

STATE OF NEVADA

**BIENNIAL REPORT**

OF THE

**ATTORNEY-GENERAL**

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**1921-1922**

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**LEONARD B. FOWLER, Attorney-General**



CARSON CITY, NEVADA

STATE PRINTING OFFICE

: : : : JOE FARNSWORTH, SUPERINTENDENT

1923

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ATTORNEY-GENERAL



LEONARD R. FORTNER, Attorney-General



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ATTORNEY-GENERAL

STATE OF NEVADA

1927

ATTORNEY-GENERAL OF NEVADA

**LETTER OF TRANSMITTAL**

STATE OF NEVADA,  
OFFICE OF THE ATTORNEY-GENERAL,  
CARSON CITY, December 31, 1922.

*To His Excellency, EMMET D. BOYLE, Governor of Nevada.*

SIR: Pursuant to the provisions of section 4132, Rev. Laws, I have the honor to herewith submit my report as Attorney-General of the State of Nevada for the years 1921 and 1922.

Very respectfully,

L. B. FOWLER,  
*Attorney-General.*

## ATTORNEYS-GENERAL OF NEVADA

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G. A. NOURSE.....	1865-1866
R. M. CLARKE.....	1867-1870
L. A. BUCKNER.....	1871-1874
JOHN R. KITTRELL.....	1875-1878
M. A. MURPHY.....	1879-1882
W. H. DAVENPORT.....	1883-1886
J. F. ALEXANDER.....	1887-1890
J. D. TORREYSON.....	1891-1894
R. M. BEATTY <sup>1</sup> .....	1895-1896
J. R. JUDGE <sup>2</sup> .....	1896-1898
W. D. JONES <sup>3</sup> .....	1899-1901
WILLIAM WOODBURN.....	1901-1902
J. G. SWEENEY.....	1903-1906
R. C. STODDARD.....	1907-1910
CLEVELAND H. BAKER <sup>4</sup> .....	1911-1912
GEO. B. THATCHER <sup>5</sup> .....	1912-1914
GEO. B. THATCHER.....	1915-1918
L. B. FOWLER.....	1919-1922

<sup>1</sup>Died December 10, 1896.

<sup>2</sup>J. R. Judge appointed to fill unexpired term, December 24, 1896.

<sup>3</sup>Resigned January 15, 1901, and William Woodburn appointed on the same day to fill the unexpired term.

<sup>4</sup>Died December 5, 1912.

<sup>5</sup>Geo. B. Thatcher appointed to fill unexpired term, December 6, 1912.

## OFFICE FORCE

L. B. FOWLER.....	Attorney-General
ROBERT RICHARDS.....	Deputy Attorney-General
MARGARET CURRAN.....	Stenographer

## BIENNIAL REPORT

Section 4130, Rev. Laws, provides: "When required, the Attorney-General shall give his opinion, in writing, upon any question of law, to the Governor, the Secretary of State, Controller, Treasurer, Surveyor-General, the Trustees, Commissioners, or Warden of State Prison, hospital, or asylum, or the officers of any state institution whatever, and to any District Attorney, upon any question of law, relating to their respective offices."

During the past two years opinions have been prepared by this office in response to inquiries submitted by various state officers and others.

In addition to the following opinions the Attorney-General, or his Deputies, have been in daily consultation with one or more of the officers, of whom he is the legal adviser, on matters of great public importance.

### OPINIONS OF THE ATTORNEY-GENERAL

#### 1. Sheriff—Compensation as *Ex Officio* License Collector.

CARSON CITY, January 10, 1921.

MR. T. J. HURLEY, *Sheriff, Virginia City, Nevada.*

DEAR SIR: You have propounded the following query:

Is the Sheriff of Storey County entitled to receive compensation as *ex officio* license collector for the collection of business licenses?

Pursuant to section 33 of an act of the Legislature of the State of Nevada, entitled "An Act to provide revenue for the support of the government of the State of Nevada," etc., Stats. 1915, p. 236, as Sheriff you are clearly entitled to such compensation. The salary act of Storey County, approved March 20, 1909, Stats. 1909, p. 167, provides among other things, that the Sheriff and *ex officio* Assessor shall receive the sum of eighteen hundred dollars a year, and that the same shall be in full payment for all services rendered by him. The said Act fails to provide any compensation or salary to the Sheriff as license collector. In the case of *Bradley v. Esmeralda County*, 32 Nev. 159, on page 166 thereof, our Supreme Court says:

The office of collector of licenses is a separate and distinct office, and has been so regarded in all of the revenue acts passed by the Legislature of this State. Citing *State v. Lawton*, 19 Nev. 202; *State v. LaGrave*, 23 Nev. 373-382.

The office of license collector being a separate and distinct office from Sheriff and Assessor, the salary Act of 1909 has no application thereto, and the Sheriff is, therefore, entitled to receive the compensation provided for by law to be paid to a license collector.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**2. Public Offices—An Official May Not Hold Two Incompatible Offices—  
Respective Offices as Member of Nevada Tax Commission and as  
Member of Board of County Commissioners Are Incompatible.**

CARSON CITY, JANUARY 18, 1921.

*His Excellency, EMMET D. BOYLE, Governor of Nevada.*

SIR: HON. SHOBER ROGERS has forfeited the office of State Tax Commissioner by reason of his election and qualification as County Commissioner of Churchill County. The general principle of law is that the same person cannot hold two offices that are incompatible. This is the common-law rule. As a member of the Board of County Commissioners of Churchill County, Mr. Rogers is also a member of the County Board of Equalization. As a State Tax Commissioner he would possess the power to sit in review, both as a member of the State Board of Equalization and as a member of the Nevada Tax Commission, of the acts and proceedings of the County Board of Equalization. Incompatibility in the offices of the State Tax Commissioner and County Commissioner is, therefore, clear and certain.

The acceptance of an incompatible office by the incumbent of another office is regarded as a resignation or vacation of the first office. 29 Cyc. 1382.

The subject of incompatibility in two offices has been many times before the courts. I desire to quote from some of the cases in support of my position in this case. One of the leading cases is that of *State v. Goff*, 15 R. I. 505. On page 506 the Court says:

It is well settled that when a person accepts an office incompatible with one which he then holds, he thereby impliedly resigns or vacates his former office. *State v. Brown*, 5 R. I. 1; *Cotton v. Phillips*, 56 N. H. 220; *State v. Buttz*, 9 Rich. 156; *The People v. Carrique*, 2 Hill N. Y. 93; *Magie v. Stoddard*, 25 Conn. 565; *Stubbs v. Lee*, 64 Me. 195; *The People v. Mostrand*, 46 N. Y. 375.

At page 507 thereof the Court further says:

The test of incompatibility is the character and relation of the offices: as where one is subordinate to the other, and subject in some degree to its revisory power; or where the functions of the two offices are inherently inconsistent and repugnant. In such cases it has uniformly been held that the same person cannot hold both offices.

In the case of *Cotton v. Phillips*, 56 N. H. 220, the question before the Court was whether or not membership in the prudential committee was incompatible with that of auditor of a school district. On page 222 the Court therein says:

The two offices are clearly incompatible. The prudential committee are charged with the administration of the affairs of the district. They are the sole custodians of the money apportioned to the district for schooling. They make contracts with teachers in their discretion, and disburse the funds. The duties of an auditor are to examine the accounts of the prudential committee, and their vouchers, and report whether they are properly cast and supported, and whether

the money has been legally expended. If the same person could hold both offices, he would in fact sit in judgment on his own acts.

The Supreme Court of the State of Maine in the case of *Stubbs v. Lee*, 64 Maine, 195, clearly states the rule and the reason therefor that the acceptance of a second office, which is incompatible with the first, vacates the first. The language of the Court, which is found on page 198 thereof, is as follows:

Where one has two incompatible offices, both cannot be retained. The public has a right to know which is held and which is surrendered. It should not be left to chance, or to the uncertain and fluctuating whim of the office-holder to determine. The general rule, therefore, that the acceptance of and qualification for an office incompatible with one then held is a resignation of the former, is one certain and reliable as well as one indispensable for the protection of the public.

In the case of *People v. Board of Fire Commissioners of Village of Saratoga Springs*, 27 N. Y. Supp. 548, the Court, on page 551 thereof, says:

The law does not favor the multiplication of offices in one person, and where they are inconsistent with each other, or where such multiplication has a tendency to impair the public service, it will be held that the occupant must surrender the one or the other if both appointments were conferred upon him at the same time, or, if they were conferred at different times, the acceptance of the one last made forfeits the first.

In the case of *State v. Jones*, 130 Wis. 572, the Supreme Court of Wisconsin declares that the offices of County Judge and Justice of the Peace are incompatible and that a County Judge vacates his office by accepting the office of Justice of the Peace.

In the case of *Attorney-General ex rel. Dust v. Oakman*, 126 Mich. 717, the subject of incompatibility in two offices was considered by the Court. The Court, on page 719, says:

The rule is that the acceptance of a second office, incompatible with the one already held, vacates the first. This was held in *Attorney-General ex rel. Moreland v. Detroit Common Council*, 112 Mich. 145 (70 N. W. 450, 37 L. R. A. 211). The result of the holding in that case is that, upon acceptance of the office relator is now contending for, he will ipso facto vacate the office of City Assessor. The title to that office will therefore fail him, but not the title to this. He is not required to sit between two stools. He can have a sitting, but only one.

You are advised that the Hon. Shober Rogers has ceased to be a member of the Nevada Tax Commission and that you possess the power to appoint some person to fill the vacancy created by the acceptance of Mr. Rogers of an incompatible office.

Yours very truly,

L. B. FOWLER, *Attorney-General*.

**3. Labor—Hours of, for Nurses in Training or Employee in Nevada State Hospital for Mental Diseases Not Limited by Statute.**

CARSON CITY, February 7, 1921.

HON. GEO. A. COLE, *State Controller*.

DEAR SIR: Answering your inquiry of this date you are respectfully advised that the attendant nurses in training or employed in the Nevada Hospital for Mental Diseases do not come under the provision of section 1 of the Act regulating hours of labor for state, county and municipal employees, chapter 203, Stats. 1919; therefore, their hours of work are not limited.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General*.

**4. Prohibition—Prepared Legislation Contravening United States Constitution and National and State Prohibition Laws Is Void.**

CARSON CITY, February 16, 1921.

*His Excellency*, EMMET D. BOYLE, *Governor of Nevada*.

DEAR SIR: Assembly Bill No. 17, which seeks to amend the city charter of Reno, is in contravention of the Constitution of the United States, the Volstead Act and the Nevada prohibition law, wherein its language endeavors to empower the City Council of Reno to regulate or license places where malt, vinous or spirituous liquors are sold. If this bill is signed by you, the part of the Act mentioned will be nugatory and, therefore, ineffective. Viewing the situation from the standpoint of policy, I beg to emphasize the fact that the Legislature should not in words empower a city to do anything which is illegal under the laws of the United States or the laws of the State of Nevada. I am writing an opinion as to a legal principle and I do not wish to be understood as casting any reflections upon the present Legislature, which inadvertently passed an Act which follows the same language that existed in the city charter at a time when to regulate or to license the sale of intoxicating liquors was legal.

Yours very truly,

L. B. FOWLER, *Attorney-General*.

**5. Legislation, Proposed—Opinion Suggesting Method of Amending Certain Acts Relating to Ex Officio Insurance Commissioner.**

CARSON CITY, March 2, 1921.

*His Excellency*, EMMET D. BOYLE, *Governor of Nevada*.

SIR: Assembly Bill No. 164, which is entitled "An Act relating to the ex officio Insurance Commissioner and amending certain Acts," seeks to amend four separate and distinct enactments of the Legislature. The title of this Act is not sufficiently comprehensive to accomplish the results sought. A title of an Act should of itself convey enlightenment as to what the subject-matter of the Act purports to do.

Any attempt to prepare a title that would include the four Acts mentioned would prove to be unsatisfactory.

It is my opinion, therefore, that separate Acts should be introduced to separately amend the respective Acts named in Assembly Bill No. 164.

Yours very truly,

L. B. FOWLER, *Attorney-General*.

**6. Justice of Peace, Compensation of—Payable from Funds in County Treasury as Other Officers Are Paid—A Particular Township May Not in Absence of Statute Be Specially Taxed to Pay Salaries of Township Officer.**

CARSON CITY, March 3, 1921.

HON. H. C. ROBERSON, *County Clerk, Goldfield, Nevada*.

DEAR SIR: A Justice of the Peace should be paid from funds in the county treasury in the same way that county officers are paid. There is no law that empowers a Board of County Commissioners to levy a tax on a particular township for the purpose of raising money to pay the salary of township officers. In the absence of such a law the board is without any such power.

Yours very truly,

L. B. FOWLER, *Attorney-General*.

**7. Pardon of Convict, Its Effect—A Pardon When Full and Complete, Restores Convict to All Civil Rights, and He May Be Appointed to Public Office.**

CARSON CITY, March 4, 1921.

HON. FRANK T. DUNN, *District Attorney, Tonopah, Nevada*.

DEAR SIR: We have your letter calling for our official opinion upon the following inquiry:

Have the County Commissioners the power to appoint a person to the office of Constable, who has been convicted of a felony and thereafter duly pardoned and restored to citizenship?

The earlier authorities by analogy, at least, would indicate that such an appointment could not be made. See *Commonwealth v. Fugate* (1830), 2 Leigh, 724; but later authorities take the contrary view. The case of *State v. Foley*, 15 Nev. 69, uses this language: "The effect of a full pardon is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtains his pardon, and not so much to restore his former, but to give him a new credit and capacity." (4 Black. Com. 402; see, also, 1 Green. Ev. sec. 377; *People v. Pease*, 3 Johns. Cases, 333; *Wood v. Fitzgerald*, 3 Or. 568; *In Re Deming* 10 Johns. 232; *State v. Baptiste*, 26 La. Ann. 136; *Ex Parte Hunt*, 5 Eng. (Ark.) 284; *Hester v. Commonwealth*, 85 Pa. St. 155; 2 Hawk. P. C. 547, and cases there cited; 1 Phill. Ev. 21; 1 Gilb. Ev. 259.)"

While the cited and quoted case is dissimilar in its facts, yet the language so used drawn to its logical conclusion, even if there were no other authority, admits of but one answer to your inquiry, namely: That such appointment may be lawfully made.

Hildreth v. Heath, 1 Bradwell's Reports, 87, contains this language: "Plaintiff in error further insists that the President's pardon, set up in his supplication, removed and cured his disqualification and ineligibility, if any such existed, and that the City Council should have so held. In this we are inclined to think that he is correct and that the City Council decided erroneously in adopting the contrary view of the law."

Mr. Justice Field, in *Ex Parte Garland*, 4 Wall. 333, has convincingly stated the law in the premises as follows: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender, and when the pardon is full, it relieves the punishment and blots out of existence the guilt, so that, in the eye of the law, the offender is as innocent as if he never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities and restores him to all his civil rights—it makes him, as it were, a new man, and gives him a new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited or property or interests vested in others in consequence of the conviction and judgment."

See, also: *Cuddington v. Wilkes*, Hobart, 81; *United States v. Wilson*, 7 Pet. 150; *Carlisle v. United States*, 16 Wall. 147; *Osborn v. United States*, 91 U. S. 474.

Such is the law. The County Commissioners may make the appointment. It is not the function of this department to discuss its expediency.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General*.

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8. Highway, State, Contracts of—State Highway Department Has Right to Allow or Reject Claims Against Fund Remaining for Distribution under a Completed Contract.

CARSON CITY, March 15, 1921.

MR. C. C. COTTRELL, *State Highway Engineer*.

DEAR SIR: We have your letter of the 15th instant, relating to State Highway Contract No. 5 and the disposition of moneys held by you applicable to valid claims presented against the contractor.

You have the right, subject to the legal advice which you have received, to pass upon the validity of any of these claims, and those which are invalid you may eliminate upon distribution of the funds in your hands. Those eliminated are fully protected according to statute, in that recourse may be made against the bond in the prem-

ises. However, before distributing this fund, I would notify those holding the rejected claims of your intended action and give them a reasonable time to pursue any legal remedy they may have in regard to the fund now in your possession.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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9. Revenue—Taxes Paid on Personal Property in Excess of Legal Amount Thereafter Computed Are Not Voluntarily Paid, and Such Excess Should Be Refunded.

CARSON CITY, March 16, 1921.

HON. G. J. KENNY, *District Attorney, Fallon, Nevada.*

DEAR SIR: For the purpose of answering a letter received from you, relative to collecting taxes on personal property, I shall quote from your letter as follows:

The county tax rate levied in March, 1920, was \$1.344, but on account of the valuations showing an excess of the March estimate, the rate was adjusted to \$1.2396, so that the excess of the adjusted rate over the levied rate is \$0.1044; now as a major portion of the personal property tax has been paid on the levied, or March, rate of \$1.344, the following question arises:

Under the above conditions are parties who paid personal property taxes on the March rate, but before the adjustment of the rate in October, entitled to a refund of the excess so paid?

If so entitled, may the County Treasurer now make apportionment to a refund fund for the excess or difference of \$0.1044? If the Treasurer is not so authorized and empowered, may the County Commissioners order such apportionment?

I desire to answer as follows:

The excess amount paid by various taxpayers cannot be held to be a voluntary payment because the taxpayer had the right to assume that the amount fixed would not be changed. Therefore, when a reduction was thereafter made that operated to the benefit of all who had not paid their personal tax, all taxpayers must be held to derive equal advantages due to said reduction. The County Commissioners should, therefore, direct and instruct the County Treasurer to make the necessary refund to conform to the reduction made.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

10. **Legislature, Members of—Must Exercise Right to Purchase Revised Laws at Price Fixed by Statute during Their Term—Right So to Do Ceases at the Expiration of Term.**

CARSON CITY, March 16, 1921.

HON. GEORGE BRODIGAN, *Secretary of State.*

DEAR SIR: It is my opinion that a member of the Legislature must exercise the privilege granted to him by an Act of the Legislature, approved March 15, 1917, Stats. 1917, p. 196, whereby he may purchase from the State the Revised Laws at \$3 per set during the term for which he has been elected. If he does not so exercise said privilege during his term, then the privilege dies at the expiration of his term of office.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

11. **Secretary of State—Law Publications of State Are in His Custody and Disposition—As an Incident Thereto He Has Right to Retain Sufficient Copies Needed for Republication or Emergency.**

CARSON CITY, March 16, 1921.

HON. GEORGE BRODIGAN, *Secretary of State.*

DEAR SIR: The custody and sale of the various law-books published under the direction of the State are placed in your hands. As an incident to your powers and duties, you have the right to protect the State by the retention of a sufficient number of copies of the various publications so that, in the case of republication or any emergency, the State will have access to the necessary books. For the purpose of so protecting the State I think it will be a reasonable act on your part to keep in your possession at least six copies of every law-book published under the direction of the State.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

12. **State Engineer—Entitled to Added Compensation Allowance by Statute for Ex Officio Services.**

CARSON CITY, March 23, 1921.

HON. J. G. SCRUGHAM, *State Engineer.*

DEAR SIR: We have your request calling for an official opinion of certain terms of Senate Bill No. 120 and Assembly Bill No. 178, which purport to allot you certain compensation for services rendered, as provided in those bills. You inquire whether there is any legal reason why you are not entitled to draw the compensation so authorized. We find none, constitutionally or otherwise. In the past, for many years, legislative construction, if no other authority existed, would be sufficient to hold that the allotments to you in these bills are valid.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

**13. Legislation—Effect of Granting Right of Way for Railroad.**

CARSON CITY, March 23, 1921.

HON. EMMET D. BOYLE, *Governor of Nevada.*

DEAR GOVERNOR: We have your letter of the 21st instant, relating to Senate Bill 109 under consideration by you, being an Act purporting to grant a right of way to John E. Sexton and his associates for railroad purposes. You are in doubt as to the right of the Legislature to commit the State as provided in this bill since the State does not own any land along the proposed line.

If you view the bill according to its letter, and not to its substance, your reasoning may be correct, but we take it that the legal effect of the bill, assuming that it purports to grant land for the right of way, would bind the State to no greater extent than a quit-claim conveyance between individuals. We take the bill as a whole as conferring a franchise upon John E. Sexton and others to initiate and consummate in due course of law a proposed railroad. If there are lands in public ownership of the United States, or of individuals, along the course of this right of way, this Act would confer no ownership thereto, and title thereto must be acquired under the federal statutes or in eminent domain.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.***14. Nevada Tax Commission—Moneys Contributed by a County for a Specific Purpose May Be Expended Accordingly by the Commission.**

CARSON CITY, March 26, 1921.

NEVADA TAX COMMISSION, *Carson City, Nevada.*

DEAR SIR: We have your letter of the 26th instant relating to the application of \$400 received from Clark County through an agreement entered into with the Nevada Tax Commission for sharing certain expenses and causing to be placed on the tax-roll certain property escaping taxation.

You inquire whether or not there is sufficient legal authority for the Tax Commission to make use of the \$400 due from the county, in the continuance of the work of the field agent in that county. We answer in the affirmative, for the reason, that this \$400 is paid under an agreement for defraying specific expenses, and the same may be applied by you accordingly.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

15. **Prohibition Law—Officials May Not Designate What Liquids of Alcoholic Content May or May Not Be Sold, Except, Where They May Take Judicial Notice Thereof.**

CARSON CITY, March 26, 1921.

RAPKEN & Co., LTD., *San Francisco, Calif.*

DEAR SIR: We have your letter of March 24, inquiring whether or not a preparation known as Abbott's Bitters could be lawfully sold to the drug and grocery trade of Nevada.

The opinions of the Attorney-General are reserved by law for the State, its officers and institutions; hence, we are precluded from advising you officially. However, out of courtesy we will state that the Nevada prohibition law gives no power to the Attorney-General, or other officials, to designate what liquids of alcoholic contents may or may not be sold, thus leaving a given case to depend upon a question of fact—namely, the contents of the liquid and its adaptability for use as a beverage. We, therefore, may not pass upon the situation presented. We will only pass upon such preparations concerning which a court would take judicial notice such as whisky, brandy, wine, beer, etc., etc. It may be that Abbott's Bitters may be sold through the drug trade, but we doubt very much if the same may lawfully be sold through the grocery trade.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

16. **Federal Taxes—County Officers on Official Business Entitled to Exemption Therefrom When Traveling. Reference Made to Collector of Internal Revenue.**

CARSON CITY, March 31, 1921.

HON. GEO. A. COLE, *State Controller.*

DEAR SIR: Pursuant to your inquiries we have to advise you as follows:

First—That it is the opinion of this department that county officers are entitled to the federal exemption on railroad traveling expense while engaged in official business, since they are exercising that portion of the sovereignty of the State which is delegated to them.

Second—We are unable to ascertain if a federal war tax is levied on county construction supplies. In this respect we would respectfully refer you to the Collector of Internal Revenue, Reno, Nevada.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

17. **Coroner—Entitled to His Legal Mileage to View Remains in Cases of Inquest—Furnishing of a Conveyance to Him by County or Individual Immaterial.**

CARSON CITY, April 11, 1921.

HON. G. J. KENNY, *District Attorney, Fallon, Nevada.*

DEAR SIR: We have your letter relating to sections 1998 and 7558 of the Revised Laws of 1912, propounding the inquiry whether or not Coroners are allowed for each mile necessarily traveled in going to the presence of the dead body, 25 cents, as specified in said sections. We reply in the affirmative. It is immaterial whether the conveyance for travel is furnished by the county or a private individual; the Coroner is entitled to this mileage. We do not mean to say, however, that he would be entitled in addition to this mileage to auto hire procured by himself to go to the presence of the body.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

18. **Noxious Animals—Force and Effect of Statute Providing for State and County Cooperation—County Cooperation Approval—If a County Fails to Provide Funds, State Rabies Commission Need Expend No Funds for Benefit of Such County.**

CARSON CITY, April 11, 1921.

HON. EDWARD RECORDS, *Secretary State Rabies Commission, University of Nevada, Reno, Nevada.*

DEAR SIR: We have your letter requesting an opinion as to the cooperative force and effect of chapter 155, Statutes of Nevada 1921, relating to the eradication of noxious animals in the State of Nevada, etc., and particularly as to the point "whether or not the Commission is warranted in limiting the expenditures of its money to such counties as may take this action." The statute in question, stripped of unnecessary verbiage, provides no county funds to consummate its purposes in the several counties and, therefore, under the terms of the Act, should any county refuse or neglect to make provisions for a county rabies fund, the State Rabies Commission may, at its option, refuse to authorize any work to be done in that county. There is no objection in law to the several counties voluntarily raising funds for cooperation in this work, but, before your Commission may take legal notice thereof, such funds must be made subject to the order of the County Rabies Board specified in the Act. A county, however, under the Act may not be required to raise such funds.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

**19. Motor Vehicle Law—Act Providing for Licensing Such Vehicles under Certain Conditions by the Public Service Commission Does Not Supersede Act Providing for Licensing Same by Secretary of State—Both Acts Are Effective as Cumulative Enactments.**

CARSON CITY, April 13, 1921.

