

**REPORT  
AND  
SELECTED OPINIONS  
OF THE  
ATTORNEY GENERAL  
OF THE  
STATE OF IDAHO  
1929-1930**



**64477**

**W. D. GILLIS, Attorney General**

Id

1929/30

ATTORNEY GENERAL'S DEPARTMENT

W. D. Gillis.....	Attorney General
Fred J. Babcock.....	Assistant Attorney General
S. E. Blaine.....	Assistant Attorney General
Alfred C. Cordon.....	Assistant Attorney General
Leon M. Fisk.....	Assistant Attorney General
Harmon E. Hosier.....	Special Assistant Attorney General
Margery Scholes Cornell.....	Secretary to Attorney General
*Martha G. Williams.....	Secretary to Attorney General
Grace H. Detweiler.....	Law Stenographer
Helen Shawhan.....	Law Stenographer
Beulah Scholes.....	Law Stenographer
*Audrey Haynie.....	Law Stenographer
*Mary Maughan.....	Law Stenographer
*Nelle Schultz.....	Law Stenographer

\*Resigned.

## ATTORNEY GENERALS OF THE STATE OF IDAHO

### TERRITORIAL PERIOD

‡D. B. P. Pride.....	1885-1886
‡Richard Z. Johnson.....	1887-1890

### SINCE STATEHOOD

‡George H. Roberts.....	1891-1892
‡George M. Parsons.....	1893-1896
‡Robert E. McFarland.....	1897-1898
Samuel H. Hays.....	1899-1900
Frank Martin.....	1901-1902
John A. Bagley.....	1903-1904
‡J. J. Guheen.....	1905-1908
‡D. C. McDougall.....	1909-1912
Joseph H. Peterson.....	1913-1916
T. A. Walters.....	1917-1918
Roy L. Black.....	1919-1922
A. H. Conner.....	1923-1926
Frank L. Stephan.....	1927-1928
W. D. Gillis.....	1929-1930
Fred J. Babcock.....	1931-

### JUSTICES OF THE SUPREME COURT

1931-1932

T. Bailey Lee, Chief Justice.....	Burley
Bertram S. Varian.....	Weiser
W. F. McNaughton.....	Coeur d'Alene
Alfred Budge.....	Pocatello
Raymond L. Givens.....	Boise

Clerk of the Supreme Court — Clay Koelsch

1929-1930

*William E. Lee.....	Moscow
Alfred Budge, Chief Justice.....	Pocatello
Raymond L. Givens, Chief Justice.....	Boise
‡Herman H. Taylor.....	Sandpoint
T. Bailey Lee.....	Burley
Bertram S. Varian, Appointed March 7, 1929.....	Weiser
W. F. McNaughton, Appointed January 20, 1930.....	Coeur d'Alene

Clerk of the Supreme Court — Clay Koelsch

‡Deceased.

\*Resigned.

# UNITED STATES DISTRICT JUDGE

Charles C. Cavanah.....Boise

## IDAHO DISTRICT JUDGES

1931-1932

First Judicial District, comprising the county of Shoshone

Albert H. Featherstone.....Wallace

Second Judicial District, comprising the counties of Clearwater and Latah

Gillies D. Hodge.....Moscow

Third Judicial District, comprising the counties of Ada, Boise, Elmore and Owyhee

Dana E. Brinck.....Boise

Chas. F. Koelsch.....Boise

Fourth Judicial District, comprising the counties of Blaine, Camas, Gooding and Lincoln

Doren H. Sutphen.....Gooding

Fifth Judicial District, comprising the counties of Bannock, Bear Lake, Caribou, Franklin, Oneida and Power

Jay L. Downing.....Pocatello

Robert M. Terrell.....Pocatello

Sixth Judicial District, comprising the counties of Bingham, Butte, Custer and Lemhi

Ralph W. Adair.....Blackfoot

Seventh Judicial District, comprising the counties of Adams, Canyon, Gem, Payette, Valley and Washington

‡James Harris.....Weiser

John C. Rice.....Caldwell

Eighth Judicial District, comprising the counties of Benewah, Bonner, Boundary and Kootenai

Bert A. Reed.....Coeur d'Alene

Everett E. Hunt.....Sandpoint

Ninth Judicial District, comprising the counties of Bonneville, Clark, Fremont, Jefferson, Madison and Teton

C. J. Taylor.....Idaho Falls

Tenth Judicial District, comprising the counties of Idaho, Lewis and Nez Perce

Miles S. Johnson.....Lewiston

Eleventh Judicial District, comprising the counties of Cassia, Jerome, Minidoka and Twin Falls

Adam B. Barclay.....Jerome

William A. Babcock.....Twin Falls

‡Deceased.



# PROSECUTING ATTORNEYS FOR COUNTIES OF IDAHO

1931-1932

Ada	Carl A. Burke	Boise
Adams	L. L. Burtenshaw	Council
Bannock	Isaac McDougall	Pocatello
Bear Lake	Chas. E. Harris	Paris
Benewah	Ed S. Elder	St. Maries
Bingham	Guy Stevens	Blackfoot
Blaine	W. A. Brodhead	Hailey
Boise	Lawrence Quinn	Idaho City
Bonner	Robert E. McFarland	Sandpoint
Bonneville	A. A. Merrill	Idaho Falls
Boundary	R. I. Keator	Bonnets Ferry
Butte	Jo G. Martin	Arco
Camas	Frank Croner	Fairfield
Canyon	S. Ben Dunlap	Caldwell
Caribou	D. K. McLean	Soda Springs
Cassia	Adonis Nielson	Burley
Clark	Grant W. Soule	Dubois
Clearwater	Paul W. Hyatt	Orofino
Custer	Harold Holden	Challis
Elmore	R. W. Beckwith	Mountain Home
Franklin	Arthur W. Hart	Preston
Fremont	E. H. Hillman	St. Anthony
Gem	J. P. Reed	Emmett
Gooding	M. F. Ryan	Gooding
Idaho	Harry J. Hanley	Grangeville
Jefferson	C. A. Bandel	Rigby
Jerome	Henry M. Hall	Jerome
Kootenai	E. T. Knudson	Coeur d'Alene
Latah	Abe Goff	Moscow
Lemhi	F. A. McCall	Salmon
Lewis	Elbert A. Stellmon	Nezperce
Lincoln	Harlan D. Heist	Shoshone
Madison	C. W. Poole	Rexburg
Minidoka	W. W. Mattinson	Rupert
Nez Perce	Ray E. Durham	Lewiston
Oneida	D. W. Thomas	Malad
Owyhee	Earl E. Garrity	Silver City
Payette	Robert E. Leitch	Payette
Power	W. C. Loofbourrow	American Falls
Shoshone	Elmer E. Johnston	Wallace
Teton	Samuel Adelstein	Driggs
Twin Falls	O. W. Witham	Twin Falls
Valley	Fred M. Taylor	Cascade
Washington	Herman Welker	Weiser

# REPORT OF ATTORNEY GENERAL

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December 1, 1930.

To His Excellency H. C. Baldrige,  
Governor of the State of Idaho,  
Boise, Idaho.

Sir:

I have the honor to submit to you my biennial report covering the business transacted by the Attorney General's Department for the period beginning December 1, 1928, and ending December 1, 1930.

## DUTIES

I need not recall to your mind the duties of an executive nature imposed upon this office, but only name at this point the several boards and commissions upon which the constitution or statutes prescribe that the Attorney General must serve. They are:

1. State Board of Examiners.
2. State Board of Land Commissioners.
3. State Board of Equalization.
4. State Cooperative Board of Forestry.
5. State Board of Prison Commissioners.
6. State Board of Pardons.
7. State Board of Parole.
8. State Library Commission.
9. State Board of Canvassers.

In addition to the foregoing, the last legislature named the Attorney General as a member of a commission to recodify the insurance laws of the state to the end that a new code on that subject might be presented to the 1931 session of the legislature. This latter duty in itself has imposed considerable additional work.

As a deputy is not authorized by either the constitution or the statutes, it follows that the Attorney General must personally serve upon these boards and commissions.

The duties of the office during the present bien-nium, while most pleasant and extremely interesting, have been very heavy. This was occasioned in part at least by reason of the fact that the legislature left a legacy of legislation some of which was vigorously attacked in the state and federal courts.

I shall not undertake to detail the activities of the office. The Attorney General is the chief law officer of the state. In him is centered the responsibility of advising all state officers, departments, and agencies in matters of law, and appearing for them in all actions and proceedings.

### CASES OF INTEREST

Here I will refer to a few of the cases of general interest defended or prosecuted by this office during the period mentioned:

#### OLEOMARGARINE CASES

34 Fed. 2nd 683

The cases of the *Best Food, Inc., vs. John S. Welch, as Commissioner of Agriculture; Otto Zurcher et al.*, against the same defendant; *Davidson Grocery Company* also against the same defendant; and *Falk Mercantile Co., Ltd.*, against the same defendant, were four actions brought to restrain the collection of a tax levied by the last legislature on the sale of oleomargarine in this state and to test the constitutionality of that act. The cases were tried before a United States Statutory Court consisting of two United States District Judges and Judge Dietrich of the Circuit Court of Appeals. The court unanimously sustained the constitution-

ality of the act to the substantial advantage of the dairy interests of the state.

“CHAPTER 252”

290 Pac. 714; 290 Pac. 717; 290 Pac. 717;  
290 Pac. 717

The last legislature in an attempt to tax capital operating in competition to banks enacted Chapter 252 of the Laws of 1929. This also was attacked through United States Statutory Court. Four cases were instituted. One section of the law exempted capital invested in local building and loan companies and this discrimination against the foreign capital was, of course, a sufficient ground for declaring that section of the law unconstitutional, and the act was declared inoperative as to all building and loan companies. The remainder of the act was sustained in these federal cases. These several cases were entitled *National Savings & Loan Assn. vs. Gillis, et al.*, which presented the side of the building and loan companies; the *New World Life Insurance Company vs. Gillis, et al.*, which represented competing capital of the insurance companies; the *Vermont Loan and Trust Company vs. Gillis, et al.*, representing the interest of concerns executing farm mortgages, and *The Oregon Mortgage Company, Limited, vs. Gillis, et al.*, having like interests. After the decision of the Statutory Court sustaining the act in all respects except as to the building and loan companies, the cases brought by the New World Life Insurance Company and the Vermont Loan and Trust Company were combined and appealed to the Supreme Court of the United States. In the meantime, the cases of the *Utah Mortgage Loan Company vs. Gillis, as Attorney General*; the *Spokane and Eastern Trust Company vs. Gillis*; *Union Central Life In-*

*insurance Company vs. Gillis*, and the *Chicago Livestock Loan Company vs. Ada County, et al.*, were instituted in the state courts also seeking to have the acts declared unconstitutional. These last named actions were successful and our Supreme Court perpetually enjoined the Attorney General from enforcing the provisions of Chapter 252.

“THE BUTCHER ACT”

The 1929 session of the legislature enacted Chapter 148 to protect the livestock men from the depredations of the thieves who steal livestock and butcher the same in order to destroy the brands thereon, and thereby destroy the evidence of the theft. This legislation was attacked in the United States District Court in the case of *C. A. Jungst, et al., vs. H. C. Baldrige, et al.* The court upheld the constitutionality of the act. An appeal was taken to the Supreme Court of the United States, but thereafter dismissed on motion of appellants.

WILLIAMS, et al., VS. BALDRIDGE, et al., RESPONDENTS, AND MILNER LOW LIFT IRRIGATION DISTRICT, et al., INTERVENORS.

48 Idaho 618.

This was a case of very considerable interest to irrigationists of the state who depend on pumping to supply their water. Certain interests of Gooding County sought to enjoin the state from allowing the Idaho Power Company exemption from taxation to be applied upon the power bills of the pumping companies. The constitutionality of the act was upheld. This conclusion was of great material benefit to farmers on irrigation systems dependent upon pumping for their water.

THE FOUR YEAR TERM CASE  
48 Idaho 517 — 283 Pac. 532

A case of state wide interest and which attracted much popular attention was that of *Lane vs. Lukens*, wherein an attack was made upon the enactment of an amendment to the constitution which provided a four year term for the executive officers of the state. Both plaintiff and defendant filed extensive briefs. The point involved was whether or not the statement of the question submitted sufficiently identified or was complete enough to inform or advise the voters of the question upon which they were to signify their approval or disapproval. The plaintiff contended that the amendment was not submitted to the electors in a proper legal manner or form. The Supreme Court of the State held the amendment void because of defective submission.

PRESTON A. BLAIR COMPANY VS. JENSEN  
286 Pac. 366

This was an action having a far reaching effect on the method of assessment and taxation of personal property. It limits the power to assess in that it requires that a dealer's stock of goods must be assessed on the second Monday of January and declares that our statutes do not provide for taxing goods received thereafter during the year in addition to the inventory values on the tax day.

PAYETTE COUNTY VS. STATE BOARD OF  
EQUALIZATION

Pending in Supreme Court of Idaho

This action is one of considerable importance in reference to our assessments and taxation. It is now pending in the Supreme Court and seeks to require the State Board of Equalization under

an amendment adopted by the legislature in 1929 to require some fourteen counties named in its complaint to reassess their household goods and farm machinery. The amendment mentioned purports to empower the State Board of Equalization, which has heretofore had only the power to equalize, to now require reassessments.

