary attached to the office of Governor. Writ issued.
- 8—Samuel Davis, appellant, vs. Board of Commissioners of Lincoln county, respondent. Appeal from District Court in and for Lincoln county. Application of Samuel Davis to District Court in and for Lincoln county for writ of mandamus to compel the Board of Commissioners of Lincoln county to levy a tax for the

- payment of interest upon the bonded indebtedness of Lincoln county. Application denied. Upon appeal reversed by Supreme Court.
- 9—The State of Nevada, respondent, vs. Virginia and Truckee Railroad Company, a corporation, appellant. Appeal from District Court of Washoe county. Action by the State to collect taxes upon increased valuation of appellant's property in Washoe county by the Assessor. Judgment of the District Court in favor of the State. Reversed on appeal by Supreme Court.
- 10—The State of Nevada, respondent, vs. Geo. H. Meyers, appellant. Appeal from the District Court of Ormsby county. Action by the State against Geo. H. Meyers for the tax upon the difference between the Assessor's and the valuation fixed by the Board of Equalization on defendant's stock of merchandise. Judgment of the District Court in favor of the State was affirmed by the Supreme Court on appeal.
- 11—John Buster, a Piute Indian, appellant, vs. The State of Nevada, respondent. Appeal from District Court, Humboldt county. Appellant indicted and convicted of the crime of murder in the first degree. Upon appeal the judgment of the District Court was affirmed.
- 12—The State of Nevada, respondent, vs. C. H. Zichfeld, appellant. Appeal from the District Court of Washoe county. Appellant was indicted and convicted of the crime of bigamy. Upon appeal the judgment of the District Court was affirmed.
- 13—The State of Nevada, respondent, vs. Austin Gray, appellant. Appeal from District Court of Washoe county. Appellant was indicted, and, on trial, convicted of the crime of burglary. Upon appeal the judgment of the District Court was affirmed.

## OFFICIAL OPINIONS.

An examination of the records of this office for the year 1896, kept by the late Attorney-General Beatty, shows that he was called upon during the year to answer a great number of official inquiries, many of which required much study and research. The following, among the opinions rendered, are of particular interest to the public:

OFFICE OF ATTORNEY-GENERAL, }  
CARSON CITY, NEVADA, March 23, 1896. }

HON. A. C. PRATT, *State Land Register, Carson City, Nevada:*

DEAR GENERAL: Yours of the 19th inst. would have been answered sooner but for the facts that I was quite busy officially at the time of its receipt and your being absent from the city.

To answer, all I can say is I know of no authority in you as an officer, nor indeed in any officer, empowering the compliance with the suggestions of the "Assistant Commissioner" to "re-convey" the land described "to the United States" or any person.

As I understand the matter the State's selection was regularly made and State patent issued to the purchaser from the State. If errors have occurred in the transaction the United States alone is responsible for them. If wrong has been done to any person such wrong can be righted by the Courts and the Courts alone.

Whatever interest, if any, the State of Nevada ever had in the lands, and her control over them, has passed by her patent to the purchaser. Whatever title she ever had, if any, has long since been conveyed away, and she now has no more authority to act in the matter, without at least a judicial determination of the conflicting interests, than a natural person would have over property previously conveyed by him. Your answer to the Register and Receiver in so far as it disclaims authority "to re-convey" coincides entirely with my view of the question. Respectfully,

ROBT. M. BEATTY, Attorney-General of Nevada.

OFFICE OF ATTORNEY-GENERAL, }  
CARSON CITY, March 27, 1896. }

F. H. NORCROSS, *District Attorney of Washoe County, Reno, Nevada:*

MY DEAR SIR: Yours of yesterday received this morning. In answer will say in my opinion there is no question as to your right to collect from a defendant, and when collected retain to your own use all legal fees of your office, not only in tax suits, but also in criminal cases.

The law under which you are now acting, Stats. 1891, p. 52, it is true fixes your salary at the sum of \$900 per annum, *i. e.*, for services rendered as District Attorney and Superintendent Public Schools to the county impliedly to be paid by the county, and you are not inhibited by any law from collecting legal fees by way of costs from a defendant, and unlike many of your confreres in office there is no provision of law requiring you to pay fees collected into the county treasury.