HON. GEORGE BRODIGAN, *Secretary of State.*

DEAR SIR: We have your verbal inquiry calling for our official opinion concerning the operation and effect of an act entitled "An Act providing for a license for the operation of motors and vehicles and other matters relating thereto," approved March 22, 1921, whereby the Public Service Commission, upon the issuance of a certificate of public convenience for the operation of commercial motor-truck and passenger lines on the highways of this State shall collect certain license fees.

You inquire whether or not this Act supersedes or conflicts with other Acts whereby you, as Secretary of State, license motor vehicles. We reply in the negative. The Act entitled and approved as aforesaid is cumulative to subsisting Acts and appertains, as is apparent from a reading thereof, to common carriers, whereas the subsisting Acts appertain to all motor vehicles. We are of the opinion, therefore, since neither of the Acts conflict, and the Act entitled and approved as aforesaid refers to common carriers and is cumulative in its scope, and independent in itself, that you should proceed under the Acts therefore subsisting and license all motor vehicles, thereunder and collect the statutory license fees in the manner provided by law.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

**20. Elections—Water-Marked Ballot Paper Designated by Statute Should Be Used. If Not Used, in the Absence of Fraud or Resulting Injustice, Election Would Be Upheld.**

CARSON CITY, April 27, 1921.

MR. WALTER J. McCURDY, *Attorney-at-Law, Sparks, Nevada.*

DEAR SIR: The Secretary of State informs me that he has water-marked paper which may be used by Sparks at its city election. It is, therefore, advisable for your city to procure the paper from him. An election is not set aside by reason of a technicality, provided that, if by any sound legal reasoning, it can be upheld. Therefore, if paper is used which does not absolutely conform to that designated by law and yet no fraud or injustice results therefrom, I believe that such an election will not be declared invalid. It is necessarily advisable that all administrative officers who have anything to do with elections to follow the law just as closely as possible, and such should be done in this case.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**21. Boxing Exhibitions—There Is No Exemption from Payment of Statutory License Fee.**

CARSON CITY, April 18, 1921.

HON. HARLEY A. HARMON, *District Attorney, Las Vegas, Nevada.*

DEAR SIR: We have your inquiry, together with cumulative inquiries from Mr. Stebenne, calling for our official opinion as to whether or not the Statutes of 1917, authorizing the issuance of a license for boxing exhibitions, is applicable to the proposed exhibition of an incorporated club where admittance is confined to the members and their invited guests with or without charge. The proposed exhibition is advertised to the public by posting, etc. It is apparently a public affair. There is no exception provided for in the Act, and if the act in this instance did not govern it could be subject to defeat at will through kindred subterfuges.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

**22. Gambling—Certain Games May Be Licensed—County Commissioners, Acting as Town Board, Have Authority to Pass Requisite Ordinance Licensing Certain Games.**

CARSON CITY, April 19, 1921.

HON. FRANK T. DUNN, *District Attorney, Tonopah, Nevada.*

DEAR SIR: We have your your inquiry of April 8, calling for our official opinion as to whether or not the Board of County Commissioners acting as a town board could legally pass an ordinance licensing certain games and accommodations relating thereto. We have already ruled what gambling games are permitted under the Statutes of 1915, p. 462, in Opinion No. 74, contained in the Biennial Report of the Attorney-General for 1919-1920. The Board of County Commissioners may legally pass an ordinance licensing games and accommodations referred to under the provisions of section 877, subdivision 9, of the Revised Laws of 1912, and particularly under the language: "Provided, that in all unincorporated cities and towns of this State the Board of County Commissioners shall have power to fix and collect a license tax upon the following places of business and amusements, and none other, as follows, to wit: \* \* \* gaming and gambling houses.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

**23. Secretary of State—Power to Exact Certain Filing Fees for Foreign Corporation.**

CARSON CITY, April 23, 1921.

HON. GEORGE BRODIGAN, *Secretary of State.*

DEAR SIR: When articles of incorporation of a foreign corporation are offered to you for filing, together with amendments thereto sepa-

rately certified to as amendments thereof, it is your duty to collect a fee for the filing of said articles and an additional fee for every one of the certified amendments. If, however, amended articles or substituted articles are filed as one instrument, which amended or substituted articles eliminate the provisions changed or destroyed by the amendments and substitutes the amendments in their places and thereby make the amended or substituted articles one complete instrument, then only one filing fee can be charged.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

24. **Prohibition Law—Amendment Thereto Relating to Procurement of Sacramental Wines Is Constitutional, But Amendment Thereto Relating to Procurement of Certain Other Intoxicating Liquors Is Unconstitutional.**

CARSON CITY, April 23, 1921.

HON. JONATHAN PAYNE, *Acting Prohibition Director, Reno, Nevada.*

DEAR SIR: The Act of the Nevada Legislature approved March 22, 1921, entitled "An Act to amend an Act entitled 'An Act to prohibit the manufacture, sale, keeping for sale, and gift, of malt, vinous and spirituous liquors and other intoxicating drinks, mixtures or preparations.'" etc., Stats. 1921, p. 331, wherein it attempts to change the original Act by making legal the use of certain intoxicating liquors made illegal by the original Act, is, to that extent, unconstitutional. The latter part of section 4, as amended by said Act, relative to the method of procuring wines for sacramental purposes, is valid, for the reason that it does not make legal something that is illegal in the original Act, but merely relates to the method of obtaining wines for sacramental purposes. The original Act provides that in such cases wine may be obtained from a druggist. This permitted any person claiming to be a minister to procure, somewhat promiscuously, wine, based on the contention that it was for sacramental purposes. This was due to the fact that he was not confined to any particular druggist, but could change to a different druggist as often as he desired, so it became difficult to keep a check on the amount of wine so obtained. Under the amended Act the procedure is centralized in the Attorney-General, who is necessarily obligated to see that a particular minister does not receive an undue and unnecessary amount of wine. It cannot be reasonably contended that this change works an annulment or repeal of any part of the prohibition law. Since the adoption of said law by the people of Nevada the Federal Government has enacted a prohibition Act. The new procedure will simplify the operation of the Nevada Act so that it will not conflict with the federal Act.

In ruling that certain parts of the amendatory Act are unconstitutional, I am called upon to construe a vital and important provision of our Constitution rather than a construction or interpretation of the Prohibition Act itself. The people, by virtue of the initiative and referendum provision of our Constitution, have reserved to themselves the power to initiate a measure and which measure, if not adopted by

the Legislature, may be enacted as a law by direct action of the people. No construction of these provisions of our Constitution can be justified which will emasculate or destroy them. The part of the amended section which I declare to be constitutional strengthens rather than weakens the law relative to the purchase of wines for sacramental purposes.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**25. Bond Issue—Act Providing for, Valid—Form of Bond Legal—Certain Bonds Lawfully Issued.**

CARSON CITY, April 28, 1921.

HON. GILBERT C. ROSS, *Secretary of State Board of Finance.*

DEAR SIR: You are hereby advised that the Act of the Legislature entitled "An Act authorizing the Board of Examiners to issue and sell bonds to provide money to pay a portion of the cost of constructing a state highway system, and providing for the payment of said bonds," approved March 28, 1919, is a valid enactment and that bonds issued pursuant thereto become a legal obligation and must be paid by the State of Nevada.

You are further advised that the form of bond duly prepared conforms to said Act.

You are also further advised that bonds numbered 1201 to 1440, both inclusive, have been legally issued.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**26. Prohibition Law—Amendments Thereto and Operations Thereof Concerning Transportation of Intoxicating Liquor—Object of the Prohibition Law Is to Prevent Use of Intoxicating Liquors as a Beverage.**

CARSON CITY, April 30, 1921.

HON. JONATHAN PAYNE, *Acting Prohibition Director, Reno, Nevada.*

DEAR SIR: The closing words in the amendment to section 4 of the Nevada Prohibition Act, Stats. 1921, p. 331, which read as follows: "Nothing in this Act which makes the transportation of intoxicating liquors unlawful shall be construed to apply to the transportation of intoxicating liquors for the uses and purposes made legal in this section," must be construed as having application only to certain new methods whereby intoxicating liquors may be lawfully obtained. It applies in the following cases: Where certificates are issued by the State Board of Health, by the State Board of Education, by the Board of Regents of the University of Nevada, or the Attorney-General, for purposes in conformity with the provisions of said amended section. It certainly cannot be contended that the placing of responsibility in the hands of such public officials weakens the prohibition law. On the contrary, it is fair to indulge in the presumption that they will do just

what the Legislature intended them to do—only to issue certificates in cases warranted by law.

In construing and interpreting the Nevada Prohibition Act, the primary object of the law must be kept in view—that is, to prevent the use of intoxicating liquors as a beverage. Assuredly this primary purpose has not been interfered with by the new legislation. Therefore, any holder of a certificate issued according to this amended section is entitled to receive shipments of alcohol or wine in the quantity provided for in any such certificate. Any person having such a certificate necessarily must comply with the provisions of the Federal Prohibition Act.

Yours very truly,

L. B. FOWLER, *Attorney-General*.

27. **Emergency Loan—The State Loaning the Money Thereunder May Consent to Extension of Time of Payment According to Method Suggested.**

CARSON CITY, May 3, 1921.

HON. ED. MALLEY, *State Treasurer*.

DEAR SIR: We have under consideration the emergency loan made by the State to White Pine County under date of July 18, 1919, and the correspondence in connection therewith. This loan is now overdue and unpaid by reason of the economic situation subsisting in White Pine County and elsewhere. The Board of County Commissioners desire an extension of time for its payment, and the question arises whether or not such extension may be legally given.

We are of the opinion that such extension may be given and, in order that the record may be perfected, we suggest that the County Commissioners pass a proper resolution in the premises reciting the present emergency and requesting the State to withhold demand for payment of the loan for a period of one year or thereabouts, and also requesting that the State Board of Finance approve the extension. Upon receipt of a certified copy of such resolution passed by the Board of County Commissioners of White Pine County unanimously, the State Board of Finance may approve the same. The record will then be complete, but, irrespective of any action in the premises, the loan as it now subsists is a valid one and the mere nonpayment of it when due would not effect its legality.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General*.

28. **Statutory Construction—There Is No Reason Why Section of Revised Laws Cited Is Null—It Should Be Followed.**

CARSON CITY, May 4, 1921.

HON. CHAS. A. WALKER, *District Attorney, Ely, Nevada*.

DEAR SIR: Your letter relative to section 842 of the Revised Laws has been considered by me. I do not know of any reason why said

section should be treated as a nullity. I, therefore, rule that it is a valid provision of law and must be followed.

Yours very truly,

L. B. FOWLER, *Attorney-General*.

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**29. Revenue—Insurance Policy Payable to Estate of Decedent Is Subject to Inheritance Tax After Exemptions Allowed.**

CARSON CITY, May 6, 1921.

INHERITANCE TAX APPRAISERS, *Reno, Nevada*.

GENTLEMEN: After a review of the various decisions on the subject, I have come to the conclusion that where life-insurance money is made payable to the estate it becomes liable for inheritance tax, subject, of course, to the regular exemption given in the Inheritance Tax Act itself. The courts have possessed a strong tendency to rule the other way when there has been any language in the policy justifying a different rule. The use of the words "administrators, executors or assigns for the express benefit of a wife and surviving children" have been held to create a trust fund and that the money did not become a part of the estate.

In Florida it has been held that a policy reading "for the benefit of estate" was intended for the benefit of only a minor child and not the creditors, and that the money derived therefrom did not become a part of the estate proper.

In New York and Minnesota it has been held, where a policy reads "to the legal representatives," that the insured means his widow and children and not his estate or creditors.

In the estate now under consideration I understand that it is made payable to the estate without any qualifying words of any description. The money derived from said policy is, therefore, a part of the estate of the decedent and must be treated by you as a part of his estate.

Yours very truly,

L. B. FOWLER, *Attorney-General*.

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**30. Industrial Insurance—A Judicial Receiver Employing Persons May Elect to Accept Benefits of Nevada Industrial Insurance Act—Such Has Been the Popular Construction of the Act.**

CARSON CITY, May 26, 1921.

CHENEY, DOWNER, PRICE & HAWKINS, *Reno, Nevada*.

DEAR SIRS: We note your inquiry calling for our official opinion as to whether or not a receiver judicially appointed for a corporation, who conducts his business and affairs as a going concern, necessitating the hiring of many employees, may lawfully avail himself of the provisions of the Nevada Industrial Insurance Act, being chapter 111 of the Statutes of 1913, and the amendments thereto.

We have been awaiting the return of the chairman of the Nevada Industrial Commission, and have just concluded a consultation with him.

We are of the opinion that a receiver may lawfully accept these acts for many reasons, among which we casually mention:

1. Section 7½ of the Act defines an employer as "every person, firm, voluntary association and private corporation," etc. We hold that a receiver comes within this definition, especially when we take into consideration the spirit, reason, and purpose of the Act sought to be accomplished as stated in its title—namely, "An Act relating to the compensation of injured workmen in the industries of this State and the compensation to their dependents where such injuries result in death, creating an Industrial Insurance Commission, providing for the creation and disbursement of funds for the compensation and care of workmen injured in the course of their employment, and defining and regulating the liability of employers to their employees; and repealing all Acts and parts of Acts in conflict with this Act." Since the assets of the corporation are in *custodia legis*, and the receiver *as such* could hardly be held liable for tort, any other construction would preclude injured workmen, otherwise entitled to damages, from any compensation whatsoever arising out of accidents in the course of their employments, and thus the reason, spirit and purpose of the Act would not be fulfilled.

2. The Nevada Industrial Commission since its creation has acquiesced in this construction; many cases insuring receivers appear on its records; and, accordingly, this departmental construction, we think, would have almost a controlling effect should the question ever arise for judicial determination.

Therefore, Mr. Frank Margrave, as the duly appointed receiver of the Nevada Packard Mines Company, may lawfully accept the Acts hereinabove referred to.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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31. **Public Commissions—A Member May Not Be a Deputy Thereof, Since Commission Could Not Exercise Its Functions with Independent Judgment and Discretion.**

CARSON CITY, May 27, 1921.

STATE APPLARY COMMISSION, *Reno, Nevada.*

DEAR SIRS: We have your letter of May 19 propounding a certain question for our official opinion under the Act creating your Commission, which we answer as follows:

A member of your Commission is barred from acting as Deputy Inspector and receiving compensation for his services as such under the Act, for the reason that the appointment of a Commissioner as a Deputy Inspector is contrary to public policy, in that the Commission,

as a whole, could not exercise its supervisory functions under the Act with that independent discretion and judgment which is required of all public officers.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

32. Public Schools — Teachers' Contracts — Budget — Certain Inquiries Answered.

CARSON CITY, May 28, 1921.

HON. W. J. HUNTING, *Superintendent of Public Instruction.*

DEAR SIR: YOUR letter of recent date recites substantially as follows: That a contract to teach was entered into by a certain district with a certain teacher who held a temporary certificate; that, during the existence of said contract, said temporary certificate expired, and the teacher, having failed in the examination for teacher's certificate, was for a space of time left without a license to teach; that thereafter upon the recommendation of the School Board of her district she was granted a third-grade certificate, which is good in that district until the next regular teachers' examination; that thereafter the teacher employed pursuant to said contract resumed her work as teacher and continued to teach in said school. You have propounded the query as to whether or not said teacher's contract was at an end when her temporary certificate terminated. I am of the opinion that when she resumed the performance of her duties under the direction of the School Board, and was duly authorized to teach by the certificate mentioned, that it was for the purpose of continuing the original contract; that all the terms and conditions of said contract applied to her continuance to teach, and she is, therefore, entitled to be compensated according to the terms provided for in said contract. I am satisfied that her contract did not lose its continuity. The actions of both parties to the contract lead me to this conclusion.

Answering your other query, as to whether or not after a contract is entered into wherein it is agreed that a teacher shall be paid a monthly salary for a definite number of months, the School Board may close the school prior to the completion of the period named in the contract and be freed of responsibility for any salary for the uncompleted time, I beg to advise that such action cannot be legally taken. The contract protects the teacher in this respect, and, as long as she is willing to fulfil the agreement entered into by her, she is entitled to be paid for the full period mentioned in the contract.

Replying to your other query, as to whether or not a School Board would be justified in departing from the original budget by spending a part of the money originally intended for the teacher's salary to pay a balance on the school building, I beg to advise that a School Board is bound by the items fixed in the budget and that, therefore, transposition of funds is not permissible.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**33. Secretary of State—May Not Charge Fees for Services Rendered the State and Others Enumerated in Their Official Capacity.**

CARSON CITY, May 31, 1921.

HON. GEORGE BRODIGAN, *Secretary of State.*

DEAR SIR: You are hereby advised that hereafter your office will not have the legal right to collect any fees for services rendered by your office to the State of Nevada or any county, city, or town thereof, or any officer thereof acting in his official capacity. Such has been decreed by the Legislature in the amendment to the fee bill which is found in Statutes of 1921, p. 290. I am rendering this opinion pursuant to a communication received from the District Attorney of Washoe County in connection with the claim of your office for the sum of \$20 relative to certain requisition papers.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

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**34. Public Employment—Statute Provides Who May Be Employed on Public Works, Etc.**

CARSON CITY, May 31, 1921.

HON. J. H. HART, *Lovelock, Nevada.*

DEAR SIR: The Act of the Nevada Legislature, found in the Statutes of 1921, at page 205, which provides that only citizens or wards of the United States or persons who have been honorably discharged from the military service of the United States shall be employed by any officer of the State of Nevada, or by any contractor of the State of Nevada, or any political subdivision of the State, or by any person acting under or for such officer or contractor, in the construction of public works or in any office or department of the State of Nevada, or political subdivision thereof, and in all cases where persons are so employed preference shall be given to honorably discharged soldiers, sailors, and marines of the United States and to the citizens of the State of Nevada, excludes persons other than those mentioned from employment as courthouse janitors and public-school janitors. The employment of persons other than those specified in the Act is, therefore, a violation of the Act.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

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**35. Fish and Game—The Statute Permits Board of County Commissioners to Lengthen the Closed Season for Game.**

CARSON CITY, May 31, 1921.

MR. E. R. SANS, *Biological Assistant, Bureau of Biological Survey, Reno, Nevada.*

DEAR SIR: Section 2 of an Act to amend certain sections of an Act entitled "An Act for the protection and preservation of fish and game," etc., approved March 27, 1921, which amended section 50 of the original Act, empowers a Board of County Commissioners when

the necessary procedure is taken to lengthen the time of the closed season for game. I am of the opinion that a fair construction of this section empowers the Board of County Commissioners to so lengthen the closed season that there will be no open season for the particular game specified by said board.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

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36. **Public Officers—Claim for Subsistence of Field Agent—Officer Held Entitled to His Claim as Made.**

CARSON CITY, June 7, 1921.

NEVADA TAX COMMISSION, *Carson City, Nevada.*

GENTLEMEN: Your letter of the 3d instant, relative to the expense claim for subsistence of H. S. Pohe of Yerington, as field agent for your Commission, wherein a claim is made for an allowance for subsistence for the months of January and February, 1921, during which time Mr. Pohe remained in Carson City pursuant to the direction of your Commission, has been considered by me.

I am of the opinion that Mr. Pohe is legally entitled to be reimbursed for money expended by him in payment of his board and lodging while in Carson City acting as herein stated. He was employed in a capacity which makes it unreasonable to say that he was required to maintain an official residence at Carson City. His regular home is Yerington and, under the circumstances, he is entitled to be allowed for subsistence during any of the time that as field agent he worked at points other than Yerington under the direction of your Commission.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

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37. **Emergency Loan—When Reason Therefor Has Been Approved, the Subject of the Necessity or Emergency for Loan Is Determined.**

CARSON CITY, June 7, 1921.

HON. W. J. HUNTING, *Superintendent of Public Instruction.*

DEAR SIR: When a public board which is empowered by law to authorize by resolution a temporary loan for the purpose of meeting a necessity or emergency has acted and there is approval of such action by the State Board of Finance, the same constitutes a determination of the subject of a necessity or an emergency. Certainly an extreme case of abuse in this respect would have to be shown before the courts would attempt to interfere with such determination, and the action of the two boards must therefore be viewed as practically conclusive. Consequently, I am of the opinion that when the two boards have acted favorably a valid loan may be made pursuant thereto.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**38. Corporations—Certificate of Stock Is Evidence of Ownership—An Assistant Secretary May Act in Signing Certificates.**

CARSON CITY, June 7, 1921.

G. L. MATHISEN TRADING CO., *San Francisco, Calif.*

GENTLEMEN: A certificate of stock is only evidence of the title that a stockholder owns his stock. The certificate itself is not the stock, but is merely a paper indicative of the ownership of the amount of stock named in the certificate. A stockholder owns his stock whether he has a certificate or not. I have stated these legal principles preliminarily so that a determination may be reached of the effectiveness of section 56 of the general corporation law of the State of Nevada which provides that certificates of stock shall be issued under the seal of a corporation, signed by the president, vice-president and by the treasurer or secretary. Taking into consideration the principles of law involved, and the intent and purpose of said section, I am of the opinion that where the by-laws of a corporation empower an assistant secretary to act in the absence of the secretary, that his acts, in so far as certification of stock are concerned, are perfectly legal.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**39. Public Schools—Vocational Training—Amendatory Act Cited Concerning the Schools of Mines Is Not Retroactive, But Prospective in its Operations.**

CARSON CITY, June 21, 1921.

MR. HOMER DERR, *Director of Vocational Education.*

DEAR SIR: You have propounded to me the following query: Is the Act of the Legislature of 1921 entitled "An Act to amend section 5 of an Act entitled 'An Act creating Schools of Mines,' " etc., Statutes of 1921, p. 264, being chapter 175 thereof, retroactive or is it strictly prospective in its effect? The ordinary rule of statutory construction is that a statute is presumed to be prospective in character unless there is language in the Act itself that indicates the contrary or the subject-matter of the Act is such that the statute would practically fail in a substantial sense if a retroactive construction is not given.

A consideration of the Act mentioned by you requires me to come to the conclusion that the Legislature has by definite language made it operative from and after January 1, 1921. The original Act passed in 1919 contains the language "on and after January 1, 1921." If the Legislature did not desire that the amendatory Act should be effective on and after January 1, 1921, it could have easily eliminated that language and made the Act indisputedly prospective, but, as the Legislature did not do this, but, on the contrary, used retrospective and retroactive language, I am compelled to rule that the Legislature did the very thing that its language purports it intended to do—that is, made the amendatory Act operative from the first day of January, 1921.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**40. Public Schools—Boards of County Commissioners Are Required to Levy Special School District Tax for Joint School District Even if There Be No School Children within the County.**

CARSON CITY, June 24, 1921.

HON. W. J. HUNTING, *Superintendent of Public Instruction.*

DEAR SIR: You have propounded the following query:

In the levy of a special district tax on a joint school district created under section 81, page 37, Nevada School Laws, 1921, is it obligatory upon the County Commissioners to levy the special district tax asked for by the Board of School Trustees of such joint district, in accordance with the provisions of section 140, page 49, Nevada School Laws, 1921?

This must be answered in the affirmative. You have inquired whether or not the Board of County Commissioners will be relieved of the obligation of making such levy if there are no school children in that portion of the joint district lying within a given county. I beg to reply that the duty of the Board of County Commissioners in the respect mentioned is absolute, and the fact that there are no school children in that portion of the joint district within said county does not affect the legal situation. The duty of the Board of County Commissioners to make such levy can in nowise be affected by reason of the fact that all the members of the Board of School Trustees of the joint district reside in a different county. The remedy of the Board of School Trustees, in the event that the Board of County Commissioners fails to make such levy, is to compel the levy by mandamus proceedings. I beg also to suggest that a deliberate declination on the part of public officials to perform their duties places them in the position where they may become the subject of successful removal proceedings. Therefore, if the members of the Board of County Commissioners are guilty of defiance of the law in regard to a tax levy, they make themselves liable to the proceedings mentioned.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**41. Emergency Loan—A Record Therefor Approved as Submitted.**

CARSON CITY, June 8, 1921.