#### THE POTATO GRADING CASES Pending in Circuit Court of Appeals

Considerable time of the office has been spent in defending various actions brought attacking Chapter 115 of the Laws of 1929 which provides for the regulations for the packing, grading and sale of potatoes when packed for sale. The last case instituted is entitled *Detweiler, et al., vs. Welch, et al.*, and seeks to restrain the enforcement of the provisions of the chapter above mentioned. It was instituted in the United States District Court and resulted in favor of the state, in a decree dismissing the action. Appeal has been taken to the United States Circuit Court of Appeals which will be argued before that court on the 5th day of December, this year.

#### THE LITTLE LOST RIVER CASE In U. S. District Court, Southern Division

Twenty years ago there was organized in what is known as the Little Lost River section of the state an irrigation district. During nearly all of this period the history of this district has been one of bitter contentions because of shortage of water. Litigation has almost drained the resources of both the builders of the system and those of the water users. Conditions became so serious during the past biennium that dynamite bombs were placed on several occasions and a fear was expressed in

many quarters that loss of life might result. It was at this juncture that this office instituted an action in the federal court making every interest of the district a party thereto and seeking in that disinterested tribunal with the force of the law, and yet by a disinterested plaintiff, to secure determination of all the conflicting interests involved. This case is still pending.

#### OTHER IRRIGATION DISTRICTS

Active effort has been made both by the State Board of Land Commissioners and by the Attorney General to assist in the reorganization of three other irrigation projects now seriously needing such attention and without which they doubtless cannot attain the prosperity and well-being that their quality of soil should command for them. These districts were organized at a time when it was believed their water supplies would irrigate much larger acreages than subsequent experience has shown possible. They started with large burdens of bonded debts which must now be rewritten. Three of such districts other than the Little Lost River have had attention. They are the Murphy Irrigation District, the Mountain Home District, and the Indian Cove System. The Gem Irrigation districts had its reorganization successfully completed this last year. Inspections were made of these Districts and plans considered for their relief which may finally be consummated.

#### RECODIFICATION OF LAWS

I wish to renew the recommendation of my predecessor, Honorable Frank L. Stephan, that the next legislature give consideration to the re-compiling and recodification of the Idaho Laws, with a view of having them written into a new



code during the biennium of 1931 and 1932 and reenacted at the session of 1933. The Compiled Statutes of Idaho were codified in 1919, nearly twelve years ago. Since that date the legislature of Idaho has convened five times and at each session has enacted numerous laws, which are either new or amendments to, or repeals of existing statutes. With two volumes of the code and five volumes of session laws, even the trained expert in statutory law has difficulty in uncovering all enactments on many subjects.

#### INHERITANCE TAX ACT

The Twentieth Session rewrote the transfer tax law of the state. Interpreting this new legislation and putting the same into effect has taken considerable of the time of one of my assistants. The new act is working successfully, producing revenue much in excess of that of the old act, and in addition discloses to this office at once (which was not true under the old law) the existence of all escheat estates, a most important feature for the benefit of the school funds of the state.

#### REFORESTATION ACT

The last legislature enacted Chapted 185, now usually known as the Reforestation Act. It made provision for the placing of cut-over and burned-over lands and lands chiefly valuable for the production of commercial forest crops under the provisions of the act, whereby for a period of fifty years and during which a crop of timber could be grown thereon, the same should be assessed at a valuation of \$1.00 per acre, but upon maturity shall pay a yield tax equal to twelve and one-half per cent. ( $12\frac{1}{2}\%$ ) of the value of the forest material cut therefrom, based upon the full current

stumpage rate at the time of cutting, to be determined by the State Cooperative Board of Forestry. It was necessary to place this act in operation when at two proceedings held in North Idaho 53,579.76 acres made application therefor. Considerable time was expended by this office in working out this procedure and in holding the necessary hearings, taking evidence, and entering the necessary orders to set these lands aside.

#### MORTGAGE FORECLOSURES

The entire time of one of my assistants is required to attend to matters submitted by the Department of Public Investments and in the foreclosure of delinquent mortgages held by the state. A special effort has been made to clean up and reduce to title every one of the old mortgages, some of which had for one reason or another been pending for a number of years. This is not intended as the slightest reflection upon my predecessors, whose vigorous prosecution of these matters made it possible for me to give time to these more greatly involved pieces of litigation. Many of these actions had been instituted ten or even twenty years ago. I am happy to advise you that every mortgage so delinquent in character as to need attention has been foreclosed.

#### RECOMMENDATIONS TO THE LEGISLATURE

It is the custom, I note, observed by the great majority of the Attorney Generals of the United States to include in their reports recommendations to the Governor and Legislature on necessary amendments and legislation to cure apparent defects of existing law.

This department in the performance of its duties is constantly examining our statutory law.

The errors of legislative drafting or judgment come closely under observation. Such is the moving reason for the following recommendations:

(1) It is my opinion that the Legislature should enact legislation to replace Chapter 252 of the Laws of 1929, finally declared unconstitutional by our Supreme Court. Unless this be done, it seems probable that at no distant date—unless we provide for the taxation of capital competing with our banks—we may reasonably expect no revenue in the way of taxation from those institutions.

I am reluctant to attempt to suggest a remedy for so large a problem, but this fact appears established from the extensive litigation we have defended in connection with the chapter, that anything along the line of the ideas embodied in that Act must be accepted as unworkable, not feasible, and even with variations and modification would probably be held unconstitutional.

(2) The Reforestation Act should be amended to permit a smaller number at least, if not one member alone, of the State Cooperative Board of Forestry to conduct hearings and make preliminary orders when petitions are filed requesting that lands be placed under the provisions of the Act.

The evidence at such hearings, having been taken and a transcript of the record supplied each member, the Board could then in regular session make determination as to whether or not the petition should be granted. In other words, it is recommended that the Board be empowered to name one of its members to act in the nature of a master. Such a plan would conserve the time of the Board and greatly curtail the expenses of the hearings.

(3) I recommend that legislation be enacted prior to the *second* Monday of January, 1931, if possible, removing the restriction placed by our

Supreme Court in the case of *Blair vs. Jensen*, 286 Pac. 366, wherein it was held that only personal property in the state on the second Monday of January might be assessed and taxed.

(4) The revenue laws of this state, because of many and frequent amendments are conflicting and ambiguous. I renew the recommendation of my predecessor that in the event the next legislature does not re-write our present plan of taxation, a commission be appointed to codify the existing enactments, on this subject.

(5) The State Land Board now sells both grant and foreclosed lands on contracts running for a period of 40 years with an initial payment of only 10 per cent. As only the equity of the purchaser is taxed, it will be quickly seen that a very large portion of the land is kept from the county tax rolls for many years. The counties are voicing considerable protest, not alone against this but other situations whereby the state undermines the valuations of the counties for taxing purposes.

The terms of these contracts should be cut to 20 years.

(6) I want to heartily join in the recommendation already made and laid before you by the Honorable E. M. Hoover, Commissioner of the Department of Public Investments, that his proposed so-called "Debenture Plan" for the handling of the educational and other trust funds received from lands where mortgages have been foreclosed be adopted.

(7) Re: The State Insurance Fund. Throughout several administrations preceding my own the legal work of the State Insurance Fund has been performed by outside counsel. This work is considerable in amount, and in course has required considerable expenditures to private counsel. I am conscious that there is warrant of law for such pro-

cedure, by reason of one of the decisions of our Supreme Court in reference to this fund. I cannot, on the other hand, discern any serious or real prohibitions against these services being performed by the Attorney General's office.

It will, however, require the appointment of another assistant in this office, as it would be impossible with the present personnel and the work now laid upon this office to take upon it these other duties. I am confident that the salary of an additional assistant would not exceed the fees which are now paid and which must necessarily be expended in the future if the present plan is continued.

All of the time of this additional assistant would not necessarily be required for the State Insurance Fund. The Public Utilities Commission has frequently suggested the need of further assistance than the pressure of other duties of the office has permitted during the past biennium. By the division of the service of this employee between these two departments, I am sure a considerable saving would follow to the state, both in service and moneys expended.

### MONEYS RECOVERED

This department has recovered during the past biennium in actions on bonds in favor of the state and in other forfeiture cases approximately the sum of \$26,000.00. No moneys of this character actually go thru this office, hence no detailed account is rendered.

### CRIMINAL CASES

Of the forty appellate criminal cases briefed and argued before the Supreme Court, only 5 were reversed. Of the 16 cases involving violation of the liquor law, only 2 were reversed.

## OPINIONS

2884 written opinions have been rendered by this office during the past biennium. They are itemized as follows and include the opinions on extraditions and official bonds mentioned below:

1247 Opinions have been rendered to officers of the executive department, commissioners, bureau heads, prosecuting attorneys, county and school district officers. These in every instance were carefully briefed before being reduced to opinion form.

1187 Opinions were rendered on abstracts, contracts and bond issues.

Of these, there were written for the Department of Public Investments:

754 Opinions on 355 loans, representing 393 abstracts examined.

132 Opinions on 69 school bond issues, and

12 Opinions on 10 abstracts for deeds.

For the Department of Public Works:

63 Opinions were written on 44 abstracts.

26 Opinions on 23 abstracts for deeds, and

156 Opinions on 150 contracts.

For the Board of Education:

37 Opinions were written on 15 abstracts.

For the Game Department:

7 Opinions were written on 5 abstracts.

## EXTRADITIONS

During the year 1929, 39 extraditions were presented to the office to be passed upon, of which 7 were recommended for denial. Several hearings conducted by this office were granted by the Governor. In 1930, 36 extraditions were passed upon, 3 recommended for refusal and 2 hearings were held.

## OFFICIAL BONDS

During the biennium opinions have been written upon 375 official bonds, of which 66 were disapproved or sent back for correction.

## CONCLUSION

In conclusion, I desire to express appreciation to my able and faithful assistants and employees, without whose splendid capacity and fidelity to duty, the work of this department could not have been performed. Those assistants were: S. E. Blaine, Leon M. Fisk, Fred J. Babcock, and Alfred C. Cordon. For a portion of the time, Mr. Harmon E. Hosier ably assisted in the foreclosure of mortgages.

To my secretary and stenographic force, I wish to express my deep appreciation for their faithful and splendid service. Those who served during the whole or a part of the biennium were: Margery Scholes Cornell, Secretary, Martha G. Williams, Secretary, and as law stenographers, Grace H. Detweiler, Helen Shawhan, Beulah Scholes, Audrey Haynie, and Nelle Schultz.

My relations with the various state officers, departments and commissions have been most pleasant. To those whom it has been my pleasure to counsel I desire to extend by appreciation for their cooperation.

And in conclusion to you, my dear Governor, I wish to express my deep appreciation for having had the privilege of being a part of your administration.

Respectfully submitted,

W. D. GILLIS,  
Attorney General.

# Selected Opinions of Attorney General

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More than twelve hundred written opinions have been rendered by the Attorney General's Office during the biennium to the elective executive state officers, the legislature, department heads, county officers and school districts. To include them all in this report would have required a volume of such size as to make the expense of publication prohibitive. The opinions selected are given in full in conformity with the practice followed quite uniformly by the Attorney Generals of other states.

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## AGRICULTURE

### Forms of Advertising Butter Substitutes Prohibited

#### 1. QUESTION:

Is the following advertisement, to-wit: "Gem Nut Margarine is made from vegetable oils, milk product and salt" a violation of the provisions of Chapter 149 of the 1921 Session Laws?

#### OPINION:

The provisions of Section 1 of Chapter 149 of the 1921 Session Laws reads as follows:

"That it shall be unlawful for any person, firm or corporation to make use of the words, milk, cream, butter, cheese, creamery, dairy, churn, cow, the name of any dairy breed or any pictorial representation of any of these terms in connection with the sale, offering for sale, or advertisement of any substance designed to be used as a so-called substitute for milk, cheese, butter or any other dairy products."

Baldwin's Century Edition of Bouvier's Law Dictionary defines "oleomargarine" as "artificial butter made out of animal fat, milk and other substitutes; imitation butter."

In the case of Libby, McNeill & Libby vs. U. S., 210 Fed. 148, we find the following language:

"\* \* \* Where words in everyday use are found on the label of a food product, they are to be given their ordinary and popular meaning, rather than the commercial meaning which they have acquired among manufacturers and dealers."



Chapter 149 of the 1921 Session Laws is broad in its provisions. It provides, in effect, that one shall not make use of the word "milk" in connection with the advertisement of any substance designed to be used as a so-called substitute for a dairy product. The word "milk" is used in this advertisement as a descriptive noun or adjective and probably is employed in this manner for the purpose of attempting evasion of the provisions of the statute. Referring to the use of the word "milk" the statute does not modify the noun in any way. It does not touch upon the use of the word, whether as a descriptive word or as a noun, simply prohibiting the use of the word "milk" in any advertisement.

I am, therefore, of the opinion that the portion of the advertisement referred to above is in violation of the provisions of said Chapter 149.

*To Honorable George N. Tucker,  
Director of Bureau of Dairying,  
March 12, 1929.*

W. D. GILLIS,  
Attorney General.

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**The Federal Government Having Deleted Standard for  
Ice Cream This State No Longer Has a Standard  
For That Product**

**2. QUESTION:**

The State of Idaho, by Section 1697, Compiled Statutes, adopted the standard for ice cream used by the United States Government at the time of the enactment of Section 1697. Since that time the United States Government abandoned or deleted the definition for ice cream. Since the **Federal definition for ice cream has been dropped**, what is the present standard in Idaho?