Therefore, in reason the Legislature undoubtedly intended that you should retain all legal fees collected by you as District Attorney from defendants. Such under

my interpretation of similar statutes was the practice in Eureka county during my own incumbency of the District Attorney's office, and has been uniformly followed by all of my successors there. Respectfully yours,

ROBT. M. BEATTY, Attorney-General of Nevada.

P. S.—Aside from the foregoing the county has no right to fees collected from a defendant unless paid by you pursuant to law into its treasury. B.

OFFICE OF ATTORNEY-GENERAL, }  
CARSON CITY, May 6, 1896. }

HON. C. A. LAGRAVE, *State Controller of Nevada*:

RESPECTED SIR: Answering yours of to-day, as your queries involve questions never judicially determined in this State, and they being of more than ordinary importance, I shall give you not only my opinions but the reasons therefor.

In our nearest sister State, California, under a Constitution of which that of Nevada is an almost *verbatim* copy, the Lieutenant-Governor has actually *succeeded to the "office of Governor upon the death or resignation"* of the elected Governor in several instances, and the right to so succeed has not been questioned, and though from a cursory reading of those two Constitutions one would naturally suppose that it had been the intention of the framers of both of those Constitutions to provide for a regular succession to the office of Governor in emergencies of this character, this error, if error it be, is natural, especially in view of the unquestioned succession to the office of President of the United States under the Federal Constitution; still, one is forced, as it were, to the conclusion that if an actual succession to the office of Governor was contemplated it would have been so declared in at least as positive terms in the State Constitutions as are found in the Federal relating to the Presidential succession. But we find by a careful reading that it is not so declared.

In the Constitution of the United States the declaration is almost positive that the "office" itself of President shall "devolve" upon the Vice-President (Const. U. S. Art. II, sec. 6), whilst in the State Constitutions of both California (Const. Cal., Art. V, sec. 17) and Nevada (Const. Nev., Art. V, sec. 18), and likewise of several other States, it is "the powers and duties of the office" only that shall "devolve upon the Lieutenant-Governor." In some States the "emoluments" also of the office "devolve," but not in Nevada.

And further, it is noticeable that all of the possible contingencies enumerated and provided for in the Constitution of Nevada, viz., "impeachment, removal, death, inability to discharge the duties, resignation or absence from the State" of the Governor are placed in the same category and the same provision in one sentence made for each, all and either contingency, whether the same be permanent as in case of death, or temporary only as in the case of absence from the State of the elected Governor. And by such sentence all that "devolves" upon the Lieutenant-Governor are the "powers and duties of the office during the residue of the term, or until the disability shall cease." Hence the Lieutenant-Governor is in exactly the same position whether the elected Governor is in condition to resume the "powers and duties of his office" or not.

In addition to this by another section of the same article (Sec. 17, Art. V) of our Constitution, a "vacancy" in the office of Governor is contemplated and, in fact, a provision is made for such a contingency, and if in case of and during such "vacancy" the Lieutenant-Governor shall be "impeached, displaced, resigned, die or become incapable of performing the duties of the office, or be absent from the State, the President *pro tempore* of the Senate shall *act as*," not become, "Governor until the vacancy be filled or the disability cease." It is further a fact that by no provision of our Constitution can there be a "vacancy" in the office of Lieutenant-Governor by reason of any succession by the incumbent of that office to the office of Governor.

From all of the foregoing it would seem to be conclusive that the Lieutenant-Governor remains Lieutenant-Governor though exercising the powers and duties of Governor which "devolve" upon him, in case of the death or disability of the elected and qualified Governor and in no event succeeds to the office of Governor.

If I did not arrive at the above conclusions from careful examination of the State and Federal Constitutions themselves, I would as a lawyer be constrained to coincide with them, at least until there is a contrary judicial determination of the question because of the precedent for us of Nevada established by acquiescence, if nothing more, in the official conduct and exercise of gubernatorial powers by his Honor, Frank Bell, Lieutenant-Governor of Nevada, when acting as Governor of the State for the residue of the term upon the death of his Excellency, Governor C. C. Stevenson. Lieutenant Bell during that time exercised the powers and performed the duties of Governor as acting Governor and drew the salary of Lieutenant-Governor. The Legislature, however, afterward enacted a relief bill which became law by the approval of his Excellency, Governor Colecord, under which Lieutenant-Governor Bell received the difference between the salary of Lieutenant-Governor and Governor for the time during which he had acted as Governor.