HON. GILBERT ROSS, *Secretary of State Board of Finance.*

DEAR SIR: An examination has been made of emergency resolution of Lyon County, Nevada, adopted by the Board of County Commissioners of said county on the 6th day of June, 1921, reciting that an emergency exists owing to the fact that the county is without funds to pay Water Commissioners of said county and the various functions connected therewith, and that it is necessary to raise money immediately for that purpose. I find that the resolution of the Board of County Commissioners conforms to the law and that due notice has been given as provided by law. A grammatical error exists in the second "Whereas" of the resolution, wherein the following language is used: "nor will not be available." To make the resolution abso-

lutely accurate the word "not" should be stricken therefrom or the word "nor" should be changed to "and." However, in that the intent and purpose of the resolution can be gathered therefrom, the natural conclusion may be reached from the entire language that the said two negatives do not in this case constitute an affirmative. I think that the resolution may be so construed.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

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42. **Criminal Law—A Certain Violation of Public Utilities Act Is a Gross Misdemeanor and Must Be Prosecuted in District Court.**

CARSON CITY, June 9, 1921.

HON. G. J. KENNY, *District Attorney, Fallon, Nevada.*

DEAR SIR: A violation of section 41 of chapter 109, Stats. 1919, relative to public utilities, is a gross misdemeanor and must be prosecuted in the District Court. Section 4851 of the Revised Laws limits criminal jurisdiction of Justice Courts to misdemeanors punishable by fine not exceeding \$500, imprisonment not exceeding six months, or by both such fine and imprisonment.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

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43. **Highways—State Highway Department—Amendatory Act Is Prospective and Does Not Affect Prior Acts.**

CARSON CITY, June 13, 1921.

MR. GEO. W. BORDEN, *Assistant State Highway Engineer.*

DEAR SIR: Any change in a route made by the State Highway Department pursuant to section 24 of the General Highway Act, which was made prior to the approval of an Act of the Legislature entitled "An Act to amend section 24 of an Act entitled 'An Act to provide a general highway,'" approved March 23, 1917, Stats. 1921, p. 170, constitutes a legal change and is not affected by the said amendment of 1921, provided, of course, that the provisions of section 24 of the general highway law as it originally stood were followed. The amendment of 1921 is prospective in character and cannot affect the acts of the department which took place prior to the enactment of said amendment and which were legal at the time they were performed.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

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44. **Motor Vehicle Law—Certain Motor Vehicles Are Not under Jurisdiction of the Public Service Commission, Being Especially Reserved Therefrom.**

CARSON CITY, June 28, 1921.

PUBLIC SERVICE COMMISSION, *Carson City, Nevada.*

GENTLEMEN: You have propounded the query as to whether or not automobiles operating under certificates from your Commission as

chartered common carriers are protected from the competition of other automobiles that are run for hire.

Section 7 of the Nevada Public Utility Act, Stats. 1919, p. 198, after defining the term "public utility," contains the following provision:

*Provided, however,* that automobiles used exclusively as hearses or ambulances operated within the limits of cities and towns, and other automobiles which have no specified routes of travel and which are not operated as common carriers, shall not be construed as being under the jurisdiction of the Commission within the meaning hereof.

The Legislature has definitely excepted from the jurisdiction of the Public Service Commission any automobile which has no specific route of travel and which is not operated as a common carrier. This provision must be construed as exempting from the operation of the Act any automobile which is offered for hire to be driven as directed by the person or persons hiring said automobile. The proviso mentioned seems to be definite. I am, therefore, unable to reach a conclusion other than as herein given. In support of my ruling I desire to cite the case of Public Utilities Commission of Utah v. Garvilo, 181 Pac. 272.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

45. **Hoisting Engineers—District Board, Election of—Duly Licensed Engineer Only May Vote at Such Election.**

CARSON CITY, July 1, 1921.

HON. A. J. STINSON, *Inspector of Mines.*

DEAR SIR: In order that a person may vote to elect a member of the district board of examiners pursuant to section 20 of an Act entitled: "An Act providing for the issuance of licenses to hoisting engineers," etc., Stats. 1921, p. 316, it is necessary that the persons so voting should be duly licensed hoisting engineers and are residents of the district in which they cast their votes. The intent and purpose of said section, relative to the election of said member, would be defeated if indiscriminate voting should be allowed. The section as a part of the Act mentioned must be sensibly construed, and in doing this I have reached the conclusions herein given.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

46. **Industrial Insurance—Volunteer Firemen Come within Purview of Act—It Is Mandatory that City or Town Accept Act and Pay Premiums for Its Volunteer Firemen.**

CARSON CITY, July 7, 1921.

NEVADA INDUSTRIAL COMMISSION, *Carson City, Nevada.*

DEAR SIRS: We have your inquiries of the 7th instant relating to the recent amendment to the Nevada Industrial Insurance Act including the volunteer firemen as being entitled to its benefits. You are respectfully advised that it is compulsory on the part of a city or

town to provide for its volunteer firemen under the terms of the Act. The phrase referred to "upon the city or town complying therewith" should give rise to no ambiguity. The payments of premiums, etc., are conditions precedent in order to entitle the employee to the benefits of the Act.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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47. **Hoisting Engineers' License—Must Procure License—Frequency of Operating Hoist Is No Test—Operation of Hoist Is the Only Test.**

CARSON CITY, July 9, 1921.

HON. A. J. STINSON, *Inspector of Mines.*

DEAR SIR: Section 1 of an Act entitled "An Act providing for the issuance of licenses to hoisting engineers," etc., Stats. 1921, p. 316, makes it mandatory for any person who operates any steam, electric, gas, air, or any other hoisting machinery over six-horsepower when either is used in lowering or hoisting men to possess a license except as specifically provided in the two exceptions contained in said section. Therefore, any person who is engaged in operating hoisting machinery must procure a license pursuant to said Act, of which section 1 is a part. The frequency with which the lowering or hoisting of men is done is not consequential. If men are lowered or hoisted at any time then a license is required.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

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48. **Industrial Insurance—Certain Phrase Quoted in Amendatory Act Raises No Ambiguity.**

CARSON CITY, July 13, 1921.

NEVADA INDUSTRIAL COMMISSION, *Carson City, Nevada.*

DEAR SIR: We have your inquiry of the 7th instant, relating to the recent amendment to the Nevada Industrial Insurance Act providing for the insurance of volunteer firemen of cities and towns. You are respectfully advised that it is compulsory on the part of a city or town to accept the Act and its amendments according to its terms. The phrase in the amendment—namely, "upon the city or town complying therewith"—should give rise to no ambiguity. It is apparent that this phrase refers to conditions precedent to be performed by the city or town such as payment of premiums, etc., before the employee would be legally entitled to the benefits of the Act.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

49. **Public Officers—Act Fixing Expenses as State Officers Does Not Apply to Officers of the United States Government in Cooperation with the State.**

CARSON CITY, July 14, 1921.

HON. J. G. SCRUGHAM, *State Engineer.*

DEAR SIR: The Act of the Legislature of the State of Nevada entitled "An Act fixing the allowance of expenses of any state officer," etc., approved February 13, 1915, does not apply to a claim presented against the State of Nevada by an officer of the Government of the United States who acts pursuant to a cooperative arrangement between the State of Nevada and the United States. The Act of the Legislature of this State which legalizes the cooperative system between the State and the Federal Government does not incorporate therein any provision similar to the said Act of 1915. Therefore, the provision in said Act of 1915, relative to a claim of a state officer for traveling expenses having vouchers attached, has no application to the case herein mentioned.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

50. **Public Bonds—Statute and Transcript of Record Show the Mineral County Light and Power Bonds to Be Legally Issued.**

CARSON CITY, July 15, 1921.

HON. EMMET D. BOYLE, *Governor of Nevada.*

DEAR SIR: We have your request for an opinion as to whether or not the proposed issue under the recent Act of the legislature of the Mineral County Light and Power Line bonds may be validly made and whether or not a transcript of the record shows that the Act of the Legislature has been complied with. You are respectfully advised that the Act of the Legislature authorizing the bond issue is valid and the proceedings thereunder by the Board of County Commissioners of Mineral County are in due conformity therewith and that the provisions of the Act have been complied with in all respects. In addition thereto, we have to advise you that in an opinion of the Supreme Court of this State, filed June 18, 1921, the Court declined to prohibit the Board of County Commissioners from carrying out the terms of this Act, and the points urged in this proceeding were not sufficient to induce a successful judicial attack.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

51. **Owyhee River Development Commission—A Deposit from the Funds Appropriated May Be Made in Cooperation with the United States Government.**

CARSON CITY, July 18, 1921.

HON. J. G. SCRUGHAM, *State Engineer.*

DEAR SIR: We have your letter calling for our official opinion on certain phases of an act entitled "An Act creating a commission

to be known as the Owyhee River Development Commission of Nevada, defining its powers and duties and making an appropriation for the expenses thereof," approved March 21, 1921, and certain correspondence from Governor Boyle and the United States Reclamation Service appertaining thereto. The Act, entitled and approved as aforesaid, has for its object to ascertain, through the Commission created thereby, whether or not it is feasible to develop irrigation for the lands mentioned therein and to obtain a report thereon. The amount of \$2,500 is appropriated for expenses and for per diem of the members of the Commission and wages and expenses of its employees.

It seems that the United States Government has also the same source of water supply under investigation for the purpose of causing it, or the greater part of it, to be placed upon certain irrigable lands in the State of Oregon, but that the United States Reclamation Service, in cooperation with said Commission, is willing to investigate the feasibility of establishing a unit of its proposed project to the end that the lands referred to in the Act, entitled and approved as aforesaid, may be irrigated from said water supply if said Commission will furnish certain engineering work, etc., and deposit with the United States Reclamation Service at Denver, Colo., \$1,000 to be applied by it on account of the expenses of such cooperative investigation.

Should said Commission decline to enter into the proposed cooperative investigation, then the United States Reclamation Service will undoubtedly proceed according to its own plans, and ultimately the water supply will be applied to irrigable lands in the State of Oregon and the object of the Act, entitled and approved as aforesaid, will thus be frustrated.

You inquire whether or not said Commission may anticipate the expenses of the investigation, or, in other words, make the deposit of \$1,000 as proposed by the United States Reclamation Service. Ordinarily, appropriated funds may be withdrawn only upon warrants of the State Controller after the contemplated services are rendered or expenses incurred, but if, adhering to this rule in this instance, the object of the Act, entitled and approved as aforesaid, would be frustrated or the Act itself would become inoperative, it is also a rule of construction that you may deviate from the letter of the statute in order that its object may be fulfilled, especially under the facts submitted where a vast potential irrigable section of this State may forever remain undeveloped by reason of official inability to apply appropriated funds to fulfill the object of the Act. We, therefore, conclude that said Commission may lawfully make the requested deposit.

The form of the contract submitted should be amended in that the State of Nevada, as the contractor, should be eliminated therefrom and, in lieu thereof, the Commission created under the Act entitled and approved as aforesaid should be named as contractor. See Biennial Report of the Attorney-General, 1919-1920, Opinion 55.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General*.

**52. Delinquent Tax Sale—On Redemption Therefrom the Treasurer Must Charge and Collect Subsequent Taxes.**

CARSON CITY, July 19, 1921.

HON. ARTHUR E. BARNES, *District Attorney, Goldfield, Nevada.*

DEAR SIR: YOUR letter of the 14th instant miscarried, and this is the reason for my delay in giving you a reply. I beg to advise that the Treasurer of your county assumed a sound legal attitude relative to the redemption of property that is held in his name as trustee. Pursuant to the provisions of section 3652 of the Revised Laws of Nevada as amended in 1919, it is provided that, if at a tax sale no other bid is forthcoming, the Treasurer shall bid the same in for the benefit of the county and State and file a certificate with the County Recorder, and the same shall be subject to redemption from the Treasurer the same as from a private purchaser. Later in said section it is specifically provided that, in the case of a redemption where a sale has been made to a private purchaser, upon the redemption being made, the said private purchaser shall be reimbursed for any additional taxes paid thereon. For the purposes of redemption it must be held that there has been an implied payment of subsequent taxes by the Treasurer that have become due and that upon a redemption the Treasurer is entitled to the payment of such taxes. Therefore, in such a case no redemption can be made without the payment of said additional taxes.

Yours very truly,

L. B. FOWLER, *Attorney-General.***53. Public Officers—A De Facto Officer Has No Right to the Salary of the Office.**

CARSON CITY, July 22, 1921.

HON. J. H. WHITE, *District Attorney, Hawthorne, Nevada.*

DEAR SIR: The question as to whether or not the de facto County Recorder is entitled to certain salary during the time that she served as County Recorder involves a conflicted situation. The State of California has made decisive this point by providing that the occupant of the office shall receive the salary.

In the case of *Merkley v. Williams*, 3 Cal. App. 268, the subject is elaborately discussed. In the absence of a statute changing the ordinary rule, the law is that the salary annexed to a public office is incident to the title to the office, and not to its occupation and exercise. I have endeavored to find decisions holding to the contrary, but I have not discovered any that are satisfactory. Our Legislature has failed to enact any provision similar to the one that exists in California. This being the case, I am unable to rule that the disputed salary can be paid, but I am compelled to say that, as the law seems to exist, the salary cannot be legally allowed.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

54. Industrial Insurance—A Certain Amendatory Act to the Nevada Industrial Insurance Act Has No Retroactive Effect.

CARSON CITY, July 27, 1921.

NEVADA INDUSTRIAL COMMISSION, *Carson City, Nevada.*

GENTLEMEN: We have your letter of the 20th instant, enclosing petition of E. D. Virden, who was injured on July 20, 1918, for relief under the amendment to the Act creating your Commission, chapter 161 of the Statutes of 1921, and calling for our official opinion as to whether the petitioner is entitled to relief under this amendment.

Compensation has already been awarded petitioner and is now being paid him under the provisions of law subsisting prior to the amendment. Authority is ample to conclude the question. We quote:

*Slink v. Augustus Carey & Company*, 113 Atl. 32: *Held*, that the rights and obligations of the parties become vested when the accident to the employee occurred, and cannot be destroyed or enlarged by legislation thereafter enacted.

*Gray v. St. Croix Paper Company*, 113 Atl. 32: *Held*, it was an error to award compensation at the rate provided in the Act of 1919, as the accident occurred in 1918. Rights and obligations of the parties become vested at the time of the accident and cannot be enlarged by subsequent legislation.

It might be contended that the amendment referred to has retroactive operation, but no retroactive Act can diminish or enlarge or otherwise impair vested rights. Even if the rule were otherwise, it is apparent from the reading of the amendment that it is prospective in its operation and cannot be made to apply retroactively to the case now under consideration. You are therefore advised to deny the petition.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

55. Corporations, Foreign—A Certain Corporation Named under Data Submitted Is Amenable to Certain Statutes Cited.

CARSON CITY, July 28, 1921.

HON. GILBERT C. ROSS, *State Bank Examiner.*

DEAR SIR: We have examined certain written data submitted to this department by you, which we are returning herewith, relating to the operations of the Pacific States Savings and Loan Company, and in reply to your inquiry, you are respectfully advised that from the data submitted we hold that this company is amenable to an Act entitled "An Act providing for the incorporation of domestic building-and-loan associations, the licensing of foreign building-and-loan associations, the examination and regulation of all building-and-loan associations doing business in this State by the State Bank

Examiner, and other matters properly connected therewith, and repealing a certain Act," approved March 24, 1915, and as amended and approved April 1, 1919. Also to an Act entitled "An Act requiring nonresident joint-stock companies, associations, and corporations doing a building-and-loan business to furnish security before doing business in this State, and prescribing penalty for a failure to do so," approved March 20, 1911.

It is apparent, therefore, that you should require the Pacific States Savings and Loan Company to comply with the provisions of these statutes within a reasonable time, and in default of so doing, upon advice from you, this department will proceed to enforce the law.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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56. **Public Employment—Bonds of Officers—Payment of Premiums from Public Funds Depends Upon Terms of Statute.**

CARSON CITY, July 28, 1921.

HON. ARTHUR E. BARNES, *District Attorney, Goldfield, Nevada.*

DEAR SIR: We have your inquiry under an Act entitled "An Act to provide surety bonds for state, district, county, city, and township officers at public expense," approved March 24, 1918, as follows:

Does the State pay the premium on the bonds of the deputy state officers? and

Do the bonds of deputies run to the State or to the principal?

These inquiries we answer in the order named:

1. If a deputy state officer gives a bond in his official capacity, pursuant to the statute, whether or not the State would pay the premium, depends upon the wording of the statute.

2. The bonds of deputy state officers will run to the State or to the principal according to the terms of the statute under which the bonds are given.

If an officer requires of his deputy a bond as protection personally to himself against nonfeasance or malfeasance of the deputy, such bond should run to the officer as principal, and the premium paid from private resources. However, if the statute makes it a prerequisite of the deputy to give a bond for the faithful discharge of his duties upon qualifying, the bond would run to the State and the premium paid from public funds.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

57. **Employment—Labor Commissioner—Stated Case Reviewed and Procedure Indicated.**

CARSON CITY, July 31, 1921.

HON. FRANK W. INGRAM, *Labor Commissioner*.

DEAR SIR: We are returning you herewith the letter of the District Attorney of Elko County, relating to certain claims of sheep-herders which remain unpaid.

We agree with the District Attorney that the so-called trust deed would be construed as a mortgage, and we think the statutory affidavit required upon chattel mortgages, and attached to the deed of trust, is at least a substantial compliance with law, and the trust deed would not be subject to attack, by reason of the affidavit being defective as alleged.

We think that the true legal redress of this case is, first, a criminal action against Quintana, and reenforced by a civil action for the wages unpaid. You might take an assignment for these wages, but we are of the opinion that as the seat of operation is so far removed from your official residence that an action under an assignment would produce delay rather than expedition.

We further remark, as in similar cases, that laborers seem to exhaust their personal efforts in attempting to recover unpaid wages before officially consulting you, and when you obtain these claims their rights have been jeopardized by themselves on account of the delay consumed, and the only redress, as a general rule, left to them, is the criminal action aforesaid.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General*.

58. **Aliens, Registration of—There Is No Statute in the State Requiring Such Registration.**

CARSON CITY, August 13, 1921.

HON. GEORGE BRODIGAN, *Secretary of State*.

DEAR SIR: Replying to your inquiry concerning the antialien registration law, we have to state that this is a statute passed at the last legislature of California requiring all resident aliens therein to register with the County Clerks of the several counties and to pay a registration fee of \$10. Of course this statute cannot apply to the State of Nevada or outside of California. We understand from the press, however, that in California this statute is being strenuously attacked in the courts and that some court there has intimated, if it has not already decided, that the statute is unconstitutional. From a cursory consideration we are inclined to think that the highest court will hold statutes of this kind unconstitutional because they do not guarantee equal protection of the laws and are discriminatory in their operations. In any event, any alien resident of Nevada, even though in business in California, would not be required to become registered in California.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General*.

59. Public Schools—Trustees' Recall—Statute and Constitution in Connection Therewith Reviewed.

CARSON CITY, August 19, 1921.

HON. CHAUNCEY W. SMITH, *Deputy Superintendent of Public Instruction.*

DEAR SIR: Replying to your inquiry as to whether or not a valid recall election of a School Trustee may be had in a school district having a voting population of less than 100, I beg to advise in the affirmative.

Under date of August 12, 1919, a ruling was made by this office that a recall election of a School Trustee could not be legally held in such a district, for the reason that the Legislature had failed to provide by statute the necessary procedure relative thereto. At the 1921 session of the Legislature the school law was amended in certain particulars, Stats. 1921, page 298. Section 9 of said amendatory Act amends section 59 of the original Act and in part recites as follows:

In case of a recall election in districts having a voting population of less than one hundred (100), candidates for the office of School Trustee shall, not later than three days before said election, have their names filed with the Clerk of the School Board in the district, with the designation of the term of office for which they are candidates, and no names shall be voted on unless filed within the time and in the manner herein provided.

The Constitution, by an amendment thereto providing for the recall of a public officer, contains the following language:

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.

A theory may be plausibly asserted that this provision of the Constitution refers to a petition for a nomination for an office at a regular election. However, in the case of the election of a School Trustee, in a district of the description under consideration, nominations are not filed and voters may vote for any person they desire at the election. The main point to be considered is whether or not the provision of the law providing for the filing of nominations for a recall election with the Clerk of the Board has controlling force in respect to the filing of a petition for the recall of a School Trustee within the meaning of the constitutional provision herein mentioned. A constitutional provision should be made effective if such can be done without a destruction of the accepted rules of constitutional and statutory construction and interpretation. The recall provision of the Constitution by its terms requires an enabling statute to make it operative. Any Act of the Legislature enacted for such purpose should be so construed or interpreted, if possible, to execute said constitutional provision. In construing such a statutory provision if two plausible theories may be followed, one giving vitality to the Constitution and the other having the opposite effect, the former should be pursued. Such being the case, it is my opinion that the amendatory Act of 1921 should be construed to make valid a recall election in a school district

of the character mentioned and that the provision therein contained, providing for the filing of nominations for a recall election with the Clerk of the School Board, governs the filing of a petition for a recall and that said petition is likewise to be filed with the Clerk of the Board.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

60. Proclamation, Executive—Alfalfa Weevil—Power of Inspection under Proclamation Defined.

CARSON CITY, August 20, 1921.

HON. EMMET D. BOYLE, *Governor of Nevada.*

SIR: Your letter, relative to regulations 4 and 8 of your quarantine proclamation issued on the 8th day of August, 1921, has been considered by me. I beg to advise that there is no inconsistency or contradiction in the two regulations. All household or agricultural emigrant movables originating in the county of Washoe, State of Nevada, are subject to the requirements contained in regulation 4. All baggage, emigrant movables, household effects, household implements, camping effects, camping implements, used farming implements, and other field appliances in process of being exported or removed from the county of Washoe, State of Nevada, are made subject to inspection by the state quarantine officer whether the same originated in Washoe County or elsewhere. Regulation 8 permits the inspection of any such property leaving Washoe County in any case where there is any likelihood that weevil may have entered said property.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

61. Revenue, Banks, Assessment of—Nevada Tax Commission and State Board of Equalization Have Authority to Act in Regard Thereto.

CARSON CITY, August 25, 1921.

STATE BOARD OF EQUALIZATION, *Carson City, Nevada.*

GENTLEMEN: Replying to your inquiry of August 16, calling for official opinion as to the method to be pursued under section 3820, subdivision 2, relating to the assessment and taxation of shares in the Nevada First National Bank of Tonopah, we have to advise you that under the provisions of this section the bank is entitled to have deducted the value of all real estate owned by it on which it pays taxes, situate in this State from the value of the shares in said bank. We understand that it has been the practice to deduct the value of the real estate owned by the bank in the county of Nye with no deductions being made for other counties. This situation arises, no doubt, for the reason that the statute lays down no specific procedure to be pursued in the premises. Under the general powers conferred upon

the Nevada Tax Commission and the State Board of Equalization, we are of the opinion that the total value of the real estate of the banks throughout the State may be ascertained by the Commission or the State Board, and the deductions ordered to be paid in accordance therewith as contemplated by the statute.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

62. Revenue—Board of Examiners—Act Providing for Deficiency in Public Office Construed.

CARSON CITY, September 2, 1921.

STATE BOARD OF EXAMINERS, *Carson City, Nevada.*

GENTLEMEN: The letter of the Hon. Geo. A. Cole, State Controller, addressed to your board, wherein he begins with the following language:

A study of the so-called "deficiency" statutes of Nevada (1887, 80, and 1915, 221) by myself, and others more qualified, leads to the belief that the same are in active conflict with article 3 and article 4, section 19, of the Constitution of the State of Nevada.

—has been considered by me. I beg to advise that the position enunciated by him is unsound, unreasonable and untenable. The provisions of law referred to by him have been repeatedly recognized and followed since the enactment of the first Act dealing with the subject. Such recognition has been given by your board, the present State Controller himself, and by his predecessors in office. Its value, from a legislative standpoint, has been repeatedly affirmed by the Legislature of this State. There is no part of the Constitution of the State of Nevada which prohibits the Legislature from enacting just such Acts as we now have under consideration. The Acts mentioned do not authorize the drawing of money from the treasury that is unappropriated. They do authorize the contracting of certain indebtedness prior to an appropriation being made.