**OPINION:**

The section of the Idaho statute pertinent to this inquiry is 1697, Compiled Statutes. It provides in part pertinent to this inquiry, as follows:

"The standards of quality, purity and strength for food, liquors, and drugs that have been or shall be adopted by the United States department of agriculture are hereby declared to be the standards of purity, quality and strength for foods, liquors, drugs and drinks in the state of Idaho."

It will be observed that the statute provides for the for the adoption of standards of the strength of foods,

liquors and drugs that *have been or shall be adopted* by the United States Department.

Under this statute, when the United States Department adopts a standard, it becomes the standard in Idaho. It will, therefore, follow that if it abandons a standard, it is likewise abandoned in Idaho. Clearly it is the intent of this act to make the standards of the United States Department and the state department one and the same. The definition in reference to ice cream having been abandoned by the government and the state statute being one intending to have the government standard as our standard, leaves the state without a specific standard of quality, purity and strength, etc., of ice cream.

It is, therefore, my opinion that the state department of agriculture has no power to set up a new standard or continue in force the one abandoned by the government in the absence of legislative authority so to do.

*To Director, Bureau of Dairying,  
January 25, 1930.*

W. D. GILLIS,  
Attorney General.

## AMERICAN LEGION

### Wearing Legion Emblems When Not a Member

#### 3. QUESTION:

Is a person subject to penalty for wearing an American Legion emblem, when not a member of that organization?

#### OPINION:

We call your attention to Chapter 117 of the 1921 Session Laws, which provides that any person who wilfully wears the badge of the American Legion or any other society, order or organization of one year's standing in the State of Idaho, or uses the name to obtain aid or assistance in the state, or wilfully uses the insignia, etc., the name of any society, order or organization, the title of its officers, or its insignia, etc., unless entitled to use or wear the same under the constitution and by-laws, shall be guilty of a misdemeanor, and shall be subject to punishment, as set out in said Chapter.

If any person wears the insignia of the American Legion to accomplish any of the purposes mentioned above, he is subject to prosecution under the act; and it is our opinion that such person is prohibited by said statute from wear-

ing such insignia, unless he is entitled so to do under the constitution and by-laws of the organization.

To Honorable Lester F. Albert, LEON M. FISK,  
Dep't Adjutant, American Legion Asst. Attorney General.  
December 31, 1928.

## APPROPRIATIONS

### Maximum of an Appropriation Must Be Fixed

#### 4. QUESTION:

Does the amendment of Section 5569 of the Compiled Statutes as provided by House Bill No. 305 make a valid appropriation of public moneys; in other words, is the amendment as set out in said bill in reference to an appropriation constitutional?

#### OPINION:

The amendment to Section 5569 in addition to changing the fees to be charged, as pertinent to this inquiry reads as follows:

"All moneys received by the Department of Reclamation under the provisions of this chapter shall be deposited with the State Treasurer, and such sums as may be necessary shall be available for the payment of the expenses of the Department of Reclamation incurred in carrying out the provisions of this chapter.

"Such expense shall be paid by the State Auditor in the manner provided by law, upon vouchers duly approved by the State Board of Examiners, for the work performed under the direction of the Department of Reclamation."

It will be noted at the outset that the form of the attempted appropriation follows Section 3013 of the Compiled Statutes of Idaho which makes the continuing appropriation out of the Carey Act Funds, except that the instant amendment does not include the provisions of Section 3072 of the Compiled Statutes of Idaho which specifically limits the appropriation of Section 3013 as follows:

"Provided that no obligation shall be incurred under this chapter in excess of the amount available in said fund."

In the case of Blaine County Investment Company v. Gallet, 35 Idaho 102, the Supreme Court held that the

statutory direction to pay for examination and survey of certain streams in the State of Idaho did not constitute an appropriation for the payment of claims arising thereunder. The court makes the following statement:

"It is said in *State ex rel. Davis v. Eggers*, supra, that: 'As all appropriations must be within the legislative will, it is essential to have the amount of the appropriations, or the maximum sum from which the expenses could be paid, stated. This legislative power cannot be delegated nor left to the recipient to command from the state treasury sums to any unlimited amount for which he might file claims. True, the exact amount of these expenses cannot be ascertained nor fixed by the legislature when they have not yet been incurred, but it is usual and necessary to fix a maximum . . . specifying the amount above which they cannot be allowed.'"

In the case of *Jackson v. Gallet*, 39 Idaho 382, at page 388, the Supreme Court of this State used the following language:

"There is no maximum amount appropriated out of which the claim in question can be paid. The mere declaration that certain charges against the state must be paid out of the state treasury on the order of a board of commissioners does not make an appropriation and is not an authorization that a specified sum and no more shall be used for a specific purpose and no other. While it is true that no set form of words is necessary to make an appropriation, language used in an act should show an intent on the part of the legislature to make an appropriation within the meaning of the constitution and the court should not be called upon to infer from doubtful or ambiguous language that it was the intention of the legislature to appropriate the public funds which would be necessary in order to sustain the theory of plaintiff that an appropriation was made under sections 9 and 10 of this act."

Numerous funds have been built up in various departments of the State government but a brief examination of the statutes creating such funds will show that in each instance those which have been attacked as unconstitutional do not make a definite appropriation.

From a careful analysis of the amendatory part of the Act under consideration it will be noted that the following provision is made:

"All moneys received by the department of reclamation under the provisions of this chapter shall be deposited with the State Treasurer, and such sums as may be necessary shall be available for

*the payment of expenses of the department of reclamation incurred in carrying out the provisions of this chapter."*

It is apparent that the language of the statute creates a situation which probably was not intended by the Legislature, but which, nevertheless, must be considered by this office.

First, it is provided that the moneys received by the Department of Reclamation shall be deposited with the State Treasurer. It then provides that such sums as may be necessary shall be available for the payment of the expenses of the Department.

I can arrive at no other interpretation consonant to the reading of the section than this, that all sums received are paid into the State Treasury and then the entire fund in the State Treasury is made available for the payment of the expenses of the Department. This is clearly not a valid appropriation within the rules laid down by the cases herein cited. No maximum sum is provided as the limit for this appropriation.

It is, therefore, my opinion that a valid appropriation has not been accomplished by this amendment and you, as State Auditor, should not pay warrants from this particular fund.

*To Honorable E. G. Gallet,  
State Auditor,  
April 1, 1929.*

W. D. GILLIS,  
Attorney General.

## ASSESSMENTS OF PROPERTY

### Capital Stock of Banks Invested in Real Property Deducted for Assessment Purposes

#### 5. QUESTION:

If a bank purchases a piece of property, making the investment out of its capital stock, and later sells that property under a conditional sales contract, the contracting party agreeing to pay all taxes due thereon, has the bank the right to deduct from the capital stock, surplus and undivided profits, the amount they have invested in this property when arriving at the valuation of the capital stock, surplus and undivided profits for assessing purposes for taxation?

## OPINION:

Section 3297 of the Compiled Statutes, as amended by Chapter 84 of the Laws of 1927, relating to the assessment of shares of capital stock of banks and other institutions for taxing purposes is as follows:

"The shares of capital stock of any bank, existing by authority of the United States or of this state and located within this State, or of any building and loan association, trust company or surety and fidelity company organized under the laws of this State and doing business within this state, shall be assessed for taxation where such bank, company, association or other corporation is located and not elsewhere, as in the same manner and upon the same basis of actual value, and uniformly with all other property assessed in the county in which such shares of capital stock are assessed, said value to be determined as of the second Monday of January in each year at 12 o'clock meridian; Provided, however, that no assessment shall be made on the part of such capital stock, or the surplus or undivided profits of such bank, company, association or other corporation which are at the time of assessment, actually invested in and represented by other property, OR STOCK IN A BANK BUILDING CORPORATION REPRESENTING OTHER PROPERTY, owned by and standing upon the records of ANY county IN THIS STATE \* \* \* in the name of such bank, company, association or other corporation, OR BANK BUILDING CORPORATION, and which have been assessed and entered for taxation in \* \* \* ANY county IN THIS STATE for the said year, which part shall be deducted from the value, as determined in the above manner, of such shares of capital stock in listing such capital stock for assessment. Any property so represented in such capital stock, on account of which a deduction has been made in the assessed valuation of the shares of such capital stock, shall be assessed separately at its full cash value, as other property."

It will be observed that no assessment shall be made on the part of such capital stock, or the surplus or undivided profits of such bank, which are at the time of assessment, actually invested in and represented by other property owned by and standing upon the records of any county in this state in the name of such bank and which have been assessed and entered for taxation in any county in this state for the said year, which part shall be deducted from the value, as determined in the above manner, of such shares of capital stock in listing such capital stock for assessment.

An analysis of said section will disclose that, before the assessor is authorized not to assess entire actual value of the shares of capital stock of any bank, existing by authority of the United States or of this state and located within this state, it is necessary that there be, at the time of assessment, a concurrence of the following conditions:

1. Part of the capital stock of such bank, or the surplus or undivided profits thereof, must be actually invested in and represented by other property.
2. Such other property must be owned by such bank.
3. Such other property must be standing upon the records of some county in this state.
4. Such other property, so standing upon the records of some county of this state, must stand in the name of such bank.
5. Such property must, for said year, have been assessed and entered for taxation in some county in this state.
6. Such property must have been assessed separately at its full cash value, as other property.

The fact that, after a bank has invested part of its capital stock or its surplus or undivided profits, in other property, it sells such property under a conditional sales contract, the contracting purchaser agreeing to pay all taxes due thereon, does not necessarily indicate that such investment has ceased. It may be that little or no payment has been made by such purchaser on such contract. In such a case, the investment is still in existence to the extent of the amount of the capital stock, surplus or undivided profits still unpaid to the bank under such contract. The fact to be ascertained by the assessor then is:

The amount of such capital stock, surplus or undivided profits invested in such property yet unpaid to the bank under such contract.

When such amount is ascertained by the assessor, he is authorized to deduct the same from the assessed valuation of the shares of such capital stock, provided all the conditions heretofore mentioned exist.

But the question arises, is the property represented by such conditional sales contract owned by such bank, within the meaning of said section? It is my opinion that it is.

The purchaser of land under a conditional sales contract is an equitable owner to the extent of the amount of the purchase price paid by him on such contract. Assuming

that the vendor was the legal owner of such property at the time of such sale to the purchaser, the vendor, after such sale, is still the legal owner, subject, however, to the equitable ownership of the purchaser.

As already pointed out, such property must be standing on the records of some county of the state and in the name of such bank.

It is my view that the agreement of the purchaser to pay all taxes due upon such property, would in no way affect this question. Such an agreement is a private one between the purchaser and vendor and does not concern the assessor so far as the assessment of such property is concerned.

For the foregoing reasons, it is my opinion that, if a bank purchases a piece of property, making the investment out of its capital stock and later sells such property under a conditional sales contract, the contracting party agreeing to pay all taxes due thereon, such bank has the right to deduct from the capital stock surplus and undivided profits, the amount such bank has invested in such property, less any such part of such capital stock invested in such property that has been paid to such bank under such contract, when arriving at the valuation of its capital stock, surplus and undivided profits of such bank for assessment purposes.

*To Mr. R. D. Leonardson,  
August 24, 1929.*

W. D. GILLIS,  
Attorney General.

**Banks May Deduct Amount of Capital Stock Invested  
in Land for Tax Assessments Although  
Reserves Set Up to Offset**

**6. QUESTION:**

Where a bank through contributions from stockholders, earnings or other sources, places funds in reserve to offset investments in real estate, the bank, however, still owning the real estate, may it still set up the investment in real estate as a deduction from the amount of its capital stock for the purpose of taxation?

**OPINION:**

It is my opinion that a bank, under the circumstances mentioned, is not prevented from setting this real estate up as an actual investment to be deducted from the amount of the capital stock investment for purposes of taxation.

Section 3298, Compiled Statutes, relating to statements



by a bank for the purpose of assessment of bank stock, requires a sworn statement to be made and delivered to the assessor, showing, among other things "the amount included in the valuation of such capital stock which is actually invested in or represented by other property which has been assessed and a full description of such property; the valuation of such capital stock, after deducting the amounts included in the valuation thereof, which is actually invested in or represented by such other property."

The Supreme Court, in the case of *First National Bank v. Board of Commissioners*, 40 Ida. 391, 232 Pac. 905, was called upon to review the action of the Board of County Commissioners as a Board of Equalization in refusing to deduct from the value of the capital stock of the bank in question, the amount actually invested in other property upon which the bank paid taxes. Quoting from the opinion of the court:

"Appellant bank furnished a tax statement as provided by C. S., Sec. 3298. This showed that its capital stock paid up was \$50,000; the amount of its surplus and undivided profits less expenses and taxes paid was \$25,506.18, and the full cash value of the capital stock, including surplus and undivided profits, was \$76,506.18. No evidence was introduced to dispute the correctness of the figures given in this statement. Therefore, according to the statute, the cash value of the capital stock was \$76,506.18. The statement showed that the amount of capital stock actually invested in other property which had been assessed to the bank was \$96,306.49. Evidence was introduced to show that part of this property was not assessed to the bank but to another party who had bought it on contract. The court therefore found, and its finding is supported by the evidence, that the actual amount invested in other property assessed to the bank was \$86,556.49. The court should have found the amount of the bank's capital surplus and undivided profits invested in other property assessed to the bank and, if it was all so invested then its capital stock was not subject to assessment. But its other property was subject to assessment on the same basis as all other property."