And here, by way of authority through custom for the correctness of my position, I will cite that under the Constitutions of Penn. (Art. IV, sec. 13) and Mass. (Chap. II, sec. 2, Art. III) both somewhat similar in this regard to ours, no "succession" being provided for in a like instance, in each of those States the Lieutenant-Gov-

ernor under like conditions to ours at present has become the "acting," not the actual, Governor. This situation exists even now in the office in the latter-named State.

From all of the foregoing and notwithstanding the action of California under similar circumstances and Constitutional provisions, and especially in view of the precedent mentioned in the case of Lieutenant-Governor Bell, I am compelled to and do advise you that his Honor, Lieutenant-Governor Reinhold Sadler, is now and ever since the death of his Excellency, Governor Jones, has been, simply and only what he was previous to such death and during Governor Jones' absence from the State, the Lieutenant-Governor with the powers and duties of Governor devolving upon him, and is therefore entitled to the per diem allowed by Statute 1891, p. 104, viz: "Eight dollars per day when acting as Governor," and nothing else. In pursuance of the above, it naturally follows that you are not authorized to draw upon the appropriation made for the payment of the Governor's salary to pay the Lieutenant-Governor, even though he be acting as Governor. With respect, I am yours to command,

ROBT. M. BEATTY, Attorney-General of Nevada.

OFFICE OF ATTORNEY-GENERAL,  
CARSON CITY, NEVADA, May 7, 1896. }

A. J. MCGOWAN, District Attorney of Ormsby County, Nevada:

RESPECTED SIR: Answering yours of the 5th inst., relating to appointments and elections of School Trustees, especially of Empire School District, I will say: This is a question that is being mooted at present at many points throughout the State, but is simply one of whether an appointment to fill a vacancy in the office of School Trustee is for the unexpired term of the predecessor of the appointee, or to fill such vacancy till the people by election can fill it.

The authority for making the appointment in case of no previous election (Stats. 1865, p. 413, sec. 23, as amended 1873, 156, amended 1875, 131, amended 1877, 190, Gen. Stats., sec. 1305) does not designate the "term" of the appointee, and in case of filling a vacancy occasioned by any other cause than "failure to elect" (Stats. 1864-5, p. 413, sec. 18, sub-div. 6, as amended 1873, 156, as amended 1877, 189, Gen. Stats. 1300) is similarly silent, both being simply to "fill by appointment all vacancies occurring," but the former declaring "until the election of a successor," ignoring, as it were, the fact that there is or ever has been a difference in the terms of office of "long" and "short" and leaving all Trustees on the same footing; and by a very slight effort of reason and construing the two sections together, we have it that in case of a "vacancy" an appointment shall be made to fill the office till a "successor" to whom? Why, the appointee, not the original incumbent, shall be elected, and naturally to be elected at the first legal opportunity, viz., the next ensuing school election.

I am perhaps a stickler for the principle of the people themselves choosing their own officers, and for appointments to be made *pro tempore*, and only until the people can legally fill the office for either full or unexpired term, and this may perhaps somewhat influence me.

Our State Constitution, Art. V, sec. 8, providing for the filling of vacancies by the Governor, limits the term of his appointee to the next election, and surely it cannot be conceived that the appointing power of a Superintendent of Public Schools should be greater than that of the Governor.

From all of the foregoing I am convinced that it was the intention of the Legislature to have a vacancy filled by appointment only till the people could fill it by election. Therefore, I advise you that there should be a Trustee elected in Empire District to fill the unexpired term of Mr. Woodbury, now temporarily filled by Mr. Longabaugh. Sincerely yours,

ROBT. M. BEATTY, Attorney-General of Nevada.

OFFICE OF ATTORNEY-GENERAL, }  
CARSON CITY, NEVADA, August 10, 1896. }

To the Honorable, the Board of Education of the State of Nevada:

GENTLEMEN: In answer to your several queries of this date, I answer:

To No. 1 thereof: Yes. "Public officer, a person who has some duty to perform concerning the public."—Anderson's Law Dic., Tit. "Public Officer," p. 729 and cases there cited.

To No. 2: Yes; provided, "that since the issuance of such certificate or diploma the applicant has been continuously and successfully engaged in teaching." Stats. Nevada, 1895, p. 83, subdivision 16.