There is no constitutional provision in this State, and I doubt if there is any in any other State, that prohibits the Legislature from making legal the contracting of an indebtedness by the State through its officers prior to an appropriation. The indebtedness may be first contracted under a statute making such a thing legal, and then an appropriation may be made to pay such indebtedness. Our Legislature has determined the policy to be pursued in this respect and its determination is in this regard final. If the Legislature deemed it expedient or advisable to adopt a contrary policy, it would have the power to do so. It, and it alone, can assert the policy and procedure that must be followed. Deficiency matters are placed by law exclusively in the hands of the State Board of Examiners. The State Controller in respect thereto acts merely in a clerical capacity. The acts of the State Board of Examiners become the subject of review, consideration, and action by the Legislature. I think it may be safely

stated that the anonymous eminent adviser of the State Controller cannot cite a decision in any State in the Union holding that such deficiency statutes are unconstitutional. Different States in the Union, acting under the direction of the best-equipped legal minds, have enacted such statutes and these statutes have found the same utilization in other States as they have found in Nevada. The men whose minds brought these statutes into existence, and the officials who have acted pursuant to them, have not heretofore been branded as being guilty of a mockery of the Constitution of their respective States. Eminent constitutional lawyers, such as Governor Hiram W. Johnson of California and Governor Joseph K. Toole, have approved Acts similar to, or almost identical in substance with, the deficiency statutes of our State. Other States, in conjunction with our own, have considered it successful and intelligent legislation to provide means for making expenditures in emergency cases without compelling the Governor of a State to call a special session of the Legislature. Various Legislatures in order to obviate the necessity of calling special sessions of the Legislature have, in the interest of economy and expedition, enacted into law deficiency measures. Governor Johnson of California signed an Act in 1915, section 5 of which reads as follows, being found on page 55 of the General Laws of California (Deering):

The officers of the various departments, boards, commissions and institutions, for whose benefit and support appropriations are made in this Act, are expressly forbidden to make any expenditure in excess of such appropriations, except the unanimous consent of the State Board of Control be first obtained, and a certificate, in writing, duly signed by every member of said board, of the unavoidable necessity of such expenditure; and any indebtedness attempted to be created against the State in violation of the provisions of this section shall be absolutely null and void, and shall not be allowed by said State Board of Control, nor paid out of any state appropriations; *provided*, that any member of any such department, board, commissions, or institutions, who shall vote for any expenditure or create any indebtedness against the State in excess of the respective appropriations made by this Act, except by the unanimous consent of the State Board of Control, and the certificate in this section provided to be first obtained, shall be liable on his official bond for the amount of such indebtedness, to be recovered in any court of competent jurisdiction by the person or persons, firm or corporation, to whom such indebtedness is owing.

This provision succeeds Section 663 of the Political Code of California which was long in existence.

The State of Montana, at its legislative session of 1907, enacted a statute which was signed by Governor Toole, which contains the following language on page 73 of the Political Code of Montana, and which is as follows:

No state officer, state board of trustees, or managers or commissioners shall have any authority to, or shall contract any liability or indebtedness whatever in excess of the amount

appropriated to such officer, board of trustees, or managers or commissioners, or for the office, institution, commission, or organization under his or their management or control, without previous authorization from the State Board of Examiners, and if any liability or indebtedness be incurred or expenditure be made, in violation of this Act, no claim therefor shall be allowed by the State Board of Examiners.

The State of Colorado has a provision for the contracting of an emergency indebtedness which provides that before such indebtedness is incurred the same shall be approved by the Governor and Attorney-General. This provision has existed during the entire statehood of Colorado. A similar provision was in existence during the time that it was a Territory.

Section 2718 of the Oregon Laws, vol. 2 (Olson) provides for an emergency expenditure in the following language:

No warrant shall be drawn by the Secretary of State in payment of any claim against the State unless an appropriation has first been made for the payment thereof; but, where such claim has been incurred in pursuance of specific authority of law, and no appropriation has been made for its payment, or, if made, has been exhausted, the Secretary of State shall audit such claim when authorized by the emergency board, and if allowed, shall issue to the claimant a certificate of indebtedness therefor, which certificate shall bear interest at the legal rate from date until funds are provided for its payment by appropriate legislative enactment.

All of the States named herein have in their respective Constitutions a provision that in its effect is the same as the one in our own Constitution—that money shall not be drawn from the treasury unless appropriated by law.

The Budget Act of 1919 does not by its terms or implication repeal the acts of the Legislature of Nevada empowering the State Board of Examiners to act in emergency cases. Such Acts are just as effective now as they were prior to the Budget Act. The State Controller is not empowered by any statute of this State to intercept, nullify, or interfere with the duly exercised powers of the State Board of Examiners in emergency matters. If the State Controller declines to perform the clerical work relative to deficiency warrants, he may be compelled to do so by court proceedings or the Board of Examiners may provide a method of drawing money from deficiency allowances.

The Controller in his letter has attempted to write a speech or essay as to his individual views of the subject under consideration. It is not a part of my duties as your legal adviser to enter into such a realm. In this connection, however, I desire to emphasize the fact that the personal views of the State Controller dwindle into insignificance when drawn in contrast with the expressions of the Legislature of this State—expressions which find support in the acts of the best thinkers and statesmen of the various States of this Union.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

63. **Revenue—Taxpayer Failing to Complain of Assessment Before County Board of Equalization May Not Receive Relief from State Board of Equalization.**

CARSON CITY, September 9, 1921.

STATE BOARD OF EQUALIZATION, *Carson City, Nevada.*

GENTLEMEN: A taxpayer who has failed to make a complaint in the manner provided for by law before the County Board of Equalization, relative to the assessment of his property, becomes bound by the assessment as made by the County Assessor. He is precluded therefore from being heard before the State Board of Equalization or the State Tax Commission.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

64. **Constitutional Law—Act Providing for Issuance and Revocation of Licenses for Billiard Halls, Etc., Is Null and Void.**

CARSON CITY, September 9, 1921.

HON. LESTER D. SUMMERFIELD, *District Attorney, Reno, Nevada.*

DEAR SIR: It is the policy of this office to refrain from declaring an Act of the Legislature unconstitutional if there is any likelihood of the Act, or any part thereof, being upheld by the courts. A careful consideration of the Act of the Legislature entitled: "An Act to create a county license board to regulate the issuance and revocation of licenses for billiard-halls, dancing-halls, bowling alleys, theaters, and soft-drink establishments in unincorporated cities and towns of this State," approved March 21, 1921, Stats. 1921, p. 194, forces me to the conclusion that the same must fall in its entirety. If the title of the Act mentioned had for its concluding words the words "outside of incorporated cities and towns of the State," the Act would then be absolutely valid. As the title reads, it does not permit of legislation that includes all territory outside of incorporated cities and towns.

The Act can hardly be construed as supplementary of or an amendment to an Act of the Legislature of this State entitled "An Act providing for the government of towns and cities of this State," approved February 26, 1881, sections 877-893, inclusive, of the Revised Laws, which provides for the government of unincorporated towns and cities by Boards of County Commissioners. This act, in subdivision 9 of section 1, being section 877 of the Revised Laws, gives to a Board of County Commissioners in the government of unincorporated towns and cities very extensive licensing powers. The fact that such power was already vested in Boards of County Commissioners makes it difficult to reach a conclusion as to just what the Legislature decided to cover by the Act being in conflict with the title of the Act, and, there being no way to apply the body of the Act so that it will be consistent with the title, places me in the position where I am compelled to rule that the said Act is null and void.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

65. Proclamation, Executive—Alfalfa Weevil—Under Statute the Governor May Quarantine by Proclamation Certain Counties—Courts May Review Same.

CARSON CITY, September 10, 1921.

HON. EDWARD RECORDS, *State Quarantine Officer, Reno, Nevada.*

DEAR SIR: We have your letter calling for an official opinion relative to the proclamation of Governor Boyle, establishing a quarantine throughout the whole of Washoe County, by reason whereof alfalfa may not be lawfully shipped therefrom, since a small well-defined area thereof is infested with what is commonly known as alfalfa weevil.

You state that by a careful survey this area "extends from a point approximately one mile west of Reno to one approximately two miles east of Sparks, being limited on the north by the natural boundaries of the alfalfa fields and only including a strip approximately one ranch wide on the south of the Truckee River." You refer to other matters relating to the premises which do not affect the legality of the situation and must be regarded as matters affecting the course to be pursued induced by expediency. With these we have no concern, as rightly they may not control or influence our opinion. The question propounded by you is, whether or not, under the provisions of law, the Governor can lay and maintain a quarantine against an entire county on the basis of the showing hereinabove referred to, or whether or not the scope of such quarantine must be limited to the area known to be infested with a dangerous insect pest, and a reasonable and necessary margin of area around the same for protective purposes? The showing referred to by you, in our opinion, is not sufficient upon which to predicate a quarantine against the entire county, and to lay and maintain such quarantine is unreasonable and unnecessary; the quarantine should be limited to the area known to be infested and a reasonable and necessary margin, in addition thereto, surrounding the same.

The power of the Governor to lay and maintain such quarantine is derived from statute, and the power of the Legislature to enact the statute is derived from the police power of the State, but the police power of the State may not be arbitrarily exercised and, when exercised, due regard must be given to the necessity therefor and the reasonable conservation and enjoyment of private rights.

Tiedeman, in *Limitations of Police Power*, section 1, lays down the rule, thus:

Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government.

And the Supreme Court, in *In re Morgan* 26 Colo. 424, recognizing this rule, uses this forceable language, viz.:

Notwithstanding this general rule, we are here met with the argument, and the assertion is baldly made, that in the exercise of its police power, the Legislature is subject to no restriction except its own unbridled discretion as to what sub-

jects it may select for regulation, and the kind of regulation it may prescribe. We cannot assent to this doctrine. It may find apparent sanction in unguarded expressions of text-writers, or in judicial opinions, but it is contrary to every well considered decision. It is for the Legislature to determine the exigency, that is, the occasion, for the exercise of the power; but it is clearly within the jurisdiction of the courts to determine what are the subjects upon which the power is to be exercised, and the reasonableness of that exercise. Tiedeman's Limitations of Police Power, sec. 3; *People v. J. & M. P. R. Co.*, 9 Mich. 285; *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191; 18 Am. & Eng. Ency. Law, 746, et seq.; *People v. Gillson*, 109 N. Y. 389.

We conclude, therefore, if the quarantine of the whole of Washoe County, for the purposes aforesaid, is unreasonable and unnecessary in its extent and operation a court of competent jurisdiction would grant adequate relief to those rightly aggrieved, thus curtailing the same within reasonable and necessary limits.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

66. **Hoisting Engineers—Act Relating to Hoisting Engineers and Their Licenses Constitutional—Procedure Indicated.**

CARSON CITY, September 26, 1921.

HON. A. J. STINSON, *Inspector of Mines.*

DEAR SIR: The Act of March 22, 1921, Stats. 1921, p. 316, entitled "An Act providing for the issuance of licenses to hoisting engineers," etc., recites in regard to a license in section 6 thereof as follows:

Except as herein otherwise provided, all licenses shall be issued to cover the year commencing with the first day of July. Any person or persons applying for a license under this Act within two months after the commencement of such year shall be required to pay the proportional share of such license for the remainder of such year as hereinbefore provided, and for the next license year at the same time.

Section 8 thereof is as follows:

Upon application for a license the applicant shall pay to the Inspector of Mines, as chairman of all examining boards, a fee of five (\$5) dollars, which shall be placed in the hoisting engineers' license fund in the state treasury, which is hereby created, and no part or portion of said fee shall be returned to the applicant should he fail to pass the required examination.

Section 13 is, in part, as follows:

All licenses granted hereunder must be renewed yearly and the fee for such renewal shall be the sum of two dollars and

fifty cents (\$2.50) and the money derived therefrom shall take the same course as provided in section 8. All such applications for renewal must be accompanied by a physician's certificate stating the facts required as herein before provided upon application for license, and such other information as may be required by the ex officio chairman of the examining board.

Section 6 is not in conflict with section 8 wherein the former section provides for a proportionate system for paying the license fee. It is, however, necessary in order to give a sensible meaning to section 6 to eliminate the word "within" and insert therein the words "later than," as otherwise the intent and purpose of said provision would be defeated. Section 8 provides for a preliminary fee of \$5 to be paid by all who file applications for an examination under the Act with the additional provision that "no part or portion of said fee shall be returned to the applicant should he fail to pass the required examination." This section emphasizes the fact that no part of said fee is to be returned to an applicant who fails in examination, but it does not prohibit the return of a part thereof upon the proportional basis to a successful applicant as provided for in section 6. An applicant receiving a license pursuant to the proportionate-fee method is entitled to have issued to him a license for the remainder of the year in which he receives his license. A deposit must be made of \$2.50 to cover the fee for the next ensuing year. The license certificate for such ensuing year is not to be issued, however, until the expiration of the year for which the first license is issued. The issuance of the second license must be deferred for the reason that section 13 expressly provides that prior to the issuance of a renewal of the license a physician's certificate stating the facts required by the Act must be filed.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

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67. Fish and Game—Law Applicable—Powers of Board of County Commissioners Construed.

CARSON CITY, September 15, 1921.

MR. E. R. SANS, *Bureau of Biological Survey, Reno, Nevada.*

DEAR SIR: You have propounded the question as to whether or not the failure of a Board of County Commissioners to designate a thirty-day period for the killing of deer with horns or antelope prior to August 1, as provided for in section 42 of the Fish and Game Act as amended, precludes such board from taking action based upon a petition filed pursuant to section 50 as amended.

It is my opinion that the two sections operate independently. Section 42 grants to such a board absolute power to act of its own volition relative to the particular thirty days between September 15 and December 15 of every year in which such game may be killed. In acting under such section a board acts pursuant to the absolute power therein given. Section 50 provides an entirely different basis of jurisdiction or control of the subject. Therefore, if a petition is filed with a

Board of County Commissioners, praying that the board pass a special ordinance prohibiting any open season for deer with horns or antelope, the said board has the legal right to enact such an ordinance even though such enactment takes place after the first day of August.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

68. **Public Schools—Duty of Board of County Commissioners to Levy Tax—Formation of School District May Not Be Attacked After Its Long Existence.**

CARSON CITY, October 4, 1921.

BOARD OF COUNTY COMMISSIONERS, *Minden, Nevada.*

GENTLEMEN: You are hereby advised that it is your duty to levy a tax of 25 cents on each \$100 of assessed valuation of Clear Creek School District (Joint) and that a failure to do so will be in violation of section 140 of an Act entitled "An Act concerning public schools and repealing certain acts relating thereto," approved March 20, 1911. The validity of the existence of such school district (joint) cannot be collaterally attacked, and even in a direct proceeding in that regard the courts will rule that after such a long existence the regularity or the formation of such district will be conclusively presumed. There are many decisions supporting the position.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

69. **Highway, State—Certain Bonds Legally Issued Therefor.**

CARSON CITY, October 14, 1921.

NEVADA INDUSTRIAL COMMISSION, *Carson City, Nevada.*

DEAR SIR: You are respectfully advised, in reply to your inquiry, that the Nevada State Highway Bonds, issued pursuant to chapter 172, Statutes of 1919, approved March 28, 1919, are in due form and the Act under which the same were issued is valid and binding.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

70. **Revenue—Nevada Tax Commission Has Power to Equalize Assessment of Property.**

CARSON CITY, October 18, 1921.

NEVADA TAX COMMISSION, *Carson City, Nevada.*

GENTLEMEN: The Nevada Tax Commission has the power to equalize the assessment of property wherein such equalization is not made by the State Board of Equalization. This power is given the Nevada Tax

Commission in section 6 of an Act entitled "An Act in relation to public revenues," Stats. 1917, p. 328. It, therefore, follows that, if the Carson Valley Bank has been assessed in a way that is different from that which applies to the other banks of the State, your board, by reason of the power specifically conferred in you to equalize assessments in cases where equalization has not already been effected, may make the necessary reduction to establish such equalization.

Yours very truly,

L. B. FOWLER, *Attorney-General*.

71. Colorado River Development Commission—Qualifications of Appointees Defined—Member of Legislature Passing Act Not Qualified to Represent State.

CARSON CITY, October 18, 1921.

HON. J. G. SCRUGHAM, *State Engineer*.

DEAR SIR: We have your letter of the 17th instant, calling for an official opinion on certain questions propounded under the Act entitled "An Act creating a commission to be known as the Colorado River Development Commission of Nevada, defining its powers and duties and making an appropriation for the expenses thereof," approved March 21, 1921, as follows:

1. Would it be legal for a member of the State Legislature of 1921, which passed the Act, to represent the State, and have his expenses paid from the appropriation there made?

To this inquiry we are constrained to reply in the negative. As well public policy as constitutional provision forbid that such member be appointed a Commissioner under the Act or that he act in a representative capacity for the State to carry out the provisions thereof. In this connection, we call your attention to section 8 of article 4 of the Constitution, which provides: "No senator or member of the Assembly shall, during the term for which he shall have been elected, nor for one year thereafter, be appointed to any civil office of profit under this State, which shall have been created, or the emoluments of which shall have been increased during such term, except such office as may be filled by election of the people." Section 4 of the Act provides for compensation and actual and necessary expenses of the members of the Commission; hence, such member of the Legislature is precluded from appointment as Commissioner or sharing in such compensation and actual and necessary expenses.

2. Does the qualification of not to exceed two members belonging to the same political party apply to the three appointive members, or is the State Engineer included?

The State Engineer being named in the Act as an *ex officio* member, his qualifications have been fixed and determined by the Legislature itself. It is apparent that the qualifications mentioned in section 2 of the Act are for the guidance of the Governor in making his selection of the appointive Commissioners, not more than two of whom shall belong to the same political party. The Governor is given no control

over the qualifications of the State Engineer as a Commissioner, since the Legislature reserved his status to itself in making him an ex officio member of the Commission. Therefore, the qualification of not to exceed two members belonging to the same political party applies only to the three appointive members and not to the State Engineer as an ex officio member of the Commission.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

72. **Torts—County Not Liable for Tort by Reason of Defective Bridge.**

CARSON CITY, October 19, 1921.

HON. GEO. J. KENNY, *District Attorney, Fallon, Nevada.*

DEAR SIR: The Legislature of this State has not enacted any provision whereby a county becomes liable for a tort. Therefore, any person who suffers damage by reason of a defective bridge, which is under the control of the county, has no legal claim against the county.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

73. **Highway, State—Certain Bonds Thereof Legal.**

CARSON CITY, October 19, 1921.

NEVADA INDUSTRIAL COMMISSION, *Carson City, Nevada.*

DEAR SIR: You are respectfully advised, in reply to your inquiry, that the Nevada state-highway bonds, 601 to 700, both inclusive, and 901 to 950, both inclusive, issued pursuant to chapter 172, Statutes of 1919, approved March 28, 1919, are in due form and the Act under which the same were issued is valid and binding.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

74. **Public Employment—An Alien May Not Be Employed as Janitor in County Courthouse.**

CARSON CITY, October 20, 1921.

HON. J. H. HART, *Lovelock, Nevada.*

DEAR SIR: You have presented to me the query as to whether or not an alien who has claimed exemption from military service can be employed as courthouse janitor.

I beg to advise that such employment contravenes the provisions of an Act of the Legislature of this State entitled "An Act to amend an

Act entitled 'An Act to prohibit the employment of any person except a native-born or naturalized citizen of the United States by any officer of the State of Nevada,' etc., Stats. 1921, p. 205.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

75. **Public Employment—An Alien May Not Be Employed as Janitor in a County Courthouse.**

CARSON CITY, October 22, 1921.

HON. HAROLD L. HEWARD, *Assistant District Attorney, Reno, Nevada.*

DEAR SIR: Under date of October 20, 1921, I wrote to Assemblyman J. H. Hart of Pershing County, relative to the employment of an alien as janitor in the courthouse, as follows:

You have presented to me the query as to whether or not an alien who has claimed exemption from military service can be employed as courthouse janitor. I beg to advise that such employment contravenes the provisions of an Act of the Legislature of this State entitled "An Act to amend an Act entitled, 'An Act to prohibit the employment of any person except a native-born or naturalized citizen of the United States by any officer of the State of Nevada.'" etc., Stats. 1921, p. 205.

The State of Nevada has a special right to regulate matters of public employment. I am of the opinion that the statute under consideration does not conflict with the Constitution or treaties of the United States or the Constitution of Nevada.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

76. **Artesian Wells—Bounty Therefor Regulated by Law—Case Stated Does Not Call for Reimbursement by State.**

CARSON CITY, October 22, 1921.

HON. CHAS. A. WALKER, *District Attorney, Ely, Nevada.*

DEAR SIR: The Act of the Legislature of the State of Nevada entitled "An Act authorizing the expenditure of money by the State under certain conditions for the purpose of aiding counties in sinking artesian wells," Stats. 1915, p. 127, provides that when a sum amounting to \$4,000 or more has been expended by a county for the purposes mentioned in an Act of the Legislature of the State of Nevada, approved March 20, 1913, relative to the acquirement of real estate and the sinking of artesian wells, makes it a requisite for reimbursement to the county by the State that the sum expended must amount

to \$4,000 or more and which must not exceed \$5,000. The claim of White Pine County being for \$1,832.37 does not come within the provisions of said statute. I am, therefore, compelled to rule that the said claim on the part of White Pine County is not a valid claim against the State.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**77. Revenue—Uncollected Taxes on Personal Property—Assessor Liable for Noncollected Taxes, But Statute Should Be Liberally Construed in Favor of Assessor.**

CARSON CITY, October 22, 1921.

HON. FRANKLIN E. WADSWORTH, *District Attorney, Pioche, Nevada.*

DEAR SIR: A tax is not a debt in the ordinary sense. Statutory law which applies to assessment and the collection of taxes should be strictly followed. Our statute makes the County Assessor personally responsible for failure to collect taxes due on personal property. The law seems to be silent relative to taxes which should have been collected in past years on personal property. The identity of live stock necessarily changes with the years. The fact that taxes must be collected as applied to specific property renders it almost impossible to meritoriously contend that the State may go back over a period of years and demand the payment of uncollected taxes on live stock. I am, therefore, of the opinion that the only sensible position to take is that our statute covering the collection of taxes on personal property, as applied to live stock, must be held to apply to the latest year and not to prior time.

In regard to your other query, as to whether or not taxes paid under an unconstitutional statute may be recovered, I beg to advise that the rule is that in the absence of a statute specifically giving to a taxpayer the right to recover such taxes, the same are held to be voluntary. Our State has no statute which confers any such right on a taxpayer. All payments of taxes which have been made under unconstitutional statutes must be held to be final and no recovery can be made by the persons making such payments.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**78. Revenue—Increased Valuation Ordered by State Board of Equalization Valid.**

CARSON CITY, October 24, 1921.

HON. H. J. MURRISH, *District Attorney, Lovelock, Nevada.*

DEAR SIR: Information has been conveyed to me that you have ruled that the 10% horizontal increase and assessed valuation on all real estate and improvements in Lovelock, ordered by the State Board of Equalization, is invalid, for the reason that a recommendation to the Tax Commission was attached thereto. I cannot see how the recommendation to the Tax Commission can defeat the action of the Board

of Equalization, which has not been interfered with by the Tax Commission. The action of the Board of Equalization is in full force and effect. If there is any part of the resolution that is invalid, it is that part which makes the recommendation. When the Board of Equalization made the raise, it undoubtedly believed that such raise was necessary in the equalization of assessments; at least, we cannot indulge in a contrary presumption. If the act of said board making said raise cannot become the subject of attack other than that a recommendation to the Tax Commission was attached thereto, then, in my opinion, the raise has been legally made.

You will favor by giving me your attitude in the matter.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**79. Public Schools—At Request of Parents Child May Be Excused from Attendance to Receive Religious Instruction.**

CARSON CITY, November 22, 1921.

BOARD OF SCHOOL TRUSTEES, *Carson City, Nevada.*

GENTLEMEN: Under date of May 27, 1920, an opinion was rendered by me addressed to Hon. W. J. Hunting, Superintendent of Public Instruction, in which the following language is used:

I am also of the opinion that upon the written request of a parent, the children of such parent may be excused from attendance at school for a brief time for the purpose of attending a certain church specified by the parent.

This language must not be construed as making it mandatory on the part of school authorities to recognize such written request of a parent. It is discretionary on the part of those controlling school affairs as to whether or not recognition is to be given to such request. When children enter school the jurisdiction during school hours passes from the parents to the school authorities. Dual jurisdiction would mean the destruction of school discipline.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**80. Revenue—Finality of Tax Assessments Determined by Delivery of Rolls to the Tax Receiver.**

CARSON CITY, December 2, 1921.

BOARD OF COUNTY COMMISSIONERS, *Carson City, Nevada.*

GENTLEMEN: After the assessment roll is delivered to the Tax Receiver, the law presumes that, in the absence of mistake or accident, finality has been reached. In all matters of procedure provided for by law it is necessarily contemplated that definiteness will some time be reached, and it is my conclusion that definiteness is attained at the time of the delivery to the tax receiver of the assessment roll. If the record preceding the delivery of said assessment roll to the tax receiver

positively establishes as a fact that a mistake or accident has occurred, a correction may be made to conform to the truth, but the assessment roll cannot be altered or interfered with in any other respect.