From the foregoing statutes and decision it seems clear that it is a bank's affirmative duty to set up in its statement required under said section the amount of the capital stock actually invested in other property which has been assessed to the bank and that it is immaterial whether or not the bank, through contributions from stockholders, earnings or from other sources, places in reserve funds

with which to offset the capital stock actually invested in such other property.

To *Commissioner of Finance*,  
April 21, 1930.

W. D. GILLIS,  
Attorney General.

**Assessments of Personal and Real Property in Reference  
to Migratory Stock; Rebates and Adjustments;  
Payment in Installments; State Equities**

**7. QUESTIONS:**

1. Does migratory livestock in the second county have until the fourth Monday of December to file for rebate and adjustment because they have not been in the second county as long as was estimated?
2. Do they have until the fourth Monday of December to file for rebate or adjustments?
3. Can migratory livestock be listed in the home county on the real estate property roll?
4. Is there a statute in Idaho covering feed and transit livestock whereby this class of livestock may be assessed for that portion of the year they may be on feed and then shipped out of the state?
5. Can migratory livestock be assessed in a county when they have not been in the county to exceed ten days?
6. Can personal property taxes be paid in two installments as under the 1927 Session Laws?
7. Can delinquent personal taxes on state equities be levied on any and all property belonging to the person assessed?
8. Can state equities be attached to real property?

**●PINION:**

Answering questions numbered 1 and 2: Section 3287, Compiled Statutes, as amended by Section 16, Chapter 263, Laws of 1929, provides for the entry of migratory livestock upon subsequent property assessment rolls in all counties except the home county, and makes taxes thereon a first and prior lien upon such migratory livestock and all other personal property of the owner in the county of the residence of such owner, and provides a penalty for any owner who shall remove such livestock from the county without having paid the proportionate part of a full year's taxes for the length of time such livestock shall have been in the county. The section then further provides:

"On or before the fourth Monday of December the owner of such migratory livestock shall file with the clerk of the board of county commissioners, of the county wherein the same is first listed in that year, a petition for deduction from his assessment for the length of time such livestock has been assessed in other counties, accompanying the same with tax receipts showing the payment of such assessments, and it shall be the duty of the board of county commissioners to deduct from the assessment of such migratory livestock the proportionate part of the year's assessment during which such livestock has been kept in other counties as shown by such tax receipts, otherwise the owner of such migratory livestock shall be held liable to pay taxes thereon in the county where first listed for the full year."

Section 3288, Compiled Statutes, which is amended by Section 17 of the Act, provides that all migratory stock must be assessed for the full year in the home county and that a statement of the owner must be furnished to the assessor showing the different counties wherein he expects to graze or keep the said livestock and the length of time.

Section 20 of the Act provides that:

"Any person paying taxes on migratory livestock may obtain a rebate on the amount paid in excess of the amount due in any county or an adjustment of the amount of taxes levied upon such property: Provided, That a duly verified claim for such rebate is filed with the clerk of the board of county commissioners on or before the fourth Monday of November in the year in which such taxes are levied or paid as in the case of a rebate for taxes on other personal property; and, Provided further, That any claims for rebate or adjustment of taxes paid or taxes levied on migratory livestock in the home county on account of taxes which have been paid or secured for any portion of the same year in another county must be accompanied by the receipt of the assessor of such county, showing what portion of the year the taxes on such livestock have been paid in such county. All such claims for rebates and adjustments shall be examined and passed upon by the board of county commissioners at the annual meeting of such board as a board of equalization in December and all rebates allowed on taxes which have been paid shall be remitted upon warrants drawn upon the personal property tax fund, as in the case of rebates for taxes paid on other personal property. No rebate may be paid, or claim for such rebate considered by the board of county commissioners, where the taxpayer fails to comply with all the provisions of this section."

This gives rise to an apparent conflict between Sections 20 and 16. It will be noticed that Section 20 provides for a rebate in the amount paid in excess of the amount due in any county and that the same must be filed with the Clerk of the Board of County Commissioners on or before the fourth Monday in November and accompanied with the receipt of the assessor. Section 16 provides that on or before the fourth Monday of December the owner shall file with the Board of County Commissioners *a petition for deduction from his assessment* accompanying the same with tax receipts showing the payment of such assessments and makes it the duty of the Board of County Commissioners to deduct from the assessment of such migratory livestock the proportionate part of the year's assessment during which such livestock has been kept in other counties, as shown by the tax receipt. This section applies to the home county. Section 20 apparently applies to any county.

It would appear then that in the home county the owner has until the fourth Monday in December to apply for such deduction. In any other county, he has only until the fourth Monday of November. The provisions contained in Section 16 are amendatory, while those in Section 20 are a portion of the old section.

Answering question numbered 3: Section 16, above referred to, provides that migratory livestock shall be entered upon the subsequent property assessment roll, except in the home county. Section 3266, Compiled Statutes, as amended by Section 3 of said Chapter 263, provides that the assessor must assess all personal property on the personal property assessment roll and provides that the same shall be completed before the second Monday in July and filed with the Board of County Commissioners. It then provides that he shall assess upon a subsequent roll, verified in the manner provided for the verification of the personal property which comes into the county between the second Monday in July and the fourth Monday in November. It also exempts livestock in the home county and contemplates that the same would be placed upon the personal property roll as assessed prior to the second Monday in July. This, however, would be impracticable for the reason that the personal property roll must be closed and the various taxes, including the state taxes, computed thereon at that time. This would make it impossible to procure a rebate or a reduction in that particular county upon the livestock for the portion of the year they were outside of the county, and, therefore, this livestock should be carried upon a sub-

sequent roll which remains open until the fourth Monday in November. There is no provision for livestock being listed in the home county on the personal property roll and, in fact, this same difficulty would arise if it were so entered.

Answering question numbered 4: There is a statute covering the assessment of livestock other than migratory. Said section is Section 3296, Compiled Statutes, as amended by Chapter 50, Laws of 1927. It provides as follows:

"The provisions of this chapter relating to the taxation of migratory livestock shall not apply to livestock in transit through the state by railroad or other means of public transportation or to livestock sold by the owner thereof in the home county upon which the taxes for the full year have been paid or secured, which said livestock is driven, shipped or transported into another county and there kept or confined in inclosures, for the purpose of preparing the same for market."

This does not apply, however, to migratory livestock and is to be construed strictly according to its provisions.

Answering question numbered 5: Migratory livestock must be assessed in the county regardless of the length of time it is there. The ten day period provided for in Section 18 of the Act simply makes it incumbent upon the owner to notify the assessor within ten days from the time of entry into the county. It does not, however, exempt him for this period of ten days.

Section 3290, Compiled Statutes, covers this question and provides as follows:

"It is the duty of the assessor to assess all migratory livestock within his county for taxation; even though the owner or the agent of the owner fails to give the notice or make the statement or statements, as provided in this chapter, and such assessor shall be liable upon his official bond for all taxes upon such migratory livestock escaping assessment, as in the case of other personal property escaping assessment and taxation."

Answering question numbered 6: Section 3267, Compiled Statutes, as amended by Section 4 of the Act, makes the county assessor the collector of personal property taxes and Sections 3284-A to 3284-J, Compiled Statutes, included in Section 15 of the Act, provide the manner of the collection of personal property taxes by the assessor.

Section 3284-B, above referred to, provides as follows:

"All taxes shown on the personal property assessment roll, and on any subsequent roll, shall become and be due and payable to the assessor on

demand and, if unpaid, shall become delinquent on the fourth Monday of December of said year, together with a penalty of 10 per centum of the amount of such taxes as shown on the assessment roll."

From an examination of this section, it is apparent that the taxes are due and collectible on demand after assessment and must be paid before the fourth Monday of December. The other statutes make the assessor personally liable for the failure to collect such taxes and if he desired to collect them in two installments he would have that privilege and would take the responsibility therefor.

Answering questions numbered 7 and 8: Section 2920, Compiled Statutes, under lease and sale of public lands, provides as follows:

"All lands sold under the provisions of this chapter shall be exempt from taxation for and during the period of time in which the title to said land is vested in the state of Idaho, but the value of the interest therein of the purchaser may be taxed, which interest shall be determined by the amount paid on such land and the amount invested in improvements thereon at the date of such assessment."

Section 3282, Compiled Statutes, under taxation of personal property, provides as follows:

"Equities in state land shall be assessed at that proportion of the full cash value of the land which the amount paid thereon bears to the total amount of the purchase price. Refusal to pay the tax levied upon any equity in state land by the owner upon demand by the tax collector shall operate as forfeiture of such equity. Any such refusal shall be reported to the state board of land commissioners by the tax collector and the said board shall thereupon declare such forfeiture and the certificate and contract relating thereto annulled in the same manner as in the case of failure of a purchaser of state land to make any of the payments stipulated and provided in section 2916."

This office in an opinion to Mr. I. H. Nash, State Land Commissioner, under date of July 25, 1929, held that this tax is a personal property tax, and as such, a lien upon the real property of the purchaser; the purchaser receiving deed to his land from the state would acquire it subject to the unpaid tax. Any other construction is not justified in view of the statutes above cited and in further view of the well known rule of law that all intendment favors the collection of the tax.

Section 3098, Compiled Statutes, as amended by Section 2 of Chapter 201, Laws of 1929, provides as follows:

"All taxes levied on personal property shall be a lien upon the real property of the owner, and if the owner of such personal property is a partnership, such taxes shall be a lien upon the real property of any and all members of such partnership, *except as otherwise provided by law*, which lien or liens attach as of the second Monday of January in the year in which such taxes are levied, and shall only be discharged by the payment, cancellation or rebate of the taxes as provided in this chapter."

The italicized portion is the amendatory matter contained in the statute.

Section 3268, Compiled Statutes, as amended by Section 6, Chapter 263, Laws of 1929, is as follows:

"*Assessable Value; Lien.* All personal property subject to assessment and taxation must be assessed at its full cash value for taxation for State, county, city, town, village, road district, school district and other purposes under the provisions of this chapter, with reference to its value at 12 o'clock meridian on the second Monday of January in the year in which such taxes are levied, and all taxes levied under the provisions of this chapter shall be a first and prior lien upon the personal property so assessed, and upon all other personal property within the county belonging to the same owner and no personal property of any kind shall be exempt from such lien, and in the event that personal property is not within the county at the time stated it shall become burdened with a lien for the taxes to be assessed against it while in the county from the time it enters the county."

Section 3304, Compiled Statutes, as amended by Section 2, Chapter 233 of the Laws of 1927, is as follows:

"*Entry of Personal Property Assessment on Real Property Roll.* All taxes upon personal property entered upon the personal property assessment roll, where the owners of such personal property are also the owners of real property in the county, which have not been paid at the time of the annual meeting of the Board of County Commissioners, as a Board of Equalization, in December, and which said Board finds to be a lien upon the real property, shall be certified to the County Auditor and the Tax Collector and so noted opposite the entry of such property upon the personal property assessment roll, and thereupon such taxes must be entered by the Tax Collector upon the real property assessment roll against the real property subject to such lien in the columns provided for that

purpose and must be charged, unless previously charged as provided in Section 3267, to Tax Collector by the County Auditor in his account with the Tax Collector, as other taxes appearing upon the real property assessment roll. The Tax Collector shall immediately notify the owner of any such real property by mail of any taxes on personal property which have been so entered."

Section 3304-A, found in Section 3, Chapter 233 of the Laws of 1927, is as follows:

*"Lien of Personal Property Taxes on Real Property Roll.* That the taxes upon not to exceed \$1000.00 of assessed valuation of personal property over and above personal property exempt from taxation entered on the real property assessment roll by the assessor under the provisions of Section 3134 or pursuant to the provisions of Section 3304 shall be a lien upon the real property against which the same is entered and the title conveyed by any tax deed issued thereon shall be superior and prior to all mortgages and liens of every kind against such real property; but if the assessed valuation of the personal property entered on the real property assessment roll as aforesaid exceeds \$1000.00 then the lien of the taxes on such excess above that amount and the title conveyed by any tax deed issued thereon in so far as the same is based on such personal property taxes shall be subordinate and subject to all valid mortgages and other liens appearing of record against said real property in the office of the county recorder of the county where such real property is situated and of which notice has been given as provided in Section 3304-B; and in case of the foreclosure of such mortgage or lien, the lien of such personal property tax may be barred and foreclosed in the same manner as any other subordinate lien. Personal property taxes placed upon the real property assessment roll hereunder upon an assessed valuation thereof over and above \$1000.00 and other taxes appearing on said roll against such real property may be separately paid, redeemed, or discharged."

Section 16 of Chapter 263 does not make taxes on migratory livestock a lien upon real property, this being an exception. There is apparently no exception in the case of an equity in state lands, and, therefore, it being a tax upon personal property, the same would operate as a lien upon real property of the owner.

To Honorable E. G. Gallet,  
State Auditor,  
March 8, 1930.