There seems to have been a serious oversight on the part of the Legislature in this instance, but so the law is, and we must interpret it accordingly.

In this connection I would, however, call your attention to the fact that your Board is the sole judge of the proof necessary to establish the fact of the "continuous and successful teaching."

To No. 3: Yes; provided such teacher was otherwise qualified to teach and had performed all the duties required of him or her as prescribed by sec. 1321, General Statutes of Nevada, and taken the prescribed oath. In such a case the length of

the time of the teacher's residence in the State, I think, would cut no figure. With respect, I am yours sincerely,

ROBT. M. BEATTY, Attorney-General of Nevada.

OFFICE OF ATTORNEY-GENERAL, }  
CARSON CITY, October 20, 1896. }

W. D. JONES, Esq., *District Attorney, Austin, Nevada:*

MY DEAR SIR: Yours of the 17th inst. just received, and in answer will say: In my opinion the Board of County Commissioners has full power and authority to employ experts to examine and report upon the books of the officers of the county, under subdivisions 3 and 13, sec. 8, of the Act of the Legislature of the State of Nevada, approved March 8, 1865, entitled "An Act to create a Board of County Commissioners in the several counties of this State, and to define their duties and powers." Vide Gen. Stats., sec. 1949.

Your only duty in such a matter will be to see that no exorbitant bill is allowed for the "expert" services. Sincerely yours,

ROBT. M. BEATTY, Attorney-General of Nevada.

OFFICE OF ATTORNEY-GENERAL, }  
CARSON CITY, November 13, 1896. }

HON. REINHOLD SADLER *Lieutenant-Governor, acting as Governor of the State of Nevada:*

RESPECTED SIR: Relative to your written official queries of the 12th inst., I have the honor to submit my opinion as follows:

Upon your question 1: Neither the Constitution nor the Statutes of Nevada anywhere or in any manner even by implication, provide for or contemplate a "vacancy" in the office of Lieutenant-Governor during the period when "the powers and duties of Governor" are "devolved upon" the Lieutenant-Governor. In addition to this there is no provision for any succession to the office of Lieutenant-Governor in the event of the powers and duties of the office of Governor devolving upon the Lieutenant-Governor. The conclusion therefore must be that the contingency of such a "vacancy" cannot legally arise during such time.

This being the condition of the law I am of the opinion that no "vacancy" in the office of Lieutenant-Governor has ever existed or now exists in this State since the death of his Excellency, the late John E. Jones. Hence I answer your questions 1 and 2 in the negative.

Upon question 3, as asked by you I answer, No; and in this connection submit in support of my position on questions 1 and 2 as well as 3, that sec. 17, Art. V, Const. of Nevada, contemplates the *filling* of a "vacancy" not in the office of Lieutenant-Governor but in that of Governor when the President *pro tem.* of the Senate is *acting* as Governor.

It will be readily seen by a careful reading of secs. 17 and 18, Art. V, Const. of Nevada, that the convention which framed it intended that upon the death as well as upon any disability of the qualified Governor to act, "the powers and duties of the office shall devolve" upon the Lieutenant-Governor (sec. 18). And "if during a *vacancy* in the office of Governor, the Lieutenant-Governor should die, etc., etc., the President *pro tempore* of the Senate shall *act* as Governor until the *vacancy* be filled etc." (Section 17.)

There being no vacancy in the office of Lieutenant-Governor an election of a Lieutenant-Governor, at the last election was, in my opinion, a nullity. Officially yours to command,

ROBT. M. BEATTY, Attorney-General of Nevada.

OFFICE OF ATTORNEY-GENERAL, }  
CARSON CITY, November 20, 1896. }

HON. H. C. CUTTING, *Superintendent of Public Instruction, Carson, Nevada:*

DEAR SIR: Answering your official query of to-day, I can but say: No, and refer you to the Statutes of 1895, pp. 81-82, sec. 4, sub-div. 10 and 11, which are the controlling law at present.

Said sub-division 10 limits the issuance of "educational diplomas" to such persons *only* as hold certificates of "high school grade," either State or county, and said sub-division 11 authorizes the issuance of "life diplomas" upon the same conditions except as to the necessary time of teaching.

Further, a "life diploma" cannot in any event be granted "upon an educational diploma" *per se.* Sincerely yours,

ROBT. M. BEATTY, Attorney-General of Nevada.