Yours very truly,

L. B. FOWLER, *Attorney-General*.

**81. Motor-Vehicle Law—Statute in Certain Respects Construed.**

CARSON CITY, December 9, 1921.

HON. HARLAN L. HEWARD, *Assistant District Attorney, Reno, Nevada*.

DEAR SIR: It is my opinion that the word "and" in section 5 of an Act providing for a license for the operation of motors and vehicles and other matters relating thereto, Stats. 1921, p. 335, joining the words "material and passengers" should, for the purpose of harmonizing the provisions of the Act, be interpreted as meaning the disjunctive "or." It is not plausible to conclude that the Legislature, after legislating on the subject covered by said Act, practically destroyed its own Act by attaching thereto a penal section which, if literally construed, will allow persons to deliberately manipulate in a way that will be destructive of the intent and purpose of the Act.

In the case of *State v. Brandt*, 49 Iowa, p. 593, the following language is found, quoting from page 615 thereof:

The only question remaining in this connection is, whether we have any authority in law for construing a disjunctive conjunction as a conjunctive and vice versa. That courts have interpreted the word "and" as a disjunctive, and the word "or" as a conjunctive when the sense absolutely required, and this in extreme cases in criminal statutes, against the accused, is laid down as elemental. Bishop on Statutory Crimes, p. 243, and cases cited in notes 1 and 2; see, also, *The Estate of Hallowell* in Supreme Court of Penn., April 3, 1875, and found in *Legal Int. (Phil.)* of April 9, Vol. 22, No. 15; and this court in *The State v. Meyers*, 10 Iowa, 448, construed the word "or" to mean "and," and this, too, when such construction operated against the accused. See also, to the same effect, *The State v. Cooster*, 10 Iowa, 453.

For the purpose of giving vitality to the Act the disjunctive "or" should be inserted in the place of "and" in said section 5 between the words "material" and "passengers."

Yours very truly,

L. B. FOWLER, *Attorney-General*.

**82. Elections—Oath of Election—Statute Providing Therefor Not Retroactive.**

CARSON CITY, December 10, 1921.

HON. HARLAN L. HEWARD, *Assistant District Attorney, Reno, Nevada*.

DEAR SIR: The new form of oath to be taken by an elector when he registers, as provided for in section 9 of the registration law as amended in 1921, pp. 370-371, should be interpreted as being prospec-

tive in its application, and it cannot affect those persons who are already legally registered. The Legislature in changing the form of oath certainly did not intend to interfere with other provisions of the statute. The statute should be construed and interpreted to give full vigor to all its parts. The views herein expressed will lead to such a result.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

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**83. Highway—Resignation of Acting State Highway Engineer Is Legal—The Word "Acting" May Be Regarded as Surplusage.**

CARSON CITY, December 12, 1921.

HON. GEO. A. COLE, *State Controller.*

DEAR SIR: Confirming the oral opinion given to you by me, I beg to advise that the designation of George W. Borden, as Acting Highway Engineer, can in nowise affect the validity of his appointment. He is actually State Highway Engineer and the word "Acting" must be treated as surplusage.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

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**84. Recall Petition—Signer Thereof May Not Withdraw.**

CARSON CITY, December 31, 1921.

HON. H. J. MURRISH, *District Attorney, Lovelock, Nevada.*

DEAR SIR: Replying to your inquiry, as to whether or not an elector who has signed a recall petition is possessed of the privilege of withdrawing his name therefrom after the petition has been filed, I beg to reply in the negative. I am satisfied that neither section 9 of article 2 of the Constitution of Nevada, nor the statute enacted to make said section of the Constitution effective, contemplates any amendment by way of addition or subtraction of a petition for the recall of an officer after the filing thereof has occurred.

Immediately upon the filing, the machinery relative to a recall of an officer is put in operation. No officer or officers are possessed of any discretionary powers in regard thereto. The Constitution and the statute should be construed and interpreted to make effective the spirit thereof. If electors give their names for the purpose of making possible a petition for the recall of an officer, and thereafter, by means of various and sundry ways, they are persuaded or coerced into making a request that their names be withdrawn and thereby destroy the basis upon which a recall election must rest, the objects and purposes of the constitutional section mentioned and the statute will be unjustly frustrated and will practically prevent any attempt on the part of the people to ever have a public officer recalled.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

## 85. Public Schools—A Certain Bond Issue Approved.

CARSON CITY, December 31, 1921.

NEVADA INDUSTRIAL COMMISSION, *Carson City, Nevada.*

GENTLEMEN: A careful examination has been made by me of all the proceedings relative to a bond issue for Caliente School District, Lincoln County, State of Nevada. I find that they are all regular and legal and that the bond issue made pursuant thereto is a valid issue and from a legal standpoint you will be safe in purchasing said bonds.

Yours very truly,

L. B. FOWLER, *Attorney-General*

## 86. Public Schools—Bond Issue Approved—Taxation for Payment Thereof.

CARSON CITY, January 6, 1922.

HON. GEO. W. FRANKS, *County Treasurer, Pioche, Nevada.*

DEAR SIR: After a careful review of all the proceedings relative to the Caliente School District bond issue, I am satisfied that they are regular and that no legal complications can arise therefrom. Included in this declaration is the recent sale of said bonds. The issue was made prior to January 1, 1922, and the sale thereof was effected on December 31, 1921, when certain departments of the state government accepted an offer of sale of said bonds.

If I should be called upon to render an opinion in regard to the construction and interpretation of section 197 of the School Code, I would rule that where such bonds are issued and sold prior to the time fixed by law for a levy in March by the Board of County Commissioners, that the mere fact that the issue and sale have occurred after the first of the year would not preclude a levy by the Board of County Commissioners; that the Legislature in using the language "and in the calendar year following the year in which the bonds are issued \* \* \* shall levy and assess a special tax" did not contemplate the denial of a levy for the purpose of raising money to redeem bonds issued and sold prior to the time fixed by law for the making of said levy. It would only exclude the making of a levy for the payment of bonds issued and sold after the time fixed by law for the making of the necessary levy. Laws must be reasonably construed and interpreted, and I believe that the expressions herein given conform to reason and justice.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

## 87. Public Officers—Removal from Office—Procedure Defined—State May Render Assistance in Certain Cases to Counties in Discharge of Public Duties.

CARSON CITY, January 7, 1922.

*His Excellency, EMMET D. BOYLE, Governor of Nevada.*

SIR: Section 2851 of the Revised Laws of the State of Nevada provides for the removal from office of any official who shall refuse and neglect to perform any official acts. The section reads as follows:

If any person now holding or who shall hereafter hold any office in this State, who shall refuse or neglect to perform any official act in the manner and form as now prescribed by law, or who shall be guilty of any malpractice or malfeasance in office, may also be removed therefrom as hereinafter prescribed.

Section 2852 provides for certain summary proceedings based upon a duly verified complaint. The complaint may be verified by any person.

Section 2853 provides for the filling of the vacancy, and Section 2854 prohibits an officer removed from filling office during the pendency of an appeal.

Necessarily, a strong case must be made against a public officer who is charged with malpractice, malfeasance, or any failure in the performance of his duties. No court would enter a judgment of removal in the absence of very strong evidence going to establish the guilt of the accused.

Sections 6894, 6907, both inclusive, of the Revised Laws, provide that "an accusation in writing against any district, county, township, or municipal officer, for wilful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed."

Section 6903 recites that the trial must be by a jury. The law of this State provides for three methods for removal from office. One by accusation made by grand jury; one by impeachment by the Assembly, and one by accusation by a private citizen. The last method only permits of summary proceedings. Our law relative to the removal of a public officer from office is declared to be constitutional in the case of *Gay v. District Court*, 41 Nev. 330.

In answer to the first query propounded in your letter, I beg to advise that if any public officer of the county of Nye has failed and is failing to perform the duties connected with his office, proceedings may be instituted for his removal in the manner provided for by law. If the situation in Tonopah is such that the local officials cannot control it, then it is within your power to furnish them assistance through the State Police. The grand jury is possessed of the power to present formal charges against a negligent official. If such negligence does not exist and state assistance is required, then the grand jury should formally call upon you, as Chief Executive, for assistance.

Your second query is answered by the law cited in this letter. No special duties are imposed upon any official of the State relative to the removal of a county official for negligence in office.

A declaration of martial law by an executive empowered to make such declaration should necessarily only be declared when a state of affairs has arisen which is beyond ordinary civil control.

The Tonopah situation presents the following complications: Specific evidence of misconduct in office on the part of any official has not been presented to you. If the grand jury is possessed of any such evidence, it should take action in the matter. Furthermore, the purported facts presented to you are more conclusions of certain persons than specific statement of facts indicative of negligence on the part of local officials. If the grand jury or people of Nye County desire

state assistance, they should make a request based upon as full and complete a statement of facts as it is within their power to furnish.

Yours very truly,

L. B. FOWLER, *Attorney-General*.

**88. Noxious Animals—County Taxation Therefor—Same May Be Included in Budget.**

CARSON CITY, January 12, 1922.

HON. H. U. CASTLE, *District Attorney, Elko, Nevada*.

DEAR SIR: The question as to whether or not a tax should be levied by the County Commissioners of your county for the purpose of creating a county rabies fund appears to be within the control of the Commissioners themselves. It is evidently the intent of the Act of the Legislature entitled "An Act providing for the eradication of noxious animals in the State of Nevada," etc., Stats. 1921, p. 230, that such a fund shall be raised by taxation in any county desiring state support to carry out the purpose of the Act mentioned. The Legislature of 1917 having repealed the Act which limited the tax rate of a county to 70 cents, there seems to be no specific limit fixed by law relative to the tax rate of a county, except as provided in section 3762 of the Revised Laws. It therefore follows that the Board of County Commissioners of your county may include in the budget an estimate of the money to be required for the county rabies fund and to make the necessary levy therefor.

Yours very truly,

L. B. FOWLER, *Attorney-General*.

**89. Public Health—Quarantinable and Placardable Diseases—Case Stated Not Quarantinable.**

CARSON CITY, January 18, 1922.

DR. S. L. LEE, *Secretary State Board of Health*.

DEAR SIR: We have your request, enclosing correspondence of Dr. John E. Worden, County Health Officer of Elko, calling for an official opinion as to whether or not the statutes of this State, or the rules and regulations promulgated thereunder relative to public health, classify chicken-pox as a quarantinable or placardable disease, and whether or not an adult, living in the same house where a child has this disease, during its continuance is precluded by law from following her profession of a school-teacher.

A thorough examination of the statutes, and the rules and regulations of the Nevada State Board of Health promulgated thereunder, classify chicken-pox as a placardable disease only, and the only precautions in regard thereto are fully named, and a following thereof would not subject the adult school-teacher from pursuing her profes-

sion. The disease is not a quarantinable one, but a placardable one, and this school-teacher should not be subjected to the rules and regulations applicable to a quarantinable disease.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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90. Elections—Absent Voting—Procedure Defined.

CARSON CITY, January 19, 1922.

A. CARLISLE & Co., *Reno, Nevada.*

GENTLEMEN: You are hereby advised that under the Absent Voter Act of 1921, Stats. 1921, p. 153, an absent voter can only open the sealed envelope, provided therein to be sent to an absent voter, in the presence of the postmaster or County Clerk. Owing to the fact that the law definitely provides that said sealed envelope is to be opened only in the presence of the two officers specified, the injection of "Justice of the Peace," relative to the remailing of the ballot, cannot change the law in the respect mentioned. The Act should be read by eliminating the words "Justice of the Peace." The ruling herein given means that no complications can result if a voter follows the determination herein reached, while any other action on the part of the elector may invalidate his ballot.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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91. Emergency Loan—Act of School Trustees Should Be Transmitted to Board of County Commissioners—Tax for School District Does Not Include Tax for Emergency Loans.

CARSON CITY, January 20, 1922.

M. J. BURR, *Deputy Superintendent of Public Instruction.*

DEAR SIR: We reply to your inquiries in the order named:

(1) The levy of a special tax to cover an emergency loan for a school district must be made and levied upon its records by resolution of its Board of School Trustees and this record transmitted, together with copies of the resolution, duly approved for an emergency loan, to the Board of County Commissioners of the county wherein the school district is situated, for the purpose of extending the same by proper resolutions in its tax levies.

(2) When, in the judgment of the Board of School Trustees of any district, the school moneys to which such district shall be entitled for the coming school year will not be sufficient to maintain the school properly and for a sufficient number of months, said board shall have power to direct that a tax of not more than twenty-five cents on the

one hundred dollars of assessed valuation of such district shall be levied."

The tax levied for any emergency loan is not included in the tax provided for in the quoted language.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

92. **Motor-Vehicle Law—Provision for License Defined and Must Be Pursued.**

CARSON CITY, January 26, 1922.

HON. GEO. BRODIGAN, *Secretary of State.*

DEAR SIR: We have your inquiry, calling for our official opinion as to the interpretation to be placed upon subdivision "b" of section 2 of the motor-vehicle laws of Nevada. There is no ambiguity in the language of this subdivision. Its wording is plain and needs no interpretation; consequently, every truck, trailer or semitrailer is to be licensed at the rate of 35 cents per hundred pounds of weight or major fraction thereof, and, in addition thereto, the body-allowance weight and the rated load-weight capacity. This would include trailers attached to pleasure cars used for hauling camping equipment; therefore, an owner of such truck, trailer or semitrailer, on applying for such license, must furnish you with its actual weight and its potential carrying-weight capacity upon which you should compute the license fee provided for in the statute. You should issue a serial numbered license for such vehicles.

Answering your further inquiry, as to whether or not a transfer of an automobile may include the transfer of the license plate, you are advised that the statute expressly prohibits such transfer of the license plate and makes it the duty of the owner transferring the car to forward such license plate to the Secretary of State. This is provided for in section 10 of the Act, reading as follows:

Upon the transfer of ownership of a vehicle its registration shall expire, and it shall be the duty of the original owner to notify the Secretary of State immediately of the name and address of the new owner or dealer, and return the registration card and license plates to the said Secretary of State.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

93. **Criminal Law—Murder—Death-Watch Not Furnished by Law—Warden Should Use His Implied Discretion.**

CARSON CITY, January 27, 1922.

HON. R. B. HENRICH, *Warden Nevada State Prison.*

DEAR SIR: We have your inquiry as to whether or not a death-watch is provided by statute for criminals in your custody awaiting capital punishment. There is no statute upon the subject, but a death-watch

could very appropriately be said to be placed upon such criminals by custom as a precautionary measure to prevent a miscarriage of justice. If there is no express law upon the subject, you certainly, as Warden, have implied powers—not only to place such death-watch upon criminals, but also to incur the necessary expense therefor, payable out of the funds appropriated for your department, since responsibility is upon you by operation of law and judgment by a court of competent jurisdiction to carry out the sentence imposed.

By order of the Attorney-General :

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

94. **Criminal Law—Gambling—Punch-Boards Are Lotteries and Are Prohibited.**

CARSON CITY, January 28, 1922.

HON. THOS. A. BRANDON, *Winnemucca, Nevada.*

DEAR SIR: Replying to your letter of the 27th instant, you are respectfully advised that this department has ruled that so-called punch-boards, whether or not there is a resultant prize in the operation which itself or the value thereof depends upon chance, are lotteries.

We call your attention to Opinions 8 and 90, contained in the Biennial Report of the Attorney-General for the years 1919 and 1920. The decision law in other jurisdictions is conclusive on the subject.

By order of the Attorney-General :

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

95. **Motor-Vehicle Law—Law Deficient—Failure to Obtain License May Be Reached by Civil Proceedings.**

CARSON CITY, February 15, 1922.

HON. HARLAN L. HEWARD, *Assistant District Attorney, Reno, Nevada.*

DEAR SIR: It has been my endeavor to find some provision of law whereby a violation of the license provision of the Motor-Vehiele Act of 1921 can be enforced by criminal prosecution. The situation in this respect is hopeless. It will be necessary, therefore, to enforce the collection of said license tax against delinquents by the institution of civil proceedings.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

96.—**Noxious Animals—Extent of State Appropriation for Destroying Same Stated.**

CARSON CITY, February 23, 1922.

A. J. REED, *Agricultural Agent, Churchill County Farm Bureau, Inc., Fallon, Nevada.*

DEAR SIR: Senator Kent is in error in regard to the existence of a \$35,000 specific appropriation made for the purpose of combating rodents and predatory animals.

Section 4 of an Act of the Legislature entitled "An Act providing for the eradication of noxious animals in the State of Nevada," etc., Stats. 1921, p. 230, reads as follows:

For the purpose of providing funds for the work mentioned in this Act, it is hereby provided:

First—That for the calendar year 1921, there is appropriated all moneys not theretofore expended which have been or shall be realized from the proceeds of the special ad valorem tax provided for in chapter 51, Statutes of 1917, as amended by chapter 29, Statutes of 1919, as assessed in the calendar year 1920, together with such further appropriation as may be made by the Legislature from the general fund of the state treasury.

Second—That for the calendar year 1922 and thereafter there is hereby appropriated from the general fund of the state treasury a sum of seven thousand and seven hundred and twenty-five (\$7,725) dollars.

I think that the law herein quoted is the only law which relates to appropriations for the purposes mentioned in your letter.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

97. **State Engineer—Statute Fixing Time of Filing Protests, Etc., Must Be Strictly Construed, as State Engineer Has No Inherent Powers.**

CARSON CITY, February 23, 1922.

HON. J. G. SCRUGHAM, *State Engineer.*

DEAR SIR: We have your favor of the 21st instant, requesting our construction of section 62 of the water law, which provides that the State Engineer shall receive and file duly verified protests against the granting of an application within thirty days after the last date of publication.

The statute in this regard should be strictly construed, as the State Engineer has no inherent powers and, therefore, if any protests are tendered to you for filing after the statutory period of thirty days, you should not file the same or take any official cognizance thereof.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

98. **University of Nevada—Tuition Fees May Not Be Charged to Bona Fide Residents—Residence Is Matter of Act and Intent.**

CARSON CITY, February 24, 1922.

CLEMENT G. CAFFREY, *Reno, Nevada.*

DEAR SIR: We have your letter relating to tuition fees fixed by the Board of Regents under the Act approved February 17, 1921.

It is the ruling of this department that, under this Act, tuition shall

be free to all bona fide resident students. A construction otherwise would operate as a denial of the equal protection of the law to residents of Nevada. Of course, residence is a question of intent and can only be established by all the surrounding circumstances in each particular case. A student coming here and claiming to have established a residence would have the burden of proving clearly and convincingly that fact in the face of the terms of the statute.

By order of the Attorney-General :

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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99. **Motor-Vehicle Law—Licenses—Description of Vehicle to Be Filed with Secretary of State—License Void Upon Transfer of Ownership.**

CARSON CITY, March 14, 1922.

HON. GEORGE BRODIGAN, *Secretary of State.*

DEAR SIR: The Act of the Legislature entitled "An Act regulating automobiles or motor vehicles in public roads," etc., Stats. 1921, p. 375, requires the owner of every automobile, motorcycle or other similar motor vehicle, to file with you, as Secretary of State, a brief description of the vehicle to be registered, including the name of the maker, factory number, motor number and weight of such car as stated by the respective makers. This becomes an established record in your office and cannot be the subject of alteration. The correctness of the facts must be ascertained by the applicant prior to filing. If an error is made by him, the only remedy is to file a new application which will necessitate the payment of an additional fee. The transfer of ownership of a registered vehicle works an immediate expiration of the registration, and the owner must forthwith return the registration card and license plates to you. The purchaser must procure a new registration card and license plates.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

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100. **Public Schools—Teachers' Salaries—Teachers' Contracts Are Valid Obligations and Funds for Payment of Their Salaries May Not Be Diverted When Set Aside in Budget.**

CARSON CITY, March 18, 1922.

M. J. BURR, *Deputy Superintendent of Public Instruction.*

DEAR SIR: We have your inquiry calling for our official opinion upon the following statement of facts:

Genoa School District No. 2, Douglas County, Nevada, has entered into the usual form of contract engaging teachers for a period of nine months, and the Board of School Trustees proposes to reduce that period to eight months for the purpose of paying other demands with the moneys reserved from the teachers' salaries.

You ask may this be lawfully done. We answer in the negative. The contract between the teachers and Boards of School Trustees is a valid and subsisting contract according to its terms, and cannot be rescinded, nor can any of the funds provided for the payment of teachers' salaries be applied to any other purpose.

We note that Genoa School District No. 2, under date of February 21, 1921, for the school year July 1, 1921, to June 30, 1922, as provided by law, has duly filed its district-school budget containing therein the sum of \$2,070 for teachers' salaries. Section 10 of the Act, relating to the fiscal management of counties, cities, towns, school districts, and other governmental agencies, approved March 22, 1911, as amended, Stats. 1921, 327, provides:

It shall be unlawful for any governing board or any member thereof or any officer of any city, town, municipality, school district, county high school, or high-school district, or educational district to authorize, allow, or contract for any expenditure unless the money for the payment thereof has been specially set aside for such payment by the budget. Any member of any governing board or any officer violating the provisions of this section shall be removed from office in a suit to be instituted by the City Attorney in the case of cities, and by the District Attorney in cases of towns, school districts, county high schools, or high-school districts, or educational districts wherein such officer or member of the governing board resides, upon the request of the Attorney-General or upon the complaint of any interested party.

Accordingly, the fund in said budget for teachers' salaries may not be diverted from the purpose named therein either by the Board of School Trustees or the County Auditor whose duty it is to draw warrants for legal claims against the sums provided in the district-school budget. Should they violate this provision of law, they will be amenable to the penalties prescribed therein.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

101. **Insurance Companies, Foreign, Not Qualifying—Policy Valid, But Jurisdiction in Judicial Proceeding Could Not Be Obtained without Resident Agent or by Consent.**

CARSON CITY, March 20, 1922.

HON. GEO. A. COLE, *State Insurance Commissioner.*

DEAR SIR: We have your favor transmitting a letter from the Reno National Bank, calling for our official opinion on the inquiry propounded as follows:

What kind of a situation would we be placed in, in case of a fire on property covered by insurance in a company not authorized to do business in the State of Nevada in case the insurance company in question refused to pay the claim?

The answer to this inquiry is severable:

First—Irrespective of the fact that the insurance company in question had not qualified to do business in the State of Nevada, the contract of insurance nevertheless would be valid and the liability of the insurance company would be fixed and could be judicially determined in accordance with the policy.

Second—However, the determination and enforcement of the liability under the policy in such insurance company could not be had in the courts of the State of Nevada without its consent because, the company not having qualified to do business in the State of Nevada or not having appointed its agent upon whom process might be served, no jurisdiction could be obtained over such insurance company by constructive service or process, as the action would necessarily seek a recovery *in personam*. In this connection your attention is called to Opinion 183, Biennial Report of the Attorney-General, 1919 and 1920, wherein this language is used:

After considerable research and due consideration, we beg to advise you that no effective legal proceedings may be brought either in the state or federal courts of Nevada, for the reason no jurisdiction over the offending corporation can be obtained therein by constructive service of process.

The process of this State, where the judgment is to operate *in personam*, must be personally served within its confines; or, if federal jurisdiction is sought to be obtained, the proceedings must be brought in that district of which the offending corporation is an inhabitant. Accordingly, under the facts submitted, proceedings could only be prosecuted either in the state courts or in the federal courts where the company referred to by you is a resident and inhabitant.

Accordingly, while the contract of insurance would remain valid, the liability thereunder without the consent of the insurance company could only be enforced wherever process might be served upon which to predicate a valid judgment *in personam*.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General*.

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102. Revenue—State Racing Commission—Excess Funds of Commission Should Be Paid into General Fund of State Treasury.

CARSON CITY, March 25, 1922.

NEVADA STATE RACING COMMISSION, *Reno, Nevada*.

GENTLEMEN: His Excellency, the Governor, has transmitted to this department your communication of the 20th instant in regard to a surplus of moneys arising under the law creating the Nevada State Racing Commission. This surplus appears to be something like \$6,755.40, and your inquiry is as to the disposition thereof.

Accordingly, to consummate the purpose of the Act creating your commission, you are entitled to use and apply such sums out of this balance as could necessarily be applied under the Act creating your

Commission, and we see no reason whatsoever that, if you turn in the balance of \$6,000 you could not retain the sum of \$755.40 for possible expenses that might occur; in fact, we think the amount that you request to be retained is abnormally reasonable. Accordingly, you should transmit to the State Treasurer, to be applied to the general fund of the State, this balance. This balance cannot be applied under the Act to the Department of Highways, for the reason that that Department has received its full quota under the Act.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

103. **Elections—Registration—Designation of Elector—Elector Not Designating Party Affiliations May Not Vote at Primary Elections for Party Candidates.**

CARSON CITY, March 28, 1922.