W. D. GILLIS,  
Attorney General.



## ATTORNEYS' FEES

### When Attorneys Are Oppointed by Court, Fees Attach As of Date First Service Performed

#### 8. QUESTION:

Four persons are charged with crime and it appears to the satisfaction of the court that the accused are unable to procure services of counsel, and under Section 8858 of the Compiled Statutes, two attorneys are appointed to represent them at their trial. On the date set for trial the Prosecuting Attorney dismissed the charges as to two of the defendants. To what fees are the Attorneys appointed entitled?

#### ●PINION:

Section 8859 of the Compiled Statutes reads as follows:

"Whenever upon the trial of a person in the district court, upon an information or indictment, it appears to the satisfaction of the court that the accused is poor and unable to procure the services of counsel, the court may appoint counsel to conduct the defense of the accused, for which service such counsel must be paid out of the county treasury, upon order of the judge of the court, as follows: In all cases of misdemeanor the sum of \$10; in all cases of felony other than murder the sum of \$25; and in cases of murder the sum of \$50."

I assume at the outset that counsel in the present case were appointed to represent the defendants in all preliminary matters arising before the trial, and have entered into the performance of their duties under such appointment. The fact that the action was later dismissed against two of the defendants should not deprive the attorneys of the fees for their services.

Under such a statement of facts, it is my conclusion that the fee would attach from the first time counsel performed any services upon behalf of the defendants.

It is, therefore, my opinion that the fee should attach for each defendant, for even though they all participated in the same crime, it can never be absolutely determined that the interest of all defendants are identical until after the trial has commenced. It may very possibly happen that it would be necessary in the interest of the rights of the defendants to call for separate trials at the very last moment.

It is, therefore, my opinion that you should properly

allow your fees to be divided by counsel in such manner as your appointment provided.

*Hon. Dana E. Brinck,  
Boise, Idaho,  
December 10, 1929.*

W. D. GILLIS,  
Attorney General.

## BONDS OF OFFICIALS

### County Officer May Not Write Surety Bonds For Other County Officials

#### 9. QUESTION:

Is the writing of surety bonds on county officers by the county auditor or other county officer prohibitive under Section 386 of the Compiled Statutes?

#### OPINION:

Undoubtedly a county officer writing surety bonds upon other officers would receive commissions or compensation from the surety company he represented for such services. That would bring him under the rules involved in *Anderson v. Lewis*, 6 Ida. 51, wherein the Secretary of State might not receive fees and commissions for the services rendered in that case. Section 386 C. S. declares that officers must not be interested in any contract made by them in their official capacity, that is, that they may not be interested in any way in contracts with fellow officers in which the county is a party.

It is quite apparent that it would be contrary to public policy to sanction such procedure.

It is, therefore, my opinion that the above section acts as a restriction upon a county officer writing surety bonds for other county officers and in effect prohibits the same.

Referring now to a county officer writing such bonds: Under Section 420 of the Compiled Statutes the auditor is made custodian of the bonds he writes; in other words, he would write and file these bonds himself. In the event of a default on a bond, he would have a very real interest as agent of the company in protecting his interest as against that of the county, and at the same time, he would have the obligation of protecting the county as against the surety

company for which he acts as agent. These duties are clearly incompatible and in conflict.

*To Mr. Samuel Adelstein,  
April 4, 1929.*

W. D. GILLIS,  
Attorney General.

## BUDGET

### Additions to Budget

#### 10. QUESTION:

May the County Commissioners at this time insert a County Fair Fund in their budget to pay the salary and expenses of the county agent, there being no provisions for the salary and expenses in the preliminary budget?

#### OPINION:

From an examination of Chapter 232 of the Session Laws of 1927, it appears: that the budget shall be submitted by the County Auditor to the County Commissioners on or before the first Monday in March, and after the submission of said budget, the County Commissioners shall consider the same in detail and may make any reduction, addition, revision or other changes they deem advisable, and then they are required to publish a notice stating that they have completed and placed on file their preliminary budget for the county. A hearing is then given to the public on the first Monday in April, and upon the conclusion of the hearing, the County Commissioners shall fix and determine each item of the budget separately, adopt the budget, and file it with the office of the clerk of the board. As provided in Section 5, "the aggregate amount of appropriations in said final budget shall not exceed the aggregate estimates of the preliminary budget."

As I construe the above provisions, the County Commissioners have the right to "make any reductions, additions, revisions or other changes they deem advisable" of the preliminary budget after it is submitted to them by the County Auditor and before they publish the notice stating that they have completed and placed on file their preliminary budget for the county. During the public hearing of said preliminary budget, it is my opinion that they have the power to make changes in the estimates, but the total amount of the estimates as adopted in the final budget shall not exceed the total estimates of the preliminary

ary budget. In other words, they have a right to make reductions or additions, or revise or change the estimates at this hearing so long as the aggregate amount of the final budget does not exceed the aggregate amount of the preliminary budget.

*To Mrs. Mrytle P. Enking,  
April 1, 1929.*

W. D. GILLIS,  
Attorney General.

### Emergencies in Reference to Additions to Budget

#### 11. FACTS:

The Commissioners of Cassia County appropriated \$3,000.00 in the regular budget for weed eradication. The County Agent desires an additional \$7,000.00 appropriated.

#### QUESTION:

May such additional appropriation be made as an emergency appropriation under the county budget law?

#### OPINION:

Section 7 of Chapter 138 of the Laws of 1929 being an amendment to Section 7 of Chapter 232 of the 1927 Laws, has to do with appropriations made in connection with emergencies. It reads in part pertinent to your inquiry:

"When a public emergency other than such as are specifically described hereinafter, and which could not reasonably have been foreseen at the time of making the budget, shall require the expenditure of money not provided for in the budget, \* \* \*"

The Section then goes on to provide the procedure.

It is my opinion that an emergency of such an appropriation does not come within the purview of the statute as being an unforeseen emergency. It is impossible to believe that the county officials could not have known at the time of the preparation of the budget what should be needed for weed eradication purposes. I will concede that it might be possible for an unforeseen contingency to arise even in connection with weed eradication.

Assume that through some agency throughout the county and the irrigated tillable sections thereof, since the adoption of the appropriation for eradication, the agency mentioned should have so broadly cast the seeds of some noxious weed that the prompt destruction of it would be for the benefit of the county. That, in my view, would be

an unforeseen contingency. You do not, however, provide us with any facts of that character. Your statement of facts declares only that the person whose duty it is to handle weed eradication now believes that additional money should be provided for the work.

It therefore follows and it is my opinion that your situation does not disclose such an emergency as might not reasonably have been foreseen and the additional appropriation should be denied.

*To Mr. B. F. Wilson,  
May 17, 1929.*

W. D. GILLIS,  
Attorney General.

## BUTCHER ACT

### Procedure for Enforcement

#### 12. QUESTION:

What is the procedure for enforcing Chapter 148 Laws of 1929?

#### OPINION:

At the outset I would suggest that in the case of C. A. Jungst, et al, vs. H. C. Baldrige, Governor, et al, the Statutory Court composed of Judges Dietrich, Neterer and Cavanah, early this month held this act constitutional.

Section 3 of said Chapter 148 reads in part as follows:

"Every butcher or meat dealer or meat peddler who slaughters any meat animal or animals, or who sells or otherwise exchanges or distributes the meat thereof to any butcher, meat dealer, or meat peddler shall have the carcass or carcasses of such animal or animals and the hide or hides thereof inspected within 48 hours after slaughter and before offering the meat for sale, by a sheriff, deputy sheriff, constable, brand inspector, or deputy brand inspector, in the county in which such animal or animals were slaughtered, which officer shall be entitled to a fee of 50 cents for inspection of the hide and carcass of each bovine animal, and a fee of 10 cents for inspection of the hide and carcass of each sheep. \* \* \*"

From an examination of this section, it is apparent that the sheriff or one of his deputies, a constable, brand inspector or one of his deputies, must be called by the butcher to make the inspection. In reference to that service, it is comparable to the lawyer who may determine

in his discretion whether he will employ the sheriff or constable to serve a legal paper. In the first instance, the law provides that the sheriff shall receive a stipulated salary in full for his services and all fees go into the treasury. In the case of the constable, he receives his fees as his salary, although he must make a report of the fees collected to the County Commissioners, have the same approved and the fees allowed. No salary is provided for the payment of the brand inspector, who is appointed under the provisions of Section 1939 of the Idaho Compiled Statutes, as amended by Chapter 76 of the Laws of 1929, and the payment of his fees are provided for by Section 1941 of the Compiled Statutes. His fees would be limited to those provided for in Chapter 143 where he is making the inspection required by that chapter. These two statutes must necessarily be read together and the latter section govern.

The statute in question also provides:

"\* \* \* The hide shall also be stamped in at least one place on the flesh side with an indelible stamp to be provided by the county in which the inspection is made, \* \* \*"

It is my opinion that the butcher may select to make the inspection any one of the officers named in the statute.

It is my further opinion that the county must provide the indelible stamp mentioned whether it receives any of the fees or not. As pointed out, it would, of course, receive the fees if the butcher saw fit to employ the sheriff, or his deputy, but if, on the other hand, the butcher employed the constable or brand inspector, the county would receive no benefit.

*To Mr. Herman O. Welker,*  
September 25, 1929.

W. D. GILLIS,  
Attorney General.

## CITIZENSHIP

### Married Woman Entitled to Her Own Nationality

#### 13. QUESTION:

Does a woman under the laws of the United States, whether married or unmarried, have the same rights as a man to retain or change her nationality?

#### OPINION:

United States Code Annotated, Title 8—Aliens and Citi-

zenship—Section 9, declares the status of citizenship of women citizens of the United States as affected by marriage. It reads as follows:

"A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens: Provided. That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States. If at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence. If during the continuance of the marital status she resides continuously for two years in a foreign State of which her husband is a citizen or subject, or for five years continuously outside the United States, she shall thereafter be subject to the same presumption as is a naturalized citizen of the United States under section 17 of this title. Nothing herein shall be construed to repeal or amend the provisions of section 15 of this title or of section 17 with reference to expatriation. The repeal of section 3 of Act March 2, 1907, Chapter 2534, Thirty-fourth Statutes, page 1228, which provided that 'any American woman who marries a foreigner shall take the nationality of her husband,' and that 'at the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein, 'shall not restore citizenship lost thereunder, nor terminate citizenship resumed thereunder; and any woman who had resumed thereunder citizenship lost by marriage shall from September 22, 1922, have for all purposes the citizenship status as immediately preceding her marriage.'" (Sept. 22, 1922, c. 411, Sec. 3, 7, 42 Stat. 1022.)

It will be noted from the foregoing that a woman citizen of the United States who marries an alien does not cease to be a citizen of the United States by reason of her marriage, unless, of course, she makes a formal renunciation of her citizenship before a court having jurisdiction over the naturalization of aliens. The statute, however, carries this provision that any woman citizen of the United States who marries an alien ineligible to citizenship shall cease to be a citizen of the United States.

Another angle of your inquiry is presented by the situation where an alien woman marries a citizen of the United

States. United States Code Annotated, Title 8, Section 10, is pertinent to this inquiry and reads as follows:

"The repeal of section 1994 of the Revised Statutes of 1874, providing that 'any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen,' shall not terminate citizenship acquired or retained thereunder. Nor shall the repeal of section 4 of Act March 2, 1907, chapter 2534, Thirty-fourth Statutes, page 1229, providing that 'any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation' terminate citizenship acquired or retained thereunder, nor restore citizenship lost thereunder." (Sept. 22, 1922, c. 411, Sec. 6, 42 Stat. 1022.)

Under the present law she must be regularly naturalized. Under the statutes existing previous to the Act of 1922, she became a citizen by marriage.

From the foregoing, it will be noted that the United States quite fully recognizes the right of a married woman to her own nationality.

To Mrs. Alice Pittenger,  
March 1, 1930.

W. D. GILLIS,  
Attorney General.

## CONSTITUTIONAL LAW

### Salaries of Prosecutors Must Be Fixed by Legislature Under Constitutional Amendment

#### 14. QUESTION:

Under the constitutional amendment prescribing that the salaries of prosecuting attorneys be fixed by law can the Legislature delegate to the county commissioners discretion in the matter of fixing salaries of prosecuting attorneys, within certain limits prescribed by the legislature?

#### OPINION:

The amendment you refer to is Section 18 of Article V of the Constitution. It was amended at the last election to read as follows:



"A prosecuting attorney shall be elected for each organized county in the state, by the qualified electors of such county, and shall hold office for the term of two years, and shall perform such duties as may be prescribed by law; he shall be a practicing attorney at law, and a resident and an elector of the county for which he is elected. He shall receive such compensation for services as may be fixed by law."

The Constitution, previous to the amendment, read as it does now except that the last sentence was substituted for the following:

"He shall receive as compensation for his services a sum not less than five hundred dollars per annum, nor more than fifteen hundred dollars per annum, to be fixed by the board of commissioners of the county at its regular session in July next preceding any general election, and to be paid in quarterly installments out of the county treasury."

It will be noted, therefore, at the outset, that previous to the recent amendment, a minimum and maximum fee or salary was fixed by the Constitution and the power to name the exact amount of salary to be received, was given to the board of commissioners, and now, under the present amendment, it is provided that the compensation shall be fixed by law.