A. CARLISLE & Co., *Reno, Nevada.*

DEAR SIR: The law provides that the absent voter, who is duly registered, may vote at a general, special, or primary election. The registration law applies in the same way to an absent voter as it does to any other voter. The general registration Act provides that if an elector desires to vote at a party primary he shall designate his party affiliation. The designation given by him is controlling, and he can only vote in the primary of the party for which he is registered.

Section 3 of the absent-voter law apparently in parenthetical form seeks to give greater latitude in this respect to absent voters than exists in other voters. I do not think that such was the intent, purpose, or desire of the Legislature. Consequently, it is my ruling that the general registration law applies in this respect, and that the language referred to in section 3 of the absent-voter law has no valid effect.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

104. **Public Employment—A Partnership Composed of a Citizen and an Alien May Not Be Employed on Public Work.**

CARSON CITY, March 29, 1922.

HON. LEROY F. PIKE, *City Attorney, Reno, Nevada.*

DEAR SIR: The Act of the Legislature entitled "An Act to amend an Act entitled 'An Act to prohibit the employment of any person except a native-born or naturalized citizen of the United States by any officer of the State of Nevada, or any political subdivision of the State,' " etc., Stats. 1921, p. 205, is constitutional. *Heim v. McCall*, 239, U. S. 175.

It applies to contractors for public work for the reason that the word "employ" must be defined in order to give effect to the intent and purpose of the Act in a broad sense.

In *State v. Gohl*, 46 Wash. 408, also reported in 90 Pac., the Supreme

Court of Washington, in considering a statute, follows the definition of "employ" given by Webster: "to use; to have in service; to cause to be engaged in doing something; to make use of an instrument, a means, a material, etc., for a specific purpose."

In the case of the United States v. Morris, 39 U. S. 464, the Court uses the following language: "to be employed in anything, means not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it."

These cases justify the contention that the Act under consideration applies to contractors. If an alien is a member of a partnership, the partnership for the purpose of this Act must be treated as an alien—in other words, an individual person who is an alien cannot be allowed to defeat the intent and purpose of the act by joining himself with a citizen. The law does not favor subterfuges and such would clearly be a subterfuge.

Yours very truly,

L. B. FOWLER, *Attorney-General*.

105. **State Engineer—Overflowing Artesian Well—Same Prohibited by Statute and Decision Law.**

CARSON CITY, April 5, 1922.

HON. J. G. SCRUGHAM, *State Engineer*.

DEAR SIR: We have your letter transmitting inquiries of Mr. H. Blanding of Las Vegas, Nevada, in regard to uncased and overflowing artesian wells, the water therefrom running to waste and injuring land adjacent thereto.

The subject-matter of the inquiry is concluded by an Act of the Legislature of this State, being chapter 210 of the Statutes of 1915, and, according thereto, such wells are prohibited from being left open and the water escaping therefrom and the county officers of the State are enjoined thereby to take the steps contemplated to remedy the situation of which complaint is made.

Independent of the Act in question, the owner of adjoining ground could undoubtedly in a court of equity obtain an injunction against a continuance of this situation since it is a private nuisance to him, materially damaging his land. If the water should flow upon public roads or highways, a public nuisance arises, which could be enjoined independent of the act by public officials or any person sustaining material damage.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General*.

106. **Corporations—Assessable and Non-Assessable Capital Stock—Law Defined.**

CARSON CITY, April 11, 1922.

STATE AGENT AND TRANSFER SYNDICATE, *Carson City, Nevada*.

DEAR SIRS: We have your inquiry in the matter of the San Diego Water Company, requesting our opinion as to whether or not its capi-

tal stock is subject to assessment, its articles of incorporation reading in part as follows: "That the capital stock of the corporation shall be subject to assessment."

This provision alone is sufficient to answer the inquiry in the affirmative, but, contrasted with the provision of the general corporation law, providing substantially that, where the articles state that the capital stock of a corporation shall not be subject to assessment to pay its debts after its subscription price has been paid, it makes an answer in the affirmative more apparent. The substantive law upon the subject, fortified by unanimous authority, provides that the capital stock of a corporation shall be subject to assessment unless it is relieved by law therefrom. Such is not the case here. The capital stock is not only not relieved from assessment, but the right to assess it is emphasized accordingly as aforesaid.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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107. **Municipal Corporations—Attorney-General Not Required to Advise Such Corporations.**

CARSON CITY, April 12, 1922.

HON. T. L. HAWKINS, *City Trustee, Carson City, Nevada.*

DEAR SIR: Under date of December 4, 1920, I wrote to Supervisor W. W. Booher of the governing board of Elko, Nevada, in reply to his request for a legal opinion in connection with the city charter of Elko. In this letter the following language is used:

It is not within the province of this office to give legal opinions as to the provisions in city charters. The city in such cases should be governed by the opinion of its regularly chosen City Attorney or an attorney specially employed by the city for such purpose. \* \* \* An opinion of this office construing or interpreting a provision of a city charter would be absolutely nonofficial in character and would, therefore, possess but slight importance.

If this office should attempt to control the legal affairs of the various municipal corporations in this State, it would face many serious complications. In that the question propounded by you is one that is absolutely foreign to the domain of this office, I feel that it would be an intrusion and an unreasonable invasion for me, as Attorney-General, to attempt in anywise to interfere with the legal affairs of Carson City, a duly created corporation operating under a city charter. The statute involved is not one of state-wide application, but is strictly an amendment of the city charter of Carson City. If the contrary existed and the statute was one that would affect the entire State, the situation would then be very different. I am satisfied that you will realize the soundness of my attitude.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

## 108. County Hospitals—Pay Patients May Be Received Therein.

CARSON CITY, April 13, 1922.

HON. H. U. CASTLE, *District Attorney, Elko, Nevada.*

DEAR SIR: In reply to your query as to whether or not it is lawful to receive pay patients in the County Hospital of Elko County, I beg to reply in the affirmative. Express law on the subject is meager. The conclusion that I have reached is based on law, custom, usage, and a consideration of public needs and public benefits. It has long been the custom of various counties of the State of Nevada to receive, at their respective county hospitals, patients other than indigents who pay for the immediate services and benefits received by them. A chaotic condition of affairs would exist in this State if this custom should be overthrown. Anything that is in the interest of public health should be upheld if possible.

Elko County has constructed and equipped, at heavy expense, a very fine hospital. This has been done pursuant to law. It is a hospital far beyond the needs of the indigents who require treatment at the hospital. In addition to this hospital, Elko County is supporting a poor farm. It seems unreasonable to contend that the hospital of your county, which possesses such size, capacity, and equipment, exists only for the benefit of indigents, and that most of the people of Elko County are denied the benefit of this splendid institution, which they themselves have created. It is true that in the first instance indigents should be cared for by a county, but an enlarged benefit should not be condemned. Section 28 of the Public Health Act, Revised Laws, p. 289, recognizes the use of a public hospital by persons who are able to pay and provides for such payment. This provision of law is of value in adopting the theory that it is not the policy of the State to restrict the use of a county hospital to indigents alone. Subdivision 8 of section 1508 confers upon the Board of County Commissioners the power to control and manage the property, real and personal, belonging to the county. This provision must not be given an effect which is too narrow. Therefore, a county hospital which is allowed to be used by the Board of County Commissioners in the interest of public health and for the general benefit and welfare of the people of Elko County must be held to be a legitimate use. It is a highly commendable policy for the public to provide such an institution for its general benefit.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

## 109. Public Schools—Bond Election Legal and Bonds Approved.

CARSON CITY, April 13, 1922.

NEVADA INDUSTRIAL COMMISSION, *Carson City, Nevada.*

GENTLEMEN: The record of the proceedings of the Board of School Trustees of Carson School District No. 1, Ormsby County, Nevada, relative to a bond issue in the sum of \$17,500 for the purpose of completing the erection of the second story, repair of the first story, and

refurnishing of the Carson school building situate in Carson City, Nevada, recently damaged by fire, has been examined by me and I find that the proceedings taken are in compliance with the law. The bond issue is, therefore, valid.

Yours very truly,

L. B. FOWLER, *Attorney-General*.

110. **Statute—Its Scope Defined—Case Stated Not Within Statute Cited.**

CARSON CITY, April 13, 1922.

HON. L. G. WILSON, *District Attorney, Winnemucca, Nevada*.

DEAR SIR: The Act of the Legislature of the State of Nevada entitled "An Act fixing the salaries of certain officers of Humboldt County, and repealing certain Acts in relation thereto," Stats. 1921, p. 151, is not possessed of a title that is sufficiently comprehensive to include the establishment of commissioner districts in the County of Humboldt. I, therefore, rule that such part of said Act has no legal effect.

Yours very truly,

L. B. FOWLER, *Attorney-General*.

111. **Elections—Election of School Trustees—Sufficiency of Return of Elections—Law Cited and Defined.**

CARSON CITY, April 18, 1922.

HON. W. J. HUNTING, *Superintendent of Public Instruction*.

DEAR SIR: We have your favor of the 13th instant, propounding certain inquiries for our official opinion and in reply we beg to advise you as follows:

First—It is a principle of law that where a majority of an official board or commission acts, the act of the majority is controlling, and, therefore, if a majority of a school-election board returns a legal certificate, that certificate would be held to be the certificate of the board and you should give it the same recognition as if it had been executed by all the members of the board.

Second—If a member of an election board, wilfully and knowingly, signs and returns a certificate or report required by law which is materially false, he is amenable to law. Section 54 of an Act relating to election, approved March 24, 1917, provides:

Every person charged with the performance of any duty under the provisions of any law of this State relating to elections, who wilfully neglects or refuses to perform it, or who, in his official capacity, knowingly and fraudulently acts in contravention or violation of any of the provisions of such laws, shall be deemed guilty of a felony, and punishable by a fine of not exceeding one thousand dollars, or by imprisonment in the state prison not exceeding five years, or by both such fine and imprisonment.

We see no difficulty for the members of the election board of the

recent Clear Creek School District to sign and return proper certificates according to the truth. For instance, if ballots were counted for long- and short-term candidates, although it appears there was no designation of the term, the members of the board could very appropriately state that fact in the certificate. Where the truth is stated there can be no violation of the law, and no one then would be subject to criminal liability.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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112. Highways, Department of—Claims Against—Certain Claim Allowed in Part.

CARSON CITY, April 18, 1922.

HON. GEO. W. BORDEN, *State Highway Engineer.*

DEAR SIR: We note your letter of April 12, calling for our opinion as to whether or not the alleged claim of the California Corrugated Culvert Company is a legal liability against your department under Contract No. 9 in which one O'Keefe, the contractor, defaulted and under the terms of which the Department of Highways completed the project.

It seems that the Corrugated Culvert Company has a balance of \$4,310.63 against this project for corrugated pipe, but that on account thereof Mr. O'Keefe paid \$2,000, although he had theretofore been allowed \$3,484.14 for payment of the pipe then delivered while he had the contract. The pipe was ordered by Mr. O'Keefe, and you allowed and caused to be paid to him the sum mentioned, and accordingly you are entitled to the deduction on the claim of the company of \$1,484.14, and the balance of \$2,826.49 is justly due the company and should be paid by you since you incurred the same after taking over the contract on the project.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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113. Boxing Exhibitions—All Such Public Exhibitions Must Be Licensed and Statutory Fee Paid.

CARSON CITY, May 4, 1922.

LAS VEGAS POST NO. 8, AMERICAN LEGION, *Las Vegas, Nevada.*

GENTLEMEN: Your letter of April 29, 1922, is received and noted. In the absence of the Attorney-General I have to advise you as follows:

There seems to be no escape from the provisions of the act entitled "An Act to restrict and license glove contests between man and man, and to repeal all other Acts in conflict therewith," as amended, Stats. 1919, p. 69, since the question submitted by you is answered by the text of the Act itself—namely, "Any male person over the age of 21 years may procure a license for an exhibition in a public place for any

contest or exhibition with gloves between white men." This squarely covers your statement, which is that the Post is planning on staging a boxing exhibition in the near future.

You will note that it is immaterial whether or not an admission charge is to be made, or whether or not the proceeds are to be applied for a certain purpose. The situation evolved is to be regretted, but the plain language of the statute admits of no other construction.

The same question arose from Las Vegas about two years ago and your District Attorney there will be able to enlighten you upon the ruling made by me then. There being no escape from the statute, I was compelled to abide by its terms as in this letter set forth.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

114. **Health, State Board of—Power Rests Therein to Appoint Child's Welfare Division in Cooperation With Federal Government.**

CARSON CITY, May 9, 1922.

HON. EMMET D. BOYLE, *Governor of Nevada.*

DEAR SIR: It is my opinion that the State Board of Health has the power to appoint a Child's Welfare Division for the purpose of working in cooperation with the Federal Government pursuant to the Sheppard-Towner bill. A committee appointed by the State Board of Health for such a purpose will aid in making effective the power given the Board of Health wherein it has general supervision over all matters relating to the preservation of the health and life of citizens of the State. I, therefore, advise that the procedure outlined by you is legal.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

115. **Public Schools—Advertising for Bids—Evasion of Law—Advertising Required.**

CARSON CITY, May 12, 1922.

HON. W. R. REYNOLDS, *District Attorney, Eureka, Nevada.*

DEAR SIR: Any attempt to evade the provisions contained in sections 1 and 2 of "An Act requiring School Trustees to advertise for bids on contracts," etc., will be dangerous. The fundamental principle which prohibits the doing of a thing indirectly which cannot be done directly must be followed. In that the total amount to be expended by the Eureka School District will approximate \$1,500, I am of the opinion that the only safe course to pursue is to follow the statute.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**116. Criminal Law—Procedure—Preliminary Examination Not Dispensed With Unless Waived.**

CARSON CITY, May 13, 1922.

HON. ARTHUR E. BARNES, *District Attorney, Goldfield, Nevada.*

DEAR SIR: We have your inquiry calling for our official opinion as to the procedure according to section 2, chapter 209, Stats. 1913, and in reply thereto you are advised:

We do not think a preliminary examination may be dispensed with unless the same is waived in the Justice Court, and that therefore, as a basis for jurisdiction, a formal complaint should be filed for the preliminary examination in the Justice Court. Such complaint is not the information referred to in the Act. The information is filed after the preliminary examination has been had or waived in the District Court. We think the procedure here outlined is sound in law and our observations lead us to conclude that this procedure is generally followed. We, therefore, advise you to proceed accordingly.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

**117. Elections—Certain School Election Held Legal.**

CARSON CITY, May 20, 1922.

MISS MAUDE FRAZIER, *Deputy Superintendent of Public Instruction, Las Vegas, Nevada.*

DEAR MISS FRAZIER: The election board of Kiernan School District, Lincoln County, correctly declared the result of the school election held in said district on the first day of April. The votes cast for certain candidates for both the short and long term cannot be added together, but must be separately counted. This the board proceeded to do and thereby pursued the legal method. Mrs. Ethel S. Henrie, Henry Schlarman, and L. L. Dixon are, therefore, the duly elected trustees.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**118. Criminal Law—Search Warrants—Who May Issue Same.**

CARSON CITY, May 24, 1922.

HON. J. H. GALLAGHER, *Mayor, Ely, Nevada.*

DEAR SIR: We have your letter of the 22d instant, requesting an official opinion upon the following inquiry:

If the city of Ely were to pass an ordinance authorizing the Police Judge to issue search warrants, would it conflict in any manner with state laws?

As an ordinary proposition, assuming that the ordinance concerned a subject-matter within the scope and delegated powers of the city as provided in its charter, we would state that the city could pass such

ordinance, for the reason that section 7415, et seq., of the Revised Laws, provide that search-warrants may be issued by magistrates, and section 6929 thereof provides that Police Judges and others, upon whom are conferred by law the powers of a Justice of the Peace in criminal cases, are magistrates. We have not the ordinance of the city referred to by you, similar to the national and state law relating to the sale and traffic of intoxicating liquors, and, hence, are not able to give you an opinion whether or not the same is within the delegated powers of the city as specified in its charter. If it is within such delegated powers, then the Police Judge may issue the search-warrants and conduct further proceedings relating thereto in accordance with the sections of the Revised Laws hereinabove referred to.

In regard to your statement that the Justice of the Peace maintains the offense is a felony and beyond the jurisdiction of his court, you are respectfully referred to the case of *Ex Parte McGee*, 44 Nev. 23, wherein the syllabus reads: "In view of Revised Laws, 4851, District Court had jurisdiction to try petitioner charged with misdemeanor of having in her possession intoxicating liquor in violation of the prohibition statute, section 3 whereof provides for fine of \$100 to \$1,000 and of imprisonment in the county jail from one to twelve months." According to this language you will note that the District Court may try cases, not because they are felonies, but because the penalty brings them within its jurisdiction.

This department has made several rulings to the effect that its opinions can hardly be rendered officially to incorporated cities, but application would be made at least in the first instance to their legal advisors since we would assume, in rendering such official positions, to go beyond the statute delegating our powers which would be confusing to the administration of local law.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General*.

119. Public Utilities—Act Providing Same for Town of Caliente Construed—  
Suggested Plan Held Illegal.

CARSON CITY, May 31, 1922.

HON. F. E. WADSWORTH, *District Attorney, Panaca, Nevada*.

DEAR SIR: We have your request, calling for our official opinion concerning the application of the Act entitled "An Act authorizing the acquisition of certain public utilities for the town of Caliente, the issuance and sale of bonds therefor, the levy and collection of taxes for the payment thereof, and other matters relating thereto," approved March 4, 1921, to the facts submitted as noted herein.

The Act provides for the acquisition of certain public utilities for the town of Caliente, to wit: an electric-light and -power system, a water system, and a sewerage system. It is proposed that the Board of County Commissioners enter into an agreement whereby the bonds authorized to be issued may be disposed of directly to the Dixie Power Company of Utah or to others, and that with the proceeds thereof this company, its source of power and plant being in Utah,

extend or cause to be extended its transmission lines to the town of Caliente. These transmission lines in no sense will be an electric-light and -power system, but they constitute merely a necessary appurtenance thereof. The source of power and generating plant are and will be owned by the company and located in Utah, and the town of Caliente will have no interest therein.

Under these statements of facts, the Act entitled as aforesaid cannot be made to apply. It contemplates an electric-light and -power system to be acquired and owned by the town of Caliente, and not a power line consisting of poles, transformers, etc., from the town of Caliente to the state-line between Nevada and Utah. There should be no reasonable doubt concerning this decision. The Act is plain and its reading concludes the question.

In addition to this, while not necessary to this opinion, it may be said that neither the State nor any municipal subdivision thereof may own property or property rights of the kind in question in a foreign State without the express consent of the latter, and if it be contended that the town of Caliente seeks eventually to obtain an interest in the source of power-generating plant situate in Utah, then this could not be done, except under the express authority of Utah through its executive officers acting pursuant to legislative grant; otherwise there would be an invasion of the sovereignty of the State of Utah.

These views may contravene the desires of a majority of the inhabitants of Caliente, but what is expedient is not always the law. Where the law conflicts with the public will, the law is paramount and the remedy rests with the Legislature.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

#### 120. Nepotism Law—Case Stated Discussed—Its Application Defined.

CARSON CITY, JUNE 1, 1922.

HON. L. G. WILSON, *District Attorney, Winnemucca, Nevada.*

DEAR SIR: We have your letter of May 31, calling for our official opinion as to whether or not certain facts stated come within the inhibition of the nepotism statute, so-called, Stats. 1915, p. 17.

Succinctly stated these facts are: The Board of County Commissioners employ certain persons within the prohibited degree of consanguinity or affinity. The question is whether or not the Act in question is applicable. The Act reads: "It shall be unlawful for any state, township, municipal, or county official, elected or appointed, to employ or to keep in his employ on behalf of the State of Nevada, or any county thereof, in any capacity, his wife, son, daughter, or any person related to him (by blood or marriage) within the third degree of consanguinity or affinity." It is contended that this Act should be strictly construed since it is criminal in nature, and, being criminal, it is also civil in its nature, in that it provides that no compensation shall be allowed to the person so employed. While the Act itself makes it unlawful for a county official to employ, or to keep in his employ-

ment, such persons, we think that, as such official, being a member of the board, necessarily adopts and is bound by the action of the board in creating the employment, he will be responsible under the Act.

Accordingly we are of the opinion that in the instant case the employment contravenes the provisions of the Act.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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121. **Elections—Political Parties Recognized by Law—Methods for Recognition of New Political Parties Defined.**

CARSON CITY, June 20, 1922.

HON. GEO. BRODIGAN, *Secretary of State.*

DEAR SIR: There are two ways whereby a political party may receive recognition at a state primary election. This is provided for in subdivision g of section 1 of the primary election law, which provides:

First—That any organization of electors which, under a common name or designation, at the last preceding November election polled for any of its candidates equivalent to 10 per cent of the total vote cast for Representative in Congress, shall be, under the Act, a political party.

Second—That any organization of electors which, under a common name or designation, shall become a political party by filing a petition signed by qualified electors equal in number to at least 10 per cent of the vote cast at the last preceding November election for Representative in Congress. Such petition must be filed at least sixty days prior to the date of the primary.

Only two political parties can be recognized at the coming state primary election under the first provision of said subdivision g of section 1 of the primary election law. No other party can receive recognition at said primary election unless it complies with the second provision of said subdivision of said election.

At the election held November 2, 1920, only two parties polled for any of its candidates votes equivalent to 10 per cent of the total vote cast for Representative in Congress, said parties being the Democratic and Republican parties.

In the absence of some action by the petition method, only two parties can be considered at the next state primary election—the Democratic and Republican parties. If the petition method is not adopted by any party, provision will only be made for ballots and tally-books for the Democratic and Republican parties. Provision must also be made as to ballots and tally-lists for nonpartisan candidates, as such nominations are specifically provided for in the primary election law.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**122. Live Stock—Method of Shipment Immaterial.**

CARSON CITY, June 24, 1922.

STATE BOARD OF STOCK COMMISSIONERS, *Reno, Nevada.*

DEAR SIR: We have your inquiry calling for our official opinion as to whether or not section 21, chapter 268, Stats. 1915, appertains to any particular method of shipment of cattle from this State. The section is:

Said inspectors shall also inspect all stock or cattle about to be shipped from the State, and the consignor, upon demand, shall establish fully his title to such stock.

You are advised that the method of shipment by rail or otherwise is immaterial. You may apply the section to all cattle shipped from the State whether aboard cars or being driven therefrom.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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**123. Elections—Special Election for Certain Purposes May Be Held on Same Day as General Election.**

CARSON CITY, June 24, 1922.

HON. G. J. KENNY, *District Attorney, Fallon, Nevada.*

DEAR SIR: We have your letter calling for our official opinion as to whether or not a high-school election may be held on the same day as the ensuing primary election, namely, September 5, 1922.

In reply thereto, we beg to advise you that, as there is no inhibition in the statute laws of this State against the holding of one or more of the elections of the class indicated, a high-school bond election may be held on the date named.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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**124. Nepotism Law—Application Already Defined Adhered To.**

CARSON CITY, June 26, 1922.

HON. W. J. BELL, *Winnemucca, Nevada.*

DEAR SIR: I received your letter regarding the construction placed by me on the Nepotism Act, as far as covering the situation presented by you. My delay in answering you was occasioned by the fact that I desired to review the situation with the Attorney-General to ascertain if he thought my conclusions were incorrect, and, if so, the same could be reversed by him. After a thorough discussion of the matter and the application of statutory rules of construction, we are agreed that the ruling heretofore made by me is sound and will stand the test of the

courts. In accordance therewith, we are applying my ruling to two instances in White Pine County, a copy of the opinion to the District Attorney being enclosed for your information.

By order of the Attorney-General :

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

125. **Nepotism Law—Its Application Defined in a Certain Instance.**

CARSON CITY, June 26, 1922.

HON. CHAS. A. WALKER, *District Attorney, Ely, Nevada.*

DEAR SIR: We have your inquiries calling for our official opinion as to whether or not (1) a brother of a County Commissioner may serve as Deputy County Treasurer, and (2) whether or not the County Board of Education may employ the son of one of its members to superintend the construction of a high school at a certain per cent of the contract price.

Wherever the power of appointment subsists in a board, no valid appointment may be made by that board of an employee within the prohibited degrees of consanguinity or affinity, even though the member of the board so related did not vote or voted against the appointment, as the appointment when made is the act of the board for which each member is legally responsible. If the Nepotism Act, Stats. 1915, p. 17, were otherwise construed, it would be subject to repeated evasions and the policy of the Act would thereby be frustrated.

By order of the Attorney-General :

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

126. **Elections—Ballot—Alphabetical List of Candidates Thereon—Certain Candidate's Place Thereon Defined.**

CARSON CITY, June 30, 1922.

HON. GEO. BRODIGAN, *Secretary of State.*

DEAR SIR: We have your favor calling for our official opinion as to the name of a certain candidate which will go on the ballot in the ensuing elections. The candidate is Lydia Adams-Williams. The question is whether or not she shall go on the official ballot under the name Williams, or under the name Adams-Williams. This question can only be answered by ascertaining the real name of the candidate. In this connection her statement is as follows: She is a widow for some thirty years; she has always used the name Adams-Williams; has always registered as such; is addressed orally and in writing as such; and is known upon bank records as Adams-Williams. If this statement is true, she is entitled to be placed upon the official ballots under the name of Adams-Williams.

By order of the Attorney-General :

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

127. **Criminal Law — Strikes—Railroads Have Constitutional Right to Employ upon Their Property, for Its Protection, Armed Guards.**

CARSON CITY, July 12, 1922.

HON. EMMET D. BOYLE, *Governor of Nevada.*

DEAR SIR: We have your letter of this date calling for our official opinion upon the following inquiry:

May railroad companies employ watchmen and guards for the purpose of protecting their property and their employees, while upon their property and premises, from injury, harm, destruction or molestation, and who, being so employed upon such property and premises, may carry arms, concealed or unconcealed, for the declared purpose of such protection?

Irrespective of any statutory provision upon the subject, it is an inalienable right that every one shall be secure in his person and his property. This inalienable right has been carried into positive expression in the Constitution of the United States and the Constitution of the State of Nevada; the provision of the latter in this respect being as follows: "All men are, by nature free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and pursuing and obtaining safety and happiness." This declaration is paramount; and therefore persons employed to watch or guard property have the right to wear arms, concealed or otherwise, so long as they remain on the property or premises of those employing them, and are actually discharging such functions.

Section 6568 of the Revised Laws of 1912 provides that "it shall be unlawful for any person in this State, except peace officers, or persons while employed upon or traveling upon trains, stages, or other public conveyances, to wear, carry or have concealed upon his person, in any town, city or village, any dirk-knife, pistol, sword in case, slung-shot, sand-club, metal knuckles, or other dangerous weapon," but this section is at all times subject to the paramount declaration of the Constitution hereinabove quoted, and is an exercise of the usual legislative authority regulating the indiscriminate carrying of weapons, in the interest of the public peace and order, and cannot be construed as limiting the provisions of the Constitutions of the United States and of the State of Nevada to which we have referred.

The question may suggest itself as to the limits of the authority of peace officers in conditions appertaining to the premises. These limits are well settled by statute and decision law, and a mere reference thereto is sufficient; when the public peace is actually, or is in imminent danger of, being broken, in an emergency a peace officer has the right to enter premises and arrest and disarm law-breakers, known criminals and the like; but in other cases he, or any person conversant with the facts, should sign and swear to a complaint, and secure a warrant of search or arrest thereon, before invading private property.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

128. Criminal Law—Strikes—Picketing Not Forbidden by Law—Offenses Akin to Picketing Enumerated.

CARSON CITY, July 19, 1922.

HON. EMMET D. BOYLE, *Governor of Nevada*.

DEAR SIR: We have your letter of the 14th instant, relating to picketing and situations potentially issuing therefrom, and requesting our official opinion as to the lawfulness thereof.

A legal definition of picketing is essential to a due consideration of the subject-matter of your inquiry. Picketing is the "stationing of persons near the premises of another for the mere purpose of observing and obtaining information, for the purpose of conveying information to persons seeking or willing to receive the same, or for the purpose of using orderly and peaceful persuasion with those willing to listen," generally at the time of, and in connection with, a labor strike, and in aid thereof.

There is no statute making such situation a criminal offense in this State; the right to picket within the purview of the definition herein laid down, even in equity cases seeking injunctive relief, has been repeatedly sustained. See 24 Cyc. 834, et seq., and the authorities cited thereto.

We quote *Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131*, 75 N. E. 877:

It is, however, generally conceded in this country and in England that workmen, when free from contract obligations, may not only themselves, singly and in combination, cease to work for any employer, but may also, as a means of accomplishing a legitimate purpose, use all lawful and peaceful means to induce others to quit or refuse employment. The law, having granted workmen the right to strike to secure better conditions from their employers, grants them also the use of those means and agencies, not inconsistent with the rights of others, that are necessary to make the strike effective. This embraces the right to support their contest by argument, persuasion and such favors and accommodations as they have within their control. The law will not deprive endeavor and energy of their just reward, when exercised for a legitimate purpose and in a legitimate manner. So, in a contest between capital and labor on the one hand to secure higher wages, and on the other to resist it, argument and persuasion to win support and cooperation from others are proper to either side, provided they are of a character to leave the persons solicited feeling at liberty to comply or not, as they please. Likewise a union may appoint pickets or a committee to visit the vicinity of factories for the purpose of taking note of the persons employed, and to secure, if it can be done by lawful means, their names and places of residence for the purpose of peaceful visitation. *Eddy on Comb.*, sec. 537; *Perkins v. Rogg* (1892), 28 Wkly. Law Bul. 32.

See, also, the authorities therein cited: *Eddy on Comb.*, secs. 537, 539; *Beach on Mon. & Ind. Trusts*, sec. 107; *Union P. Ry. Co. v. Ruef* (C. C.) 120 Fed. 102; *Foster v. Retail Clerks Association*, 39 Misc. Rep. 48, 78 N. Y. Supp. 860; *Rogers v. Evarts* (Sup.) 17 N. Y. 264; *Perkins*

v. Rogg, 28 Wkly. Law Bul. 32; Reg. v. Druitt, 10 Cox, Cr. R. 592; Reg. v. Hilbert, 13 Cox, Cr. R. 82.

The nearest approach to declaring picketing a crime by statute in this State is observed in sections 6377 and 6740 of the Revised Laws, 1912. These, as far as necessary to illustrate the proposition, provide:

SECTION 6377. Whenever two or more persons shall conspire \* \* \* 5. To prevent another from exercising any lawful trade or calling or from doing any other lawful act, by force, threats or intimidation or by interfering or threatening to interfere with any tools, implements or property belonging to or used by another, or with the use or employment thereof; or, \* \* \* 7. To accomplish any criminal or unlawful purpose, or to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means—every such person shall be guilty of a gross misdemeanor.

SECTION 6740. Every person who, with intent to compel another to do or abstain from doing an act which such other person has a right to do, or abstain from doing, shall wrongfully and unlawfully—

1. Use violence or inflict injury upon such other person or any of his family, or upon his property, or threaten such violence or injury; or
2. Deprive such person of any tool, implement or clothing, or hinder him in the use thereof; or
3. Attempt to intimidate such person by threats or force—shall be guilty of a misdemeanor.

It is apparent, therefore, that a potential situation must first issue from the alleged picketing before the same is denounced by the criminal laws of the State, such as force, threats, intimidation, interference, etc., covered by the sections of the Revised Laws cited and quoted. See 24 Cyc. 834, and authorities therein cited.

We note from your letter that you have information from Las Vegas, Nevada, that "seven men were taken off Train 20 on the outskirts of the town, put in automobiles and taken to Arden, Nevada, where they were put on train there and sent back to Los Angeles." No discussion is necessary to declare that the sections of the Revised Laws cited and quoted, and others, were violated in this instance; and if the strike in question proceeds according to a plan of which such conduct is an index, then it is incumbent upon the State to interfere, upon proper state of facts and sufficient evidence in support thereof, through criminal proceedings and actions seeking injunctive relief.

However, a right may be invaded and nevertheless a crime may not be committed. If such invasion contravenes a right of the State, is continuous, or is gravely imminent or threatened of being so, through a conspiracy or concerted plan to do an unlawful act or acts, the consummation of which will disturb general order, public peace and the common welfare of the people, the State would have undoubted authority to seek and obtain injunctive relief on account thereof, not to prevent the commission of crime, which is never allowed, but to preserve unimpaired such order, peace, and welfare in which all citizens are vitally interested, though incompetent to pursue a judicial

remedy on account thereof; accordingly the State in its sovereign capacity, as *parens patriæ* may pursue it for them, and thus afford society as a whole requisite protection of constitutional right. See *People ex rel. Miller v. Toole*, 6 L. R. A. (N.S.) 822.

Nevertheless, the injunctive relief suggested is not a remedy exclusively afforded the State; if such invasion contravenes a private right—be it of an individual, firm, or corporation, is continuous, is gravely imminent or threatened of being so through a conspiracy or concerted plan to do an unlawful act or acts, the consummation of which will lessen or impair such private right secured by statute or organic law, such individual, firm, or corporation, has authority *a fortiori* to seek and obtain injunctive relief on account thereof by reason of the special and continuous injury to person and to property. Such is fundamental law, and it is needless to cite decision law in support thereof; but this phase of the situation is merely incidental to this opinion, and its further discussion is unnecessary.

Courts, in proceedings for injunction, in cases appertaining to the subject-matter of the premises, have, according to the current course of decision, applied a strict interpretation as against the accused until hearings had on the merits. Juries, on the other hand, have been prone to give force to those provisions setting forth exceptional cases in which the activities of the accused may be viewed as lawful.

Accordingly, we recapitulate:

1. Picketing, as herein defined, does not contravene any criminal statute of this State.
2. Picketing, with the added elements of force, threats, interference, etc., contravenes sections 6377 and 6740 of the Revised Laws, 1912.
3. If there should arise an invasion of the State's rights as hereinabove laid down, the State as *parens patriæ* may seek and obtain injunctive relief on account thereof; and
4. If there should arise an invasion of private right, as hereinabove laid down, the individual, firm, or corporation, whose right is invaded, may seek and obtain injunctive relief on account thereof.

By order of the Attorney-General:

Respectfully submitted.

ROBERT RICHARDS, *Deputy Attorney-General*.

129. Elections—Vacancies in Office—There Is No Vacancy in Office of State Senator of Humboldt County.

CARSON CITY, July 21, 1922.

HON. L. G. WILSON, *District Attorney, Winnemucca, Nevada*.

DEAR SIR: We have your letter calling for our official opinion as to whether or not the State Senator from Humboldt County, at the general election held in 1920, was elected for an unexpired term or for the full term of four years. The facts sufficiently appear in this opinion.

The Constitution, after providing for the election of members of the Assembly biennially for the term of two years, in section 4 of article 4, declares:

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

Section 19 of the Act entitled "An Act creating and organizing the County of Pershing out of a portion of Humboldt County, and providing for its government and to regulate the affairs of Humboldt County and Pershing County," approved March 18, 1919, as amended, approved March 18, 1919, provides:

At the general election to be held in 1920, Humboldt County shall elect one State Senator and two Assemblymen, and Pershing County shall elect one State Senator and one Assemblyman, and thereafter said counties shall, as provided by law, elect such Senators and Assemblymen as may by law be to each of them respectively apportioned.

The Constitution has created the office; the Legislature has applied the organic provision to the office so created, not as a vacancy therein, but without limitation, for the full term of four years. In passing the Act entitled and approved as aforesaid the Legislature had all subsisting legislation appertaining to the premises before it, and section 2 of the Act entitled "An Act reapportioning Senators and Assemblymen of the several counties to the Legislature of the State of Nevada," approved March 5, 1915, provides:

Nothing in this Act shall be construed as to affect the term of office of Senators and Assemblymen now in office.

This is the last expression of general law on the subject and is still in full force and effect.

It is apparent, therefore, that the incumbent Senator from Humboldt County, in the general election held in 1920, was chosen for the full term of four years as by the Constitution declared.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

130. Elections—Statute Not Unconstitutional in Not Providing Compensation for Primary Election Officers.

CARSON CITY, July 22, 1922.

HON. F. T. DUNN, *District Attorney, Tonopah, Nevada.*

DEAR SIR: We have your letter of July 7, calling for our official opinion as to the constitutionality of that portion of section 14, page 394, Stats. 1921, wherein it is provided that officers at a primary election are not entitled to receive compensation.

This office has not been prone to declare a statute unconstitutional except in a very clear case and of extreme urgency. Your inquiry, therefore, is not one of this kind. However, we can see no reason why this section should be unconstitutional because the officers at a primary election are not entitled to receive compensation. It is not compulsory for any person named by the committee of a political party to

serve as an election officer, and, this element being eliminated, it would seem that the section is, therefore, constitutional. There are many duties imposed upon citizens to be performed without compensation, yet the statute providing for the performance of such duties has not been declared unconstitutional. For instance, jury duty in criminal cases in Justice Courts is not paid for; the Sheriff may want a posse when necessary—this service is not paid for; and surely there is no stronger reason to pay members of a party for supervising their party's primary than the instances noted.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

**131. Elections—Enrolled Partisan May Seek Nomination as an Independent—  
An Official Is Not Required to Resign Office to Become Candidate  
for Another Office.**

CARSON CITY, July 22, 1922.

HON. J. W. BURROWS, *City Attorney, Sparks, Nevada.*

DEAR SIR: Your letter of July 11 to the Secretary of State has been transmitted to this department for reply. Accordingly, you are advised that an enrolled Republican may secure nomination for an office as an Independent; that the securing of a nomination for an office in Sparks township would not necessitate resigning an office already held under the city of Sparks. Your questions 2 and 3 are answered by section 31, page 28, of the Election Laws, which we are enclosing you under separate cover.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

**132. Elections—Laws Relating Thereto Construed in Certain Respects.**

CARSON CITY, July 25, 1922.

*To the County Clerks of Nevada:*

DEAR SIRS: This department is in receipt of several urgent requests calling for our official opinion concerning the subject-matters hereof. Accordingly, to the end that there may be uniformity throughout the State of the application of the law in regard thereto, you are severally advised as follows:

1. "Registration offices shall be open for registration of voters for any election, Sundays and legal holidays excepted, from and after the first day of June, in any general election year, except as otherwise provided in this Act, up to the twentieth day next preceding such election and between the hours of 9 a. m. and 5 p. m."

This is the language of the statute (Stats. 1919, p. 264); it is clear, it requires no interpretation, and must be pursued.

The doubt in the premises is more apparent than real, and arises from the proviso following the language quoted, namely: "*provided*, that the office of the County Clerk, as *ex officio* registrar, shall be open for registration of voters for any election at all times when said office is open for the transaction of his business as County Clerk; *provided further*, that during the ten days previous to the close of registration the registration office shall be open evenings until 9 p. m."

These provisos, if taken according to the letter and not according to the spirit of that portion of the statute quoted, defining the periods when the registration offices shall be open and closed, respectively as aforesaid, nullify the statute in that regard. It is an ancient rule in the interpretation of statutes that provisos in a statute, which, taken literally, render the body of the statute inoperative, have no binding force. Moreover, as laid down in 36 Cyc. 1132, "where one part of a statute is susceptible of two constructions and the language of another part is clear and definite, and is consistent with one of such constructions and opposed to the other, that construction must be adopted which will render all clauses harmonious." This rule is fortified by abundant decision law.

Therefore, the registration office shall be open from and after the first day of June in any general election year, up to the twentieth day next preceding such election, as aforesaid.

2. "No elector shall be entitled to vote a party ballot at primary elections unless he has theretofore designated to the registry agent his politics or political party to which he belongs and has caused the same to be entered upon the register by such registry agent; *provided, however*, that no elector shall be denied to vote a nonpartisan ballot for judicial and school offices at such primaries." Stats. 1917, p. 276.

This language is equally clear.

Therefore, no elector shall be entitled to vote upon the ballot of the party with which he is not affiliated as disclosed by the registration records: except, if he is not affiliated of record with any party, he, with all other electors registered, shall have the right to vote a nonpartisan ballot for judicial and school offices, as laid down in the statute.

A political party stands for certain principles, and each of its members stand for these same principles. It would be destructive of party organization and, as a consequence, of the party itself if unaffiliated electors would be permitted to vote at primaries the ballots of any political party, or if affiliated electors would be permitted to vote at primaries ballots of any political party with which they are not affiliated.

3. No filing fee shall be exacted of candidates for the office of Public Administrator.

The statute provides: "Any candidate filing a nomination paper \* \* \* shall pay to the filing officer a fee for such filing as follows: If a candidate for nomination for United States Senator, two hundred fifty dollars, etc. \* \* \* No filing fee shall be required of a candidate for an office the holder of which receives no compensation." Stats. 1921, p. 321.

The statute referred to and quoted specifically enumerates the offices and the respective filing fees therefor, but the office of Public Administrator is not included. Moreover, the holder of the office of Public Administrator receives no compensation whatever as Public Administrator. The office merely qualifies him to become administrator of certain estates, and for his services as administrator of such estates he is compensated under general law on a parity with other administrators—not as Public Administrator, but as administrator of such estates. He, therefore, is not compensated for holding the office of Public Administrator, and the filing fee in question should not be exacted of him.

Therefore, you should govern yourself in the discharge of your official duty, in accordance with this opinion.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

133. Criminal Law—Strikes—Railroad Forcing Trespassers to Work—Amenable to Law Quoted.

CARSON CITY, July 31, 1922.

HON. FRANK H. INGRAM, *Commissioner of Labor.*

DEAR SIR: We have your letter of the 31st instant, calling for our official opinion on the facts contained in the affidavits submitted therewith. Succinctly stated those facts are: Two men, Joseph Bondi and John O'Dea, arrived in the Sparks yards on July 15, 1922, apparently secreting themselves en route upon one of the freight trains of the Southern Pacific Railroad Company. Upon alighting from said train a special officer of the company approached them and stated that unless they went to work in the shops for said company at Sparks for fifteen days he would throw them in the "can" for sixty days, and that, on account of said threat, and for no other reason, they did go to work in said shops.

Assuming the facts as stated are true, the railroad company, through its officer, violated section 6740 of the Revised Laws of 1912, which provides:

Every person who, with intent to compel another to do or abstain from doing an act which such person has a right to do, or abstain from doing, shall wrongfully and unlawfully attempt to intimidate such person by threats or force, shall be guilty of a misdemeanor.

It may be suggested that Bondi and O'Dea were unlawfully upon the railroad company's property. If this be true, such trespassing by them in nowise affects the situation to permit the company, or its officers, in violating the law. This violation of the law occurred in Washoe County. The evidence and complaint in regard thereto should be submitted to the District Attorney of Washoe County.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

## 134. Public Service Commission—Interstate and Intrastate Rates—Inquiries Answered—Effect of Injunction.

CARSON CITY, August 2, 1922.

PUBLIC SERVICE COMMISSION, *Carson City, Nevada.*

DEAR SIRs: We have your inquiry of the 21st ultimo, requesting an official opinion as to your jurisdiction in fixing intrastate rates for common carriers. You concretely state the inquiry as follows:

The fourth-class rate from San Francisco to Tonopah and Goldfield has been reduced to \$1.75, whereas the mileage rate upon the same class from Reno to Tonopah, a purely intrastate situation, would figure \$1 per cwt. Instead of establishing such rate, the Southern Pacific Company, in filing the aforesaid San Francisco-Tonopah and Goldfield rate, put in a rate of \$1.35 from Reno to Tonopah and Goldfield. It is now proposed that a rate of \$1.10, or between the two levels aforesaid, will satisfactorily move the business from Reno to Tonopah and Goldfield. Query: Is there any inhibition which will prevent this Commission from going forward in the hearing and establishment of such rate to cover the movement of fourth-class goods from Reno to Tonopah and Goldfield?

The right to fix a purely intrastate rate, which does not affect interstate commerce, reposes in your Commission under the doctrine laid down in the Wisconsin case and the Texas case, with which you are familiar, recently handed down by the Supreme Court of the United States. These cases, and particularly the former, which is the paramount authority, have much general language upon the subject, recognizing the general rule herein stated, which intimates, if not directly stating, that, before acting independently, or acting at all in the premises, your Commission should first seek relief from the Interstate Commerce Commission, and none of which cites or illustrates instances which could be regarded as covering a purely intrastate rate situation.

To quote from the Wisconsin case:

It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.

Therefore, while you have such right, in view of such decision law and the meager judicial development of its subject-matter, it cannot be safely declared what is a purely intrastate rate nor what will be the policy laid down in future judicial expressions concerning the same. It might be said that a shipment initiated in the State for delivery therein is purely a matter calling for a rate in intrastate commerce; but the doctrine announced in the Wisconsin case would seem to be

more extended in its application in that there, among other things, the earning capacity and the annual return on the investment of the carriers engaged both in interstate and intrastate commerce are taken into consideration.

What, then, without further authoritative definition, either through the development of decision law or statutory repeal or amendment in the premises, is a purely intrastate rate situation remains for future determination. What may be the policy of the United States Supreme Court in its subsequent decisions under the Transportation Act, may reasonably be gleaned from this language quoted from the Wisconsin case:

It may well turn out that the effect of a general order in increasing all rates, like the one at bar, will, in particular localities, reduce income instead of increasing it, by discouraging patronage. Such cases would be within the saving clause of the order herein, and make proper an application to the Interstate Commerce Commission for appropriate exception. So, too, in practice, when the State Commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the Interstate Commerce Commission and the State Commissions may dispense with the necessity for any rigid federal order as to the intrastate rates, and leave to the State Commissions power to deal with them and increase them or reduce them in their discretion.

It is apparent that you are left without guidance in the premises by reason of the general expressions of the Wisconsin and Texas cases, and, no matter how guardedly you may attempt to apply the jurisdiction left in your Commission, in specific cases your action may offend against the law in these decisions so generally expressed. If there is to be no judicial relief for the States from the burdens imposed by the Transportation Act, conditions can only be relieved by appropriate amendments thereto or repeal thereof.

However, you are now restrained by the United States District Court from in anywise interfering with the horizontally increased freight rates and passenger fares, pursuant to Ex Parte 74 of the Interstate Commerce Commission. We note that this restraining order might be regarded as obsolete, as since the entry thereof the carriers have repeatedly, through permission of the Interstate Commerce Commission, decreased or otherwise modified such rates and fares. Such action in nowise affects the continuing validity of such restraining order, but such action undoubtedly would be a compelling force on proper proceedings to vacate and set aside such restraining order. We think, therefore, that before you should, even in a remote degree, attempt to fix the rates suggested, application should first be made in the United States District Court to have such restraining order vacated and annulled.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

**135. Fish and Game Law—Board of County Commissioners Has Power to Shorten Season for Grouse, etc., under Law.**

CARSON CITY, August 12, 1922.

FISH AND GAME COMMISSION, *Reno, Nevada.*

DEAR SIR: The Board of County Commissioners of Washoe County has the power under the law to shorten the open season for grouse and mountain quail. Necessarily the board must proceed in strict conformity with the law. It is my opinion that it has the power to alter the open season even to the extent of abolishing an open season entirely. There is no provision in the law which gives a Board of County Commissioners authority to fix a bag-limit. Any provision of law in this respect cannot be changed by a Board of County Commissioners.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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**136. Municipal Corporations—A Vacancy in Office of Mayor Is Not Appointable by Governor.**

CARSON CITY, August 14, 1922.

HON. E. H. WHITACRE, *City Clerk, Yerington, Nevada.*

DEAR SIR: The provision in the Constitution of Nevada, quoted in the petition to the Governor praying for the appointment by him of a Mayor for the city of Yerington, primarily relates to a state office. I think it is very doubtful if it has any application to an officer of a municipal corporation. The charter of the city of Yerington in section 7 provides as follows:

A Mayor pro tem shall be elected by the Council from among its members as soon after its organization as practicable, and in case of the absence of the Mayor or his inability to act, the Mayor pro tem shall preside over the Council in the same manner and with like effect as the Mayor; provided, that the restrictions upon the right of the Mayor to vote shall not apply to the Mayor pro tem while acting as Mayor.

The language in this section is not as complete as it should be. The word "resignation" should have been included therein. Nevertheless, I am of the opinion that when a Mayor resigns he becomes permanently absent in respect to the performance of his duties as Mayor, and that such duties are then to be performed by the Mayor pro tem. If the City Council has not yet chosen such an officer, it is within its power to do so at any time.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

137. **Elections—Mail Voting—Certain Acts Do Not Conflict—Neither of Them Repealed.**

CARSON CITY, August 30, 1922.

HON. FRANK W. INGRAM, *Labor Commissioner*.