The delegation of authority to county boards and officers has frequently, under state constitutions, been declared valid, while in many other states such delegation of power has been denied. The general rule seems to be that the fixing of salaries of county officers may be delegated to the boards of county commissioners, within certain limits, except where such delegation is in direct conflict with constitutional provisions.

12 C. J. 847, 862.

Our Supreme Court has laid down the rule that the provisions of our Constitution do not confer any powers upon the legislature, but they are mere limitations.

Idaho Power v. Blomquist, 26 Ida, 222, 141 Pac. 1083.

In the case of Conger v. Commissioners of Latah County found in 5 Ida. 347, 356; 48 Pac. 1064, this rule was laid down:

"A grant of power to an officer who exercises limited authority by constitutional provisions should not be extended by implication, but should be limited by construction to the evident intent of the people, as gathered from the entire context of the constitution, having due consideration for the con-

ditions existing at the time of the adoption of the constitution. The rule of strict construction does not obtain in this state, for the reason that our statutes enjoin a liberal construction."

There is an unbroken line of authorities in California which hold it the duty of the legislature to fix compensation and declare that it cannot delegate this duty or any part of it to a county board of supervisors. Thus rule is laid down in authorities construing a similar provision of the California State Constitution to the constitutional provision now under consideration by us.

A late authority and a leading case is that of *Arnold v. Sullenger*, County Auditor, found in 254 Pac. 267. The constitution under consideration provided as follows:

That the legislature by general and uniform laws shall "regulate the compensation of all such officers." The court defined the word "regulate" to mean "to establish" or "to fix." In that case the legislature attempted to confer upon the board of supervisors the power to fix the compensation of the county surveyor and the court concluded that the statutory provision, insofar as it attempted to delegate to such board the power to fix the compensation, was invalid and contrary to that section of the constitution.

*Dougherty v. Austin*, 28 Pac. 834.

*People v. Johnson*, 31 Pac. 611.

*Scott v. Boyle*, 128 Pac. 941.

*Ryan v. Riley* 223 Pac. 1027, 1032, 1035.

*Cawley v. Pershing County*, 255 Pac. 1073, 1076.

The State of Ohio has laid down a different principle as found in the case of *Cricket, et al, v. State of Ohio*, reported in 18 Ohio State Reports, page 9, 21, and, while the Ohio case appears to be in point, I am inclined to the opinion that the better rule to follow in this instance is the one laid down by the courts of California. I am also impelled to take this view by the fact that the rule laid down by the courts of California complies more strictly with the rule used by our court in the construction of constitutional provisions.

Our constitutional amendment contains words of limitation, and it is, therefore, my opinion that, under the ordinary rules of construction, the legislature must fix the compensation of prosecuting attorneys.

*To Carl A. Burke,*  
*January 24, 1929.*

W. D. GILLIS,  
Attorney General.

## COUNTY CONVENTIONS

### A Chairman of a County Convention Must Be a Duly Elected Delegate

15. QUESTION:

May a person not a delegate to a county party convention be elected as its chairman?

OPINION:

Section 520, Compiled Statutes, provides as follows:

"County conventions of political parties composed of delegates chosen at the primary election shall be held in the several counties on the third Tuesday of August following the primary election, at such place in each county and beginning at such hour as may be fixed by the respective county committees.

"At the time and place so designated and fixed, or as soon thereafter as a majority of the duly accredited delegates appear, the convention shall organize and then select delegates to the state convention, also a member of the state central committee, and if so determined by the convention, adopt a county program. \* \* \*"

It will be noted that there is no specific declaration that the chairman must be chosen from the delegates, but the intention seems to be clear that the convention shall organize from the duly accredited delegates. The section specifically declares that the convention shall be composed of delegates chosen at the primary election. The chairman is a convention officer and a part of it, and it is apparent that the activities of the convention are to be performed by duly elected delegates.

It is my opinion that the chairman of the convention must be one of the regularly elected delegates.

*To John Case,  
July 31, 1930.*

W. D. GILLIS,  
Attorney General.

## DELEGATES TO COUNTY CONVENTION

### Vacancies in Delegation to County Convention

16. QUESTIONS:

1. If there are no delegates elected to the county convention from a certain precinct within a county may ap-

pointments be made to fill the vacancies or must the precinct remain unrepresented at the county convention?

2. If delegates may be appointed to fill the vacancies who has the authority to make them?

3. If a precinct does not elect its full quota of delegates to which it is entitled may those who are elected from that precinct to the county convention vote the entire strength of its quota; for example, if a precinct is entitled to fourteen delegates and only seven are elected, are the seven who are elected and present at the convention entitled to two votes each?

OPINION:

The question to be first determined in answering your first inquiry is whether or not vacancies actually exist which may be filled where no primary election has been held in the precinct, or at least no delegates elected.

Section 554 of the Compiled Statutes deals with vacancies existing before the ballot is printed. It will be noted the section reads in part:

“Before the ballots are printed for the election, if any person nominated at a primary election \* \* \* die or decline the nomination \* \* \* or becomes ineligible to hold office for which he was nominated, or any such nomination be or become insufficient or inoperative from any cause, the vacancy thus occasioned may be filled in the manner hereinafter specified, to-wit:  
\* \* \* the power to fill vacancies \* \* \* shall lie \* \* \* for a \* \* \* precinct officer with the county committee. \* \* \*”

On the other hand, Section 555 of the Compiled Statutes, deals with vacancies arising *after the ballots are printed*, but it will be noted is restricted to those occurring before the election is held. It provides that the procedure set out in Section 554, *supra*, be followed, and requires that the officer whose duty it is to have the ballots printed shall supply a sufficient number of stickers to be affixed to the ballots by the election judges before the ballot is delivered to the voter.

Clearly, then, neither Section 554 nor Section 555 makes any provision for the filling of vacancies, if indeed a vacancy can exist, *after the primary election*. But, I call attention to this, that the legislature *has made careful and full provision* for having a complete ticket for those cases arising where the nominee dies, becomes ineligible, declines the nomination or the nomination “become insufficient or inoperative for any cause.”

In passing, I call attention to the fact that Chapter 198 of the Laws of 1927 limits the provisions of Sections 554 and 555, *supra* (in the case of all offices above those of the precincts), and although by proviso retains the powers granted to the county committee as to the filling of vacancies in the case of the offices of Justice of the Peace, Constable, Precinct Committeeman and delegates to the county convention, yet in no way extends their power to fill vacancies *after* the primary election has been held.

Section 520 of the Compiled Statutes deals with county conventions and declares the composition of them. It reads in part pertinent to this inquiry:

*"County conventions of political parties composed of delegates chosen at the primary election shall be held in the several counties on the third Tuesday of August following the primary election, at such place in each county and beginning at such hour as may be fixed by the respective county committees. \* \* \*"*

Primaries are intended by our law to be strictly party affairs. A party's County Central Committee is the executive committee, or we may describe it as the directors of the party for the county, corresponding in many respects to like officers in a corporation. Among the powers granted the Central Committee, we should find, if anywhere, this authority we seek.

We now turn to Section 4 of Chapter 107 of the Laws of 1919, which is Section 519 of the Compiled Statutes. That section declares the powers and duties of the County Central Committee. It reads as follows:

*"The County Central Committee of each party shall be composed of one member elected from each voting precinct of the county by the electors of each party in such precinct, at said primary election; the person receiving the greatest number of votes shall be, by the precinct judges, declared elected, and such judges shall issue to him a certificate of election, which shall entitle him to a seat in said County Central Committee."*

*"The persons so elected by each party shall separately meet at the County Seat at noon on the second Saturday following their election, and organize by electing a Chairman, and a Secretary, together with such other officers as they may deem necessary, and when duly organized shall have the usual powers vested in such committees, including the power to fill vacancies in the Committee and upon their respective party tickets, and shall have power to select and name the primary election judges, clerks and other officials. \* \* \*"*

It will be noted that in addition to the usual powers vested in such committees, there is included the power to fill vacancies in the committee, clearly referring to the county central committee, and to fill vacancies upon their respective party tickets.

Here we must pause to determine what is meant by "party tickets," and whether or not delegates to the county convention are intended to be included as a part of the "party ticket."

A primary election has two functions, first to permit the members of a political party to select from possibly several nominees who claim allegiance to their party, candidates to be placed on the party ticket who will later at a general election oppose candidates on the "party ticket" of another or other political parties. The other function of the primary is to *elect precinct committeemen and delegates to the county convention*. Only to the last named are certificates of election issued at the closing of the precinct primary. The delegate or committeeman becomes an officer at the closing of the polls if he has received the highest number of votes, while as to other persons on the primary ballot, they become candidates on the party ticket, and later the general election determines whether or not the candidate is to become an officer. We must, therefore, conclude that after the holding of the primary election, delegates to the county convention are no longer a part of the party ticket and the reference to "filling vacancies on the party tickets" cannot refer to them.

Section 519 of the Compiled Statutes grants power to the County Committee to fill vacancies in its own ranks. It might well have added the power to fill vacancies where no delegate to the convention was elected, but it must be accepted that the last named power has not been specifically granted. It is a well known rule of statutory construction that where specific powers are granted and others withheld, or not enumerated, those not named may not be read into the statute.

Section 525 of the Compiled Statutes permits the County Convention to judge the qualifications of the delegates, but restricts the unseating of a delegate to those cases where there have been irregularities and frauds on the part of the voters or election officers resulting in the election of delegates who do not represent the principles of the party to which they are accredited.

We may possibly assume that the legislature intended

that no vacancy should exist where a precinct holds no primary, or if so, only a portion of its representation is elected. It may have concluded that in such a case all the electors of such a precinct were of an opposite political affiliation and, therefore the precinct was not entitled to representation, or that their indifference was of such a character as to make it proper to withhold representation from them, a representation which might so easily be obtained and which as noted before it attempts to so fully safeguard by provisions for the filling of the vacancies before and after the ballots are printed for the primary; or it may have concluded that the delegation of this power to the County Committee to fill the vacancies in the ranks of the delegates after the primaries would give a power to that committee which would tend to unhealthy manipulations.

It may be urged that the filling of vacancies is a "usual" power vested in the County Convention itself. Attention is called to *Walling vs. Lansdon*, 15 Idaho 282. It is my opinion it is not so vested.

I am inclined to the view that where no person was nominated and elected as a delegate that no vacancy exists to be filled. This view is supported by the case of *State ex rel vs. Board of Ballot Commissioners*, (W. Va.) 97 S. E. 284, where it was said:

"Before there can be a vacancy in a nomination, there must have been a nomination."

The State of Montana has a statute quite similar to our own. In the case of *State ex rel Smith vs. Duncan*, (Mont.) 177 Pac. 248, in construing the section of their law which permitted the county central committee to make nominations to fill vacancies caused by the death or removal of the nominee from the electoral district, the court said the committee had no power to make an original nomination, but was limited to filling vacancies which occur after nominations have been regularly made.

If, as we have just seen, our courts have strictly construed this power to nominate, how then may we read into our statute and invest our county committee (the only body which it would be expected might be so invested) with the power to make both the *original nomination* and at the same time *elect* the delegate.

For the reasons given, it is my opinion that the legislature has provided no procedure or agency for the naming of delegates from a precinct wherein no primary election was held or for completing the representation where only

a portion of the precinct's delegation was elected at the primary.

Your second inquiry is covered by the foregoing.

Your third question deals with the right of less than the full quota of delegates from a precinct to vote the full strength of the precinct at the convention.

In 1919, the legislature enacted Chapter 107, which was known as Senate Bill No. 68. In such chapter, a portion of its Section 3 reads as follows:

"At any convention held under the provisions of this act each delegate shall be entitled to one vote; but in case the whole number of delegates are not present from any precinct or county, the delegate or delegates present from said precinct or county shall cast the vote for the full delegation by each delegate present voting an equal proportion of the absent vote."

This act was approved on March 3, 1919. At the same session of the legislature, and by Chapter 21, being Senate Bill No. 188, Section 3 above mentioned was amended in several details and the portion above quoted was dropped and omitted from said Section 3, clearly showing the intention of the legislature to abandon the procedure provided therein.

It is, therefore, my conclusion and opinion that the delegates from such precinct where a full quota was not elected would have only one vote for each delegate; in other words, they may not vote the full strength of the precinct.

To Mr. John Case,  
August 13, 1930.

W. D. GILLIS,  
Attorney General.

## COUNTY CENTRAL COMMITTEE

### Qualification of Chairman

#### 17. QUESTION:

Is it a necessary qualification of a county chairman of the county central committee that he be a member of the county central committee before his election?

#### OPINION:

There are some reasons to support the view that this could not be done. The statute relating to the organization of the state central committee specifically provides that the chairman need not be a member of the committee, but



Section 519 of the Compiled Statutes, which relates to the organization of the county central committee, is silent and it might be concluded that this silence in the fact of the specific reference in the case of the state committee would prohibit the selection of a chairman who is not a member of the committee.

However, the general rule is that committees, commissions, boards or bodies of similar nature whose duties are prescribed by law and who operate under general provisions, may do anything which is reasonably necessary to accomplish the purpose of their creation, which would include the doing of things reasonably connected with that purpose, so long as the particular thing is not prohibited.

As the statute does not prohibit the going outside of the committee for the selection of a chairman, I am of the opinion that it has the authority to do so.