DEAR SIR: We have your letter of August 29, requesting our official opinion as to whether or not chapter 90, Statutes of 1921, referring to voting by postal ballot, repeals by implication, or otherwise, chapter 231, Statutes of 1917, permitting employees engaged in moving trains, etc., to vote at a place other than their precinct. We see nothing in these Acts which conflict, and, therefore, we are of the opinion that the former does not repeal, by implication or otherwise, the latter.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General*.

138. **Elections—Ballot—Instructions to Voters—Law Defined—Whether to Vote for One or Two for Nonpartisan Nomination.**

CARSON CITY, August 30, 1922.

HON. FRANK E. BROCKLISS, *District Attorney, Minden, Nevada*.

DEAR SIR: You have propounded the following inquiry:

Should voters on the primary election ballot be instructed to vote for one or two candidates for nomination for Justice of the Supreme Court or District Judge?

My answer is that they should be instructed to vote for one. Laws must be reasonably construed and interpreted. Absurdities are to be avoided. It was certainly not the intent of the Legislature that the same nonpartisan voters may vote to nominate a candidate for one office and then vote to nominate another person for the same office, one of whom is destined to be defeated at the general election. The purpose of a primary election is to give voters an opportunity to nominate persons for whom they can vote at the general election and is not for the purpose of allowing voters to nominate certain persons for whom they can vote and to nominate others for whom they cannot possibly vote. The logic of the situation herein presented demands that we consider the voters when voting at a nonpartisan primary election as belonging to groups—Group No. 1, Group No. 2, Group No. 3, etc. The respective groups vote to nominate one person for the offices mentioned, for the reason that only one office is to be filled and voters can only vote for one person for either of said offices at the general election. No group is allowed to vote for an actual choice, and then to vote for some person that said group thinks may be easily defeated by the person who is their actual choice. If the candidate of one group receives the highest vote, then said candidate becomes a nominee to be voted on at the general election. In order to give the voters an opportunity to choose between two candidates at the general election the law makes the person receiving next to the highest vote

at a nonpartisan primary election a nominee. It is not reasonable to contend that the legislative intent was to allow the same voters to nominate two candidates for one office, and then be in a position where they would, in order to elect their actual choice, have to strive to defeat one of the persons they themselves had nominated. Such a dishonest and unfair method was certainly not contemplated by the Legislature. The manifest unfairness of the same voters voting to nominate two candidates for one place and then, after nominating them, to be in a position where they can support only one of them is apparent. Such injustice should be avoided if possible. To allow a voter to vote to nominate some person for whom he cannot possibly vote at the general election, is repulsive to honesty and fairness. Laws should be construed and interpreted to promote honesty and fairness rather than to be construed in a way that will lead to corrupt methods. Farcial indeed, would become a primary election under a law which would permit voters to nominate one candidate with the intent of endeavoring to elect him, and another candidate with the deliberate intention of defeating him. In the case of nominations by party the voters of the respective parties vote to nominate candidates equal to the offices to be filled. In such a case the voters vote for the same number of candidates for a given office at the primary election that they are allowed to vote for at the general election. In such a case voters do not vote to nominate persons whom, if successful in the primary election, they cannot support at the general election. It is, therefore, my opinion that a reasonable construction and interpretation of the primary election law leads to but one conclusion, and that is that voters who vote for nonpartisan nominees are allowed to vote for but one candidate for one nonpartisan office to be filled.

Yours very truly,

L. B. FOWLER, *Attorney-General*.

139. Elections—In Canvassing Vote, Board of County Commissioners May Not Open Envelopes Containing Ballots—Tally-Sheets Are Controlling.

CARSON CITY, September 7, 1922.

HON. CLARK J. GUILD, *District Attorney, Yerington, Nevada*.

DEAR SIR: Answering your inquiry as to whether or not the Board of County Commissioners, in canvassing the votes cast at the recent primary have the right to open the envelopes containing the ballots and count the same, you are advised that the board may not do so.

The canvass of the votes must be confined to the tally-sheets; the envelopes may be opened only by a court of competent jurisdiction in a proper proceeding.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General*.

140. **Emergency Loan—Transmitted Papers Deficient in Certain Respects.**

CARSON CITY, September 8, 1922.

HON. GILBERT C. ROSS, *Secretary of State Board of Finance.*

DEAR SIR: The papers forwarded to you by the Board of School Trustees of Kiernan School District of the county of Lincoln, State of Nevada, relative to an emergency loan, have been examined by me. I find the following objections in connection therewith:

1. I am of the opinion that the subject is one for a bond issue rather than an emergency loan.

2. The resolution of necessity is not among the papers.

3. The published notice is insufficient, in that it does not recite the nature of the emergency. The words "general expenses of said district" could not possibly convey any information in regard to the particular purpose for which the money is desired and to which it is to be applied.

4. The resolution following the notice fails to detail why and in what manner the school-building facilities of the district are insufficient and inadequate to properly accommodate the increased number of children of school age in said school district.

Yours very truly,

L. B. FOWLER, *Attorney-General.*141. **Highways, Department of—The Term "Concrete" Defined.**

CARSON CITY, September 12, 1922.

HON. GEO. W. BORDEN, *State Highway Engineer.*

DEAR SIR: We have your letter of even date calling for our official opinion as to the meaning of the term "concrete" as applied to highway pavements.

The inquiry issues from the proposed paving of a certain portion of the city of Sparks; it seems that the ordinance of the city providing for a bond issue for the paving uses the term "concrete pavement," and the legal notice to the bidders calls for bids in the alternative, namely, a "cement concrete pavement" or an "asphaltic concrete pavement." The question is: May either of these alternative proposals be included in the general term "concrete pavement."

The term "concrete," as popularly understood, is defined to be "a mixture of sand, gravel, pebbles or stone clippings with cement used for sidewalks, roadways, etc."

The later and more technical definition, which is broader in its scope, may include any binder in lieu of cement, such as tar or tar products. However, when the ordinance provided for a concrete pavement, it is apparent that the term "concrete" therein used was taken in its popular sense, and therefore the binder to be used under the ordinance should be cement.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

**142. Criminal Law—Strikes—Calling of Names Such as "Scab," etc., in Presence of Strike-Breaker Not Justified in Law.**

CARSON CITY, September 12, 1922.

MR. A. B. RIGGLE, *Secretary, Sparks Federation of Railway Employees No. 13, Sparks, Nevada.*

DEAR SIR: From a legal standpoint, any person is entitled to move about unmolested. Any interference with any person by another in this respect is in violation of the law. The law does not justify the act of a striker in calling a strike-breaker, in his presence and directed to him, a "rat" or a "scab." If strikers are gathered together, and, among themselves or in public discussion, refer to strike-breakers as "rats" or "seabs," they would not be guilty of any violation of the law. They would be using terms that are applicable to strike-breakers under the definitions given in your letter, which are taken from Webster's International Dictionary.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**143. Elections—Registration of Voters—An Elector May Register Only by Appearing in Person before Proper Officer.**

CARSON CITY, September 16, 1922.

HON. J. W. LEGATE, *County Clerk, Carson City, Nevada.*

DEAR SIR: A careful examination of the registration law of this State has led me to the conclusion that a person can only register by actually appearing in person before the County Clerk of the county in which he resides, or before a qualified deputy registrar within the county where he resides. The Legislature has not provided any method whereby absentees may be registered.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

**144. Elections—Nonpartisan Candidates May Incur Ordinary Campaign Expenses, Although Office Has No Salary—Corrupt Practice Act Applies Particularly to Political Parties and Nonpartisan Offices Receiving No Salary.**

CARSON CITY, September 21, 1922.

MR. FRED J. SIEBERT, *Reno, Nevada.*

DEAR SIR: We have your letter of the 13th instant, calling for our official opinion as to the interpretation of section 4 of the Corrupt Practice Act as applying to nonpartisan candidates where there is no salary attached to the office. One of the elements provided for in the section is absent in the case of nonpartisan candidates—namely, a compensation or a salary for the office—and, hence, it would be an unreasonable construction to declare that a nonpartisan candidate is prohibited by this section from paying or incurring ordinary expenses

of his campaign. We are inclined rather to the view that the section noted, and the Corrupt Practice Act generally, is applicable to candidates of political parties for office and to nonpartisan candidates for office providing a salary or compensation, since it is this which would be the incentive for the expenditure of moneys in a campaign. Where there are two or more interpretations to be placed upon a statute, that interpretation which is the most reasonable, fair and just is to be adopted, and absurd interpretations under the rules of law should be discarded.

By order of the Attorney-General :

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

145. **Fish and Game—Chinese Pheasants Reared in Captivity in Foreign State May Be Sold in Dining-Cars in State of Nevada.**

CARSON CITY, September 21, 1922.

MR. F. W. GENTSCH, *Superintendent Dining-Car and Hotel Department Union Pacific System, Ogden, Utah.*

DEAR SIR: We have your letter of September 19 calling for our official opinion as to whether or not our fish and game law prohibits the sale, in dining-cars operating through the State of Nevada, of Chinese pheasants raised in captivity in the State of Oregon.

We are of the opinion that our law does not contain the prohibition, either expressly or by implication, as the facts submitted by you show that these pheasants are raised in captivity beyond the State, and it is the intention of the law to protect fish and game of a wild nature of this State. However, should the question directly arise with you, the burden of proof might be upon you to show the facts stated in your letter.

By order of the Attorney-General :

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

146. **Elections—Filing of Declaration of Candidacy by Socialist Has No Legal Value, since Socialist Party Became Defunct in State Election of 1920.**

CARSON CITY, September 25, 1922.

HON. H. U. CASTLE, *District Attorney, Elko, Nevada.*

DEAR SIR: Answering your wire of this date, inquiring if a candidate for Constable filing his declaration as a Socialist is entitled to have his name certified as a nominee on the ballot at the general election, you are respectfully advised in the negative. Filing of such

declaration by a Socialist is of no legal value and, therefore, certification of a nomination for Constable should not be made, particularly for the reason that the Socialist Party in the general election of 1920 did not poll the requisite percentage of votes to enable it to be now recognized as a distinct party under the election laws of this State.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

147. **Elections—On a Recount of a Primary Election in a Judicial Proceeding, the Decree Therein Is Self-Executing and May Not Be Stayed Pending New Trial or Appeal.**

CARSON CITY, October 13, 1922.

HON. J. W. DAVEY, *County Clerk, Winnemucca, Nevada.*

DEAR SIR: We have your letter, calling for our official opinion concerning the subject-matter hereof and have given the same due consideration.

We are advised that you are in doubt as to the printing of the official ballot for the ensuing general election, for the reason a contest was instituted in the District Court there by H. Warren for a decree that he was duly nominated as the Democratic candidate for District Attorney over H. G. Wilson, to whom the certificate of nomination was issued after the official canvass by the County Commissioners. Mr. Warren obtained such decree and, pursuant thereto, a certificate of nomination was duly issued to him. Thereafter certain proceedings, which are now pending, were had and taken by and on behalf of Mr. Wilson for a new trial, which proceedings eventually may lead to an appeal. The question arises: Does this pending motion for a new trial together with the appeal thereon, if taken, stay proceedings against you from causing the official ballot to be printed with the name of H. Warren, as the Democratic candidate for District Attorney of Humboldt County thereon? Preliminarily, the cases cited by Mr. Wilson, through you, have been considered; they do not apply.

The decree in question is self-executing and, in fact, it has already been executed by the issuance of the certificate of nomination, even if this were necessary. Self-executing judgments, as a general rule, may not be stayed in the main action or through supersedeas or otherwise on new trial or appeal. See

20 C. J. 266, par. 384, and cases there cited.

In the instant case, if due consummation of the procedure laid down in the election laws of this State is delayed or otherwise interfered with, then public right secured by statute for a general election on a day certain throughout the State may be nullified, and this at the instance of a candidate at the primary election, who may or may not have been nominated. Assuming, which we do not hold, that it is a question whether or not Mr. Wilson has a right to the suggested stay of proceedings, it is an accepted principle that where two rights conflict, the superior right is paramount in its operations and the inferior right must fall.

Accordingly, you will pursue the election laws in the preparation

and printing of the ballots for the general election, giving full faith and credit to such decree, together with the certificate of nomination issued to Mr. H. Warren pursuant thereto, unless a court of competent jurisdiction should stay your hand, in which case, as well your office as this department is relieved of responsibility in the premises.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

148. Revenue—Public Funds—Fines Collected for Violation of County Ordinance Payable into County Treasury.

CARSON CITY, October 19, 1921.

HON. GEO. J. KENNY, *District Attorney, Fallon, Nevada.*

DEAR SIR: A fine collected pursuant to a prosecution for the violation of a county ordinance belongs to the county and should therefore be paid into the county treasury. That part of section 3 of article 11, which provides that "all fines collected under the penal laws of the State \* \* \* shall become, and the same are hereby solemnly pledged for educational purposes, and shall not be transferred to any other fund for other uses," only applies to fines collected from the enforcement of statutory laws directly enacted by the Legislature. *State of Nevada v. Rosenstock*, 11 Nev. 128.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

149. Revenue—Nevada Tax Commission—State Bank Purchasing Property under Escrow—Contestant Not Entitled to Have Assessment of Such Property Stricken, since Title Has Not Passed.

CARSON CITY, November 2, 1922.

NEVADA TAX COMMISSION, *Carson City, Nevada.*

DEAR SIR: We have your letter of the 1st instant, calling for our official opinion on the law applicable to the facts herein contained.

It appears that the Carson Valley Bank has entered into an agreement with one Rita Hamlin for the purchase of the bank building occupied by it in Carson City. The deed to said property is held in escrow pending the perfection of the title thereto. The question is presented by the Carson Valley Bank as to whether or not it is entitled to a deduction of \$4,000, the assessed value of the bank premises, from its assessment appearing on the tax-rolls, under the law relating to the method of assessment of state banks.

From the facts stated the Carson Valley Bank does not own the premises covered by the assessment, although it has an inchoate right to perfect title thereto. Title to real property does not vest until the delivery of the instrument of conveyance. Such delivery has not been had of the deed provided for in the agreement, and, while the failure

of such delivery in the future may be remote, nevertheless the delivery according to the agreement is subject to the due fulfilment of the eserow. Accordingly, the legal title to the premises in question reposes in said Rita Hamlin, and the Carson Valley Bank is not entitled to the suggested reduction.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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150. **Public Schools—State Orphans Home Not Part of Public-School System—Teacher There Not Entitled to Benefits of Public-School Teachers' Retirement Act.**

CARSON CITY, November 2, 1922.

PUBLIC-SCHOOL TEACHERS' RETIREMENT SALARY FUND BOARD, *Carson City, Nevada.*

DEAR SIR: We have your favor of October 30, calling for official opinion on the law applicable to the facts herein contained.

The State Orphans Home at the time school was taught there was not a part of the public-school system contemplated in the laws governing public schools, therefore a teacher in the State Orphans Home would not come under the provisions of the Public-School Teachers' Retirement Act, approved March 15, 1915, as amended. No credit should be given to her for the time teaching there.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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151. **Elections—Candidate Defeated by Three Votes Not Entitled to Recount before Canvassing Board—Recount May Be Had Only in Judicial Proceedings—Costs.**

CARSON CITY, November 20, 1922.

R. J. REID, Esq., *Eureka, Nevada.*

DEAR SIR: We have your letter of November 18, calling for our official opinion on the facts herein stated.

You desire to know whether or not you have a right to a recount of the votes cast in your county for County Commissioner, since you are apparently defeated by three votes. You are not entitled to such recount, under the law. The Board of County Commissioners, acting as a canvassing board, may only look to the tally-sheets to ascertain which candidate has the highest number of votes, except in the case of a tie for any office. However, the law provides that, if sufficient grounds appear, you would be entitled to institute a contest in the District Court, the costs of which and the fee of your attorney, should you retain one, must be paid by yourself.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

152. **Revenue—Nevada Tax Commission—Assessment of Patented Mining Claims May Be Ordered Stricken from the Rolls Though Marked Delinquent at Any Time upon Proper Showing.**

CARSON CITY, December 4, 1922.

NEVADA TAX COMMISSION, *Carson City, Nevada.*

DEAR SIR: We have your favor of this date, requesting our official opinion as to whether or not the assessment of patented mining claims may be ordered stricken from the rolls after delinquency of taxes thereon upon a proper showing, through affidavit or otherwise, that the constitutional amount of work has been done. The statute would tend to limit the time before the expiration of the year which the Constitution allows. No statute may curtail the scope of a constitutional provision, and therefore, if the work upon a patented claim is done at any time within the year, upon proper showing the assessment should be stricken.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

153. **State Engineer—Artesian Wells—Under Subsisting Law State Engineer Has Jurisdiction over Artesian Wells—Procedure Defined.**

CARSON CITY, December 12, 1922.

HON. ROBERT A. ALLEN, *State Engineer.*

DEAR SIR: We have your inquiry calling for our official opinion concerning the following proposition:

Has the State Engineer, under the subsisting water laws, jurisdiction to hear and determine cases arising out of the flow from artesian wells, and to what extent, if any, may he exercise this jurisdiction?

It is declared by statute, among other things, that—

All underground waters, save and except percolating water the course and boundaries of which are incapable of determination, are hereby declared to be subject to appropriation under the laws of the State relating to the appropriation and use of water.

It is apparent, therefore, that such jurisdiction reposes in the State, to be exercised by the competent official whose duty it is to administer the water laws of this State.

Accordingly, in exercising this jurisdiction the State Engineer should proceed in accordance with the scheme defined for the appropriation and application of water to beneficial use as in other cases. Therefore an applicant has the right to file for an appropriation of water to a beneficial use issuing from artesian wells, and his application and priority concerning the same will depend upon the same rights and

duties as now prescribed in cases governing the appropriation and application of waters from other sources. His application would be subject to protest and to hearing, as provided by statute.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

154. **Revenue—Bullion Tax—Deductions for Mill Reconstruction and Cleaning of Debris Not Allowable under the Law.**

CARSON CITY, December 13, 1922.

HON. GEO. A. COLE, *State Controller.*

DEAR SIR: We have your favor, transmitting the letter of the Recorder and Auditor of White Pine County relating to the assessment list of the net proceeds of mines in White Pine County for the quarter ending September 30, 1922, made by the Nevada Consolidated Copper Company.

The inquiry is made whether or not the items, \$319,830.57, for mill reconstruction, and \$127,890.13, for the cleaning of debris, are proper deductions.

These items are not proper deductions. Section 3687, Revised Laws of 1912, enumerates what deductions are legal, and no implied interpretation of this section would permit the deductions in question. Moreover, it appears from the resolution adopted by the Nevada Tax Commission after legal opinion that "no charge whatever for depreciation or the redemption of any investment in mine ground, development done prior to the quarter for which the report is made, or plant construction, or taxes, federal, state or local, shall be allowed." The statute is definite, and this resolution is in accordance therewith. The deductions noted should be disallowed.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

155. **Public Funds—Where Statute Provides for Participation by the State in Salaries of Certain County Officials, and in Other Expenses, the State Does Not Participate in Such Expenses unless Same Are Specified by Law.**

CARSON CITY, December 14, 1922.

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

DEAR SIR: We have your letter calling for a comparative construction of sections 1701 and 3749 of the Revised Laws of 1912, concerning legal allowances made by the State to the several counties for services rendered under the Revenue Act by certain county officers.

In the latter section we find the expression "fully itemized vouchers shall be made, allowed and certified to in duplicate by the Board of

County Commissioners, for all claims for salaries *and other expenses* for which the State is wholly or in part liable," etc.

The question is raised whether or not, under the term "other expenses" is the State liable for expenses incurred by the Assessor while absent on official duty and in assessing property, and for the expenses incurred by the Auditor in extending the valuations on the assessment roll.

This term "and other expenses" may be viewed in two aspects, either of which must militate against granting the relief suggested in your inquiry. It may be taken to be a fugitive expression appearing in the statute, and if, it being without limitation, as it is, the expenses referred to by you may be allowed, then the expenses for every item connected in any conceivable way with the discharge of the duties of these county officials must also be allowed, such as the books and supplies necessary in the discharge of such duties. This is not a reasonable construction and must be discarded.

Again, it may be taken to mean, and it is the view we adopt, "and other expenses" as are or may be provided for by law, which makes the statute intelligible, confines such expenses within limitations, and does not subject them to an interpretation influenced by the bias or caprice of any official, state or county.

We fail to see wherein the statute fixing the compensation of county officers of Lincoln County, Stats. 1920-21, p. 198, in anywise affects the situation. County officers are provided, primarily, for the execution of county business, and, secondarily, for the execution of such duties as may be delegated to them by legislative authority, and when the Legislature has enacted its statute authorizing the State to participate in the salaries of certain county officers for certain services, and there is thrown in the statute by inadvertence, or otherwise, the expression "and other expenses" without limitation, such expression can have no force unless such expenses are or may be elsewhere authorized by law.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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156. **Elections—Canvass of Vote—In Case of Recount on a Tie Vote, before Board of County Commissioners, the Certificate and Minutes of Recount Are Controlling.**

CARSON CITY, December 18, 1922.

HON. GEORGE BRODIGAN, *Secretary of State.*

DEAR SIR: There has been transmitted to this department (1) the abstract of statement of the vote of Elko County at the general election held November 7, 1922, for nonpartisan state and district offices, and (2) a certified copy of the minutes of the Board of County Commissioners of November 16 and 18, 1922, wherein it appears that, upon demand of the nonpartisan candidates for the office of District Judge of the Fourth Judicial District who appeared to have received a tie vote at the general election, a recount of the ballots was had.

The abstract of statement of the vote shows that these two candidates received, respectively, 1,487 votes each, and the subsequent recount shows that one of them received 1,479 votes and the other 1,472 votes; the certificate of election for the office of District Judge was thereupon ordered to be issued accordingly. The question is: Shall the Supreme Court, acting as a board of canvassers, recognize the abstract of statement or the minutes of the Board of County Commissioners hereinabove referred to?

We are of the opinion that the minutes of the Board of County Commissioners relating to the recount had pursuant to the provisions of law, being of a later date than the date of election covered by the abstract of statement of votes, must be followed, as this later instrument is the last record authorized by law in the case of a tie vote for a public office.

By order of the Attorney-General:

Respectfully submitted,

ROBERT RICHARDS, *Deputy Attorney-General.*

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157. **Bonds, Official—Bonds Required by Law, Premium Payable Out of Public Treasury—If Official Exacts Bond from Deputy, Premium Not Payable Out of Public Treasury.**

CARSON CITY, December 30, 1922.

HON. CLARK J. GUILD, *District Attorney, Yerington, Nevada.*

DEAR SIR: The Act of the Legislature of March 24, 1917, entitled "An Act to provide surety bonds for state, district, county, city and township officers at public expense," permits the payment of the premiums for any said bonds out of the public treasury, provided that it is a bond which is required by law. If a person holding a public office exacts a bond from a deputy for his own protection and without any express provision of the law requiring said bond, then the premium for any surety bond furnished for such a purpose cannot be paid from public funds.

Yours very truly,

L. B. FOWLER, *Attorney-General.*

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**LITIGATION AFFECTING STATE**

The department of Attorney-General during the last two years has construed a vast amount of litigation affecting the interests of the State. The forum of this litigation embraced the Justice, District and Supreme Courts of Nevada and the District and Supreme Courts of the United States. Besides, much attention was required to be given on behalf of the Public Service Commission to hearings and matters affecting Nevada before the Interstate Commerce Commission at Washington, D. C., and elsewhere. Criminal litigation was ordinary in its scope, but the civil litigation was extraordinary, as it appertained in

no small degree to the revenues of the State. Much revenue from a variety of sources, including assessed taxes, forfeited bail bonds, and inheritance taxes was caused to be collected and deposited in the proper funds as provided by law.

It should be noted that at divers times, at the request of the Governor or upon application of local authorities, the Attorney-General appointed deputies to take charge of legal situations arising from time to time and which could not have been foreseen.

#### RECOMMENDATIONS

This office, by reason of the meager and unreasonable appropriation for contingent and traveling expenses made by the Legislature of 1921, has not been properly equipped to investigate and take the necessary action in all cases of inheritance taxes, escheats, and forfeited bail bonds. If the Legislature pursues its attitude in adopting a niggardly policy in the office of the Attorney-General, it will result in a great financial loss to the State. The Attorney-General should be allowed at least \$2,500 annually for contingent and traveling expenses. In addition to this sum, there should be set aside a litigation fund. The Attorney-General is called upon to litigate with powerful corporations who are willing to use thousands of dollars to promote their interests. It is an impossibility for the Attorney-General of Nevada, based upon the meager appropriations that have been allowed him, to satisfactorily cope with said corporations in matters of litigation.

Respectfully submitted,

LEONARD B. FOWLER,  
*Attorney-General.*

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