*To Hon R. E. Whitten, State Senator*  
*January 23, 1929.*

W. D. GILLIS,  
Attorney General

## DELEGATES TO STATE CONVENTION

### Qualifications of Delegates to State Political Convention

#### 18. QUESTION:

Is it a necessary qualification of a delegate to a state convention that such person be a duly elected delegate to the county convention?

#### OPINION:

I quote you several sections of the Compiled Statutes which have to do with the primary election, the county convention and state convention. They read in part pertinent to this inquiry as follows:

Section 518 provides:

"Primary elections shall be held on the 1st Tuesday of August, 1920, and biennially thereafter, for the nomination of candidates \* \* \* and the election of delegates to attend the county convention, hereinafter provided for, and there represent their respective precincts \* \* \*."

Section 520 provides:

"County conventions of political parties composed of delegates chosen at the primary election shall be held in the several counties on the third

Tuesday of August following the primary election, at such place in each county and beginning at such hour as may be fixed by the respective county committees.

"At the time and place so designated and fixed, or as soon thereafter as a majority of the duly accredited delegates appear, the convention shall organize and then select delegates to the state convention, \* \* \*"

Section 524 provides:

"A State convention of each political party shall be held on the fourth Tuesday of August following the primary election, \* \* \*. At the time and place so designated and determined, or as soon thereafter as a majority of the duly accredited delegates appear, the convention shall organize and proceed to the adoption of a platform and the nomination of candidates. \* \* \*"

A careful and exhaustive examination of all of the provisions of our statutes in reference to this question discloses no qualifications provided in the law for the delegate to the state convention. I find no law prohibiting the election of any person, be he either a delegate to the county convention or not a delegate. The custom of many years in this state has been that any member of the party, whether a delegate or not, might be elected by a county convention to represent that county and party in the state convention.

There can seem to be no good reason dictated by public policy, or other, restricting the selection of the delegates to the state convention from the personnel of the delegates who assemble to elect them. On the other hand, it would seem to be almost as unreasonable as a provision that only from the delegates to the state conventions might the candidates for state offices be selected. Doubtless, the legislature might make reasonable qualifications as to delegates selected at the county convention, but it has not seen fit to do so in this state.

It is, therefore, my opinion that any elector of a county is qualified to be elected a delegate to the state convention, and that such delegate need not have been a delegate to the county convention.

*To Mr. Laurel Elam,  
August 15, 1930.*

W. D. GILLIS,  
Attorney General.

## CORPORATIONS

### A Foreign Trust Corporation May Not Act As An Executor or Administrator in Idaho

#### 19. QUESTION:

May a foreign state bank operating in Spokane and having trust powers and a membership in the Federal reserve system, and qualified in Idaho as a foreign corporation, act as an administrator or executor of any estate in the State of Idaho under the laws thereof?

#### OPINION:

This question is answered by the provisions of Chapter 44, Laws of 1923. Section 1 of said chapter reads as follows:

"It shall be unlawful for any foreign corporation to be appointed or to act as administrator or executor of any estate in the state of Idaho, under the laws of the state of Idaho."

It is, therefore, my opinion that the corporation mentioned may not act as an administrator or executor of any estate in the state of Idaho.

*To Hon. E. W. Porter,  
Commissioner of Finance,  
July 5, 1930.*

W. D. GILLIS,  
Attorney General,

### Filing of Articles of Incorporation

#### 20. QUESTION:

Does Section 4772 of the Compiled Statutes as amended by Chapter 282 of the 1929 Session Laws require the office of Secretary of State and the office of county recorder in the county in this state in which is designated the principal place of business of a foreign corporation, to record articles of incorporation or file in the respective offices without recording?

#### OPINION:

Section 4772 of the Compiled Statutes as amended by Chapter 282 of the 1929 Session Laws reads as follows:

"Section 4772. Every corporation not created under the laws of this state must, before doing business in this state, file for record with the Secretary of State a copy of the articles of incorporation of said corporation, duly certified to by the Secretary of State of the state in which said cor-

poration was organized, or such other legal custodian of the corporation records of said state as is qualified under its laws to make such certified copy and file for record a copy of such articles of incorporation, duly certified by the Secretary of State of this state and bearing the endorsement of the fact and time of filing for record in his office, in the office of the county recorder of the county in this state in which is designated its principal place of business in this state."

The title of the said chapter reads as to the matter pertinent to this inquiry as follows:

"\* \* \* RELATING TO THE FILING OF EVIDENCE OF INCORPORATION BY FOREIGN CORPORATIONS\* \* \*"

Section 4772 of the Compiled Statutes before amendment employed the word "file" and such records accordingly were not recorded by the transcribing of the original instrument into some other book of records. The employment of the phrase "file for record" might seem to indicate an intention upon the part of the legislature to require the transcribing of instruments. I cannot, however, believe that such was the intention. The title of the act employs only the word "file." The custom of many years under the old statute was simply the placing of the instrument for permanent preservation. Had the legislature intended to require the transcribing of the instrument it would have indicated that fact by declaring that the instrument would be recorded and providing a record book for such purpose with a proper designation for the same or would have employed the term "file and enter of record."

In *Naylor v. Moody* (Ind.) 2 Blackf, 247, the court said:

"Filing and entering of record are not synonymous. \* \* \* They always convey distinct ideas. Filing originally signified placing the papers in order on a thread or wire for safe-keeping. In this country, and, at this day, it means, agreeably to our practice, depositing them in due order in the proper office. Entering of record uniformly means writing."

In the case of *Delaware Surety Co. v. Layton* (Del.) 50 Atl. 378, it was said:

"The word 'filing' when applied to the filing of an instrument in a public office, carries with it the idea of permanent preservation. That the paper filed becomes a part of the permanent records of the public office where it is filed."

It is my opinion that it was the intention of the legislature to employ the phrase "file for record" as being synony-

mous with the word "file," and that it is not necessary that the copies of the articles of incorporation mentioned in the section be written or transcribed into a book and that both your office and that of the county recorder are required only to permanently preserve said articles as papers or documents of public record.

*To. T. H. Shrontz,*  
*Assistant Secretary of State,*  
*May 11, 1929.*

W. D. GILLIS,  
Attorney General.

### Filing of Articles by Foreign Corporation

#### 21. QUESTION:

Do the laws of Idaho require a foreign corporation to file articles of incorporation within this state, which corporation has not been doing business within the state, but has acquired title to real property by execution or settlement of a claim, and now desires to transfer title to said real property?

#### OPINION:

I assume that your corporation is organized under the laws of Utah for the purpose of making loans, contracts, mortgages, and investments. You state that you have never done any business in Idaho and do not contemplate doing any, but have acquired real estate through the settlement of a claim. You do not state the details or the manner in which the claim was settled, but for the purpose of this opinion, we accept your statement of the fact that you have not done business in the State of Idaho. Starting with such a premise, it is my opinion that your corporation comes within the rule laid down by our Supreme Court, in the case of *Foore v. Simon Piano Co.*, reported in 18 Idaho at page 178. At pages 178 and 179, the Court said:

"\* \* \* Under the provisions of the statute \* \* \* it is only corporations that are 'doing business in this state' without first filing their articles of incorporation and complying with the statute that are prohibited from taking and holding title to realty acquired prior to the making of such filings. The mere purchase at execution sale of real property in satisfaction of a judgment procured on an interstate transaction is not in itself 'doing business in this state.' \* \* \* The legislature has not undertaken to prohibit a corporation engaged in interstate business from taking title under judicial process in the collection of a debt where the corporation was

not otherwise 'doing business' in this state within the meaning of the constitution and statute."

It will be noted from the foregoing that where a foreign corporation is required to purchase real estate upon execution or is required to take title under judicial process, it is not required to file its articles of incorporation in the State of Idaho, as required of foreign corporations doing business within this state.

It is, therefore, my conclusion that your corporation would not come under the requirements of Section 4772, Compiled Statutes, as amended by Chapter 82 of the Laws of 1925, and would not be compelled to file its articles in this state.

*To Union Bond and Finance Company,  
January 31, 1930.*

W. D. GILLIS,  
Attorney General.

### A Reinstated Corporation May Execute Conveyances

#### 22. FACTS:

In closing up the affairs of a state bank by voluntary liquidation—that is, the liquidation of the bank by its own stockholders, directors and officers—it was found that all of the deeds, releases, assignments, etc., had not been executed by the bank and that in the meantime it had ceased paying license fee and is therefore presumably non-existent as a corporation.

#### QUESTION:

Would the reinstatement of the bank by the payment of license fees and any arrears which might have accrued, restore it to a position where it could legally cure the problem thus created?

#### OPINION:

Section 4787 C. S., as amended by Chapter 37, 1925 Laws, and Chapter 60, 1929 Laws, relates to reinstatement of corporations.

Construing the aforementioned section, the Supreme Court in the case of Ferguson Fruit and Land Company v. Goodding, 44 Idaho 76, 258 Pac. 557, at page 82 of the Idaho Report, said:

"Section 4787 provides that any corporation which has forfeited its charter for failure to pay the license tax, which shall pay all the license taxes and penalties prescribed by Sec. 4782, 'shall be

relieved from the forfeiture prescribed by this chapter, and all persons exercising the powers of such corporation shall be relieved of the penalties prescribed by the provisions of Sec. 4789 making it unlawful for any delinquent corporation to transact any business while so delinquent, and making it a misdemeanor, punishable by fine or imprisonment, for any person to exercise any of the powers of such delinquent corporation while delinquent."

From the foregoing it is my opinion that upon the reinstatement of the bank in question by the payment of all license taxes and penalties prescribed by Section 4782, C. S., and the license taxes and penalties that would have accrued if such corporation had not forfeited its charter or rights to do business, said bank will then be restored to a position where, as a corporation, it can execute the conveyances in question.

*To Commissioner of Finance,  
January 22, 1930.*

W. D. GILLIS,  
Attorney General.

## COST BILLS

### Against State Not Collectible

#### 23. QUESTIONS:

1. Is the State liable for costs in an action when it appeals to the Supreme Court from a decision of a district court on an Industrial Accident Board case?
2. May the Attorney General stipulate that a cost bill be taxed by the Supreme Court, even though not filed in the time required by Rule 37?

#### OPINION:

Taking up the first inquiry, will say, this question was first raised in the case of *Brady vs. Place*, 41 Ida. 747, 242 Pac. 314, but the case turned on another question.

However, this question has been definitely passed upon by our Supreme Court. On March 14, 1929, in the case of *Chicago, Milwaukee & St. Paul Railway Company*, a corporation, appellants, vs. the Public Utilities Commission of the state of Idaho, respondent, being case No. 4252, 47 Ida. 346, the appellants petitioned, among other things, for the entry of judgment against the respondent for costs in said suit. The Court held that insofar as the Public Utilities Commission was a party to the proceedings, the State is a

party and as to the question of costs the Court had the following to say:

"Costs against the state are allowed only when provided by statute, either expressly or by necessary implication. (15 C. J. 328, Sec. 815; *State v. Kinne*, 41 N. H. 238.) Provision is made by the C. S. Sec. 7223 for the payment of costs by the state when costs are taxed against the state; but the only statute that has been called to our attention under which it is urged costs may be taxed against the state in this proceeding is C. S., sec. 7212, providing generally that upon appeal, except when a new trial is ordered or a judgment modified, the prevailing party shall recover costs. It is commonly considered that a general statute of this nature does not apply to the state (25 R. C. L. 418; *State v. Williams*, 101 Md. 529, 4 Anno. Cas. 970; note, 8 Ann. Cas. 398) particularly when the state is a party in its governmental capacity. In *re Ward's Estate* (Minn.) 158 N. W. 637. Appellant's costs in this court are therefore disallowed.

It is therefore my opinion that in view of the foregoing decision, these costs may not be collected from the State, even though your cost bill had been filed in time.

*To Mr. Ralph S. Nelson,*  
*April 13, 1929.*

W. D. GILLIS,  
Attorney General.

## COUNTIES

### Cost of Boarding Prisoners

#### 24. QUESTIONS:

1. May the County Commissioners contract with the sheriff to board county prisoners at a flat rate of 75 cents per day, and not require an accounting from the sheriff as to the actual cost of boarding of such prisoners? Should the actual cost of boarding prisoners be less than 75 cents per day would it be proper for the sheriff to retain the excess over and above such actual cost?

2. May the sheriff contract with the Federal Government to furnish board for Federal prisoners at a flat rate of 75 cents per day and not account to the county for the actual cost of the boarding of such prisoners? In other words, if the actual cost of boarding Federal prisoners is less than 75 cents per day, may he retain any excess over such actual cost?



## OPINION:

In answer to your first inquiry, attention is called to Section 9429 C. S., which provides in substance that the sheriff shall receive all prisoners committed to his custody and provide them with necessary food, clothing and bedding for which he shall be allowed a reasonable compensation to be determined by the board of county commissioners. Another statute of relative importance in dealing with this question is Section 3699 C. S., which provides that the sheriff shall be allowed "in addition to such salary, the actual and necessary expenses for care of each prisoner confined in the county jail."

From the language contained in this statute, I am of the opinion that the additional allowance to the sheriff must be only the actual and necessary expenses for the care of each prisoner confined in the county jail. If this actual and necessary expense is 75 cents per day, such an amount may be agreed upon, but in no event do we believe that the statute intends that the sheriff shall be permitted to make a profit or sustain a loss because of expenditures made necessary for the care of prisoners. The county commissioners can arrive at a reasonable compensation which reasonable compensation is supposed to be and should be approximately the actual cost of sustaining such prisoners, and I am of the opinion that such compensation may be by a per diem allowance.

In answer to the second inquiry, I am of the opinion that the same rule would apply. The statute authorizing the sheriff in the State of Idaho to receive Federal prisoners was not intended to authorize the sheriff to make a profit from such transaction or to suffer a loss. If 75 cents per diem is the allowance, then that amount should be devoted to the purpose for which it is authorized.

*To Mr. Carl Burke,  
July 25, 1929.*

W. D. GILLIS,  
Attorney General.

**Publishing Financial Statement of County**

## 25. QUESTION:

When and in what manner must the county financial statement be published?

## OPINION:

Section 3518 of the Compiled Statutes of Idaho provides as follows:

"The Board of County Commissioners shall, at the April session of said board, prepare from said auditor's statement and have spread upon their minutes a full statement of the financial condition of their county for the preceding fiscal year, together with a concise description of all property owned by the county, with an approximate estimate of the value thereof. The said board shall cause to be printed the said auditor's statement in full for the information of the public."

Section 3434 of the Idaho Compiled Statutes provides as follows:

"To cause to be published monthly such brief statement as will clearly give notice to the public of all its acts and proceedings, and, semi-annually, a statement of the financial conditions of the county. Such statement as well as all other public notices of proceedings of, or to be had before the board, not otherwise specially provided for, must be published in one issue of such newspaper printed and published in the county as will be most likely to give notice thereof; and when no newspaper is published in the county, copies of such statement must be kept posted for at least 20 days in three public places in the county, one being a conspicuous place at the courthouse door."

From an examination of the above statutes, it is apparent that the financial statement of a county must be published semi-annually and a statement should be published monthly giving notice to the public of the acts and proceedings of the board. This should be published in one issue of such newspaper printed in the county as in the opinion of the board would be most likely to give notice thereof.

*To Hon. Chas. Hackney,  
September 24, 1929.*

W. D. GILLIS,  
Attorney General.

#### Duties of Treasurer of County

##### 26. QUESTIONS:

1. Should not the 1½% for collecting taxes of highway districts and also incorporated cities and villages, be turned over to the county rather than being held by County Treasurer as fees belonging to him personally?

2. Where the County Treasurer is Ex-Officio Public Administrator, should he turn over to himself commissions secured as such Public Administrator?

3. Should the Treasurer's report show costs which were paid as well as fines?

4. Should officer serving papers in all criminal cases, report mileage and fees for service?

OPINION:

The above questions will be answered according to number and in the order given.

Replying to inquiry No. 1, Section 1543 of the Compiled Statutes provides that each highway district and each included municipality shall pay to the county  $1\frac{1}{2}\%$  on the amount of district taxes received by it, such payment to be in full for the services and compensation of the county assessor, tax collector and all county officers, in assessing, collecting, equalizing and paying over said district taxes. Section 3224 of the Compiled Statutes, as amended by Section 1 of Chapter 85 of the 1923 Session Laws provides that this  $1\frac{1}{2}\%$  of all taxes of every city, town, village, etc., collected and paid into the county treasury shall be apportioned to the county current expense fund, which apportionment shall be in full for all services of all county officers in the levy, computation and collection of such taxes. They intended that these fees should be turned into the current expense fund of the county and do not belong to the county treasurer personally.

Answering inquiry No. 2, the county treasurer as ex-officio administrator should pay into the county treasury all commissions received by him as public administrator, these fees belonging to the county and not to the county treasurer individually. Section 7 of Article XVIII of the Constitution provides that all county officers and deputies shall receive as full compensation for their services fixed annual salaries.

Answering inquiry No. 3, it is my opinion that it is not necessary that the county treasurer show the items of costs paid to him. If costs were assessed by the court they would be included in and added to the fines.

Replying to the fourth inquiry, it is my opinion that it is necessary for an official serving papers in criminal cases to report to the court mileage and fees for service of papers. This is necessary for the information of the court when he renders a judgment of a fine and costs.

*To J. B. Loomis,  
March 11, 1929.*

W. D. GILLIS,  
Attorney General.

### County Printing

#### 27. QUESTION:

Must the county commissioners call for competitive bids on county printing and if so, must they let the contract to the lowest bidder?

#### OPINION:

Section 3433 of the Idaho Compiled Statutes recited as among the powers of the county commissioners, the right to contract for the county printing but does not provide any particular machinery by which the contract shall be let. It is apparent from the reading of this section that the county commissioners are not required to call for bids in letting the printing contracts.

Section 3434 requires them to cause certain publications to be made but puts the matter squarely up to the sound discretion of the county commissioners as to which newspaper, published and printed in the county, *will be most likely to give the required notice*. This, in our opinion, is the holding of our Supreme Court.

The question was treated in the case of *In re: Gemmill*, 20 Ida. 732. The letting of the contract to a newspaper of very limited circulation when another of very extensive circulation was available might be held an abuse of discretion, but resort to the courts would be necessary to determine that question.

Section 2336 requires county printing to be done within the county for which the work is done when there are practicable facilities within the county for executing the same.

*To Mr. Ray E. Coleman,*  
*February 6, 1929.*

W. D. GILLIS,  
Attorney General.

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## COUNTY OFFICERS

### Appointment of Deputies

#### 28. QUESTION:

May county commissioners authorize the appointment of deputies for the assessor, treasurer and ex-officio tax collector, sheriff and clerk of the district court without first complying with a full thirty days' notice of publication as required by Section 3700 of the Compiled Statutes?

## OPINION:

Section 3700 of the Compiled Statutes was enacted into our statutes as Section 4 of House Bill numbered 265, Laws of 1899 (page 405-406) and continues forward in practically the same form to the present day. So far as I am able to learn there has been no judicial construction of the exact question presented here although the Section has been before the courts several times.

This Section in substance, provides that the sheriff, assessor, treasurer, and clerk of the district court shall be empowered by the board of county commissioners to appoint such deputies and clerical assistants as the demands of their office may require, provided, however that the officers requiring such clerical assistance or deputies shall first publish for at least thirty days before any regular meeting of the Board of County Commissioners a Notice in a newspaper in the county, which Notice shall advise the public of their intention to apply to the county commissioners for the deputies or clerical assistants as the case may be, and the statute in specific language says:

"\* \* \*and no deputy shall be appointed or clerical assistance allowed by said board until due proof of the publication of said notice shall have been furnished said board and the necessity for said assistance is satisfactorily shown, and any taxpayer in the county shall have the right to appear before said board and protest against said appointment and show cause why said assistance should not be allowed."

The statute further provides, however, that during the terms of the district court, the district judge may authorize the above named officers other than the assessor and treasurer to employ such temporary assistance as they may need and their certificate is sufficient proof to the board of the necessity of such employment.

From this last proviso it would appear that upon order of the district court, made during term time, the sheriff or clerk of the district court may secure temporary assistance without the formalities of such publication. In the present case of the sheriff (the Clerk not being affected as I understand it) it would appear that if the district court is in session the judge may authorize the appointment of temporary assistance for the sheriff until the Notice provided for has been published so as to authorize the proper appointment of the deputies. This proviso would be of no aid to the other county officers.

It appears that the order authorizing the employment of deputies or clerical assistants with the exception for temporary assistance above noted, is made contingent upon a compliance with the statute. While the Section has not been directly passed upon, we quote you the following language from the case of *Dexter Horton Bank v. Clearwater County*, 235 Federal, 743, in which Judge Dietrich said:

"Section 2119 of the Revised Codes, as amended in 1913 (Session Laws, p. 474) (Section 3700 C. S.) authorizes the board of county commissioners to empower the assessor to appoint such clerical assistance and such deputies as the business of the office may require, and to fix their compensation. It is further provided, however, that such power may be exercised only upon the application of the assessor after 30 days' public notice. If, after such notice, upon a hearing, at which any taxpayer may appear in opposition, the board finds an existing necessity, it may grant the application.

"Now, what reason can be assigned for ignoring this method, and, by resorting to the one here employed, depriving the taxpayers of the statutory right to be heard? Admittedly no sudden emergency had arisen."

From the language above noted it would appear that the thirty days' notice and the right to appear in protest are guaranteed to the taxpayer and are conditions precedent to valid exercise of the authority to authorize the appointment by the county commissioners.

It is, therefore, the opinion of this office that the county commissioners cannot authorize the appointment of deputies or clerical assistants except upon compliance with this statute.

I regret that we must come to this conclusion, and this office has given a very considerable amount of time and research in an endeavor to find a method to secure for you an interpretation which might relieve the situation in which the officers of Fremont County find themselves but I cannot escape the conclusion that they will have to function as best they can without assistants until such Notice has been given as will give the Commissioners the power to authorize the appointment of deputies.

To Hon. Hensley G. Harris,  
January 16, 1929.

W. D. GILLIS,  
Attorney General.

## DEPOSITORY ACT

### Definition of a Special Deposit Under Depository Act

#### 29. QUESTION:

1. What constitutes a special deposit?
2. What is the proper procedure in which to make a special deposit?
3. What protection would be afforded in case a bank in which a special deposit was made failed?
4. Is there any limit as to the amount that can be placed on special deposit?

#### OPINION:

Section 24 of the depository law, as amended by Section 10, Chapter 45, Laws of 1925, and Section 10, Chapter 154, Laws of 1927, relates to the duties of the treasurer of a depositing unit with respect to the deposit of public funds, and is as follows:

"Except where the public moneys of a depositing unit in the custody of the treasurer at any one time are less than \* \* \* \$1000, the treasurer shall deposit, and at all times keep on deposit, subject to the provisions of this law, in designated depositories, all public moneys coming into his hands, but not in excess of the maximum sum he is entitled so to keep on deposit therein under this act; \* \* \* and it is hereby made the duty of said supervising board at the time it makes its investigation of bonds or securities as provided in the Public Depository Law to fix by order the maximum sum the treasurer may so keep on deposit in said depository, a copy of which order shall immediately after it is made be \* \* \* served on the Treasurer by the supervising board or its Clerk; Provided, \* \* \* that, whenever the public moneys of a depositing unit shall exceed the maximum sum which may be deposited in designated depositories, it shall be the duty of the \* \* \* supervising board of the depositing unit to designate and \* \* \* place for the safe-keeping of such public moneys, and until such designation it shall be the duty of the treasurer to deposit such excess sums *on special deposit* in some bank or trust company, and the expense of such service shall be borne by the depositing unit."

An examination of the law shows that there is no statutory definition of what constitutes a special deposit. I believe that the courts have interpreted the term "special deposit" to mean and include first securities delivered to a bank to be specifically kept and redelivered.

I call your attention to the following cases: *Mut. Acc. Asso. v. Jacobs* 141 Ill. 261, 267, 31 N. E. 414, 33 Am. St. Rep. 302, 16 L. R. A. 516 and note; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am D 168; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 36 Am R 582; *Carlisle First Nat. Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750.

7 C. J. 630, defines a special deposit as follows:

"A special deposit is a delivery of property, securities, or even money to the bank for the purpose of having the same safely kept and the identical thing deposited returned to the depositor."

The case of *Adams County vs. First Bank of Council*, 47 Ida. 89, 272 Pac. 699 was an action brought by Adams County against the defunct First Bank of Council, the Commissioner of Finance and Liquidating agent. It was an action to recover a deposit claimed as a trust fund. The moneys involved in this fund were placed on special deposit with said bank by said county. The question of whether or not such deposit constituted a trust fund was not raised and was not decided in the case; but it seems to have been conceded that such special deposit constituted a trust fund. At any rate the county recovered on that theory.

It is, therefore, my conclusion that a special deposit means as follows: You deliver your moneys to the depositing unit with specific directions that they shall be retained on special deposit, which means in effect that the identical moneys shall be returned to you; in other words, that such moneys, or evidence of money, are not to become mingled with other moneys of the bank.

Turning now to your second question as to what is the proper procedure in which to make a special deposit, it has been partially answered above. It is my opinion that when you as treasurer of the depositing unit actually have excess moneys in your possession which must be placed on special deposit in some bank or trust company that you should take them to the bank or trust company in which you determine to make such special deposit and deliver them upon the understanding that they constitute a "special deposit" within the meaning of the public depository law, and take from such bank or trust company a certificate of deposit showing such understanding and agreement. It will be noted that the statute provides that the expense of such service shall be borne by the depositing unit; in other words, you are simply paying to have your funds cared for.

Turning now to your third inquiry as to what protec-



tion would be afforded in case a bank in which a special deposit was made failed, as already suggested and as determined in the case of Adams County vs. First Bank of Council, above mentioned, the protection to the depositing unit consists of the depositing unit's right to the return of the identical moneys deposited, or if they cannot be produced its right to recover an equal amount as a trust fund.

Turning now to your fourth question as to whether or not there is any limit as to the amount that can be placed on special deposit, it is my opinion, in view of the provisions of Section 24 of said public depository law and of what has been said with respect thereto, that there is no limit to the amount of public moneys that may be placed by the treasurer of the depositing unit on special deposit, and that it is the duty of the treasurer of a depositing unit to deposit all sums in excess of the maximum sum which may be deposited in designated depositories as special deposits.

*To Miss Mary E. Gilmore,  
October 23, 1930.*

W. D. GILLIS,  
Attorney General.

#### **Public Funds May Be Deposited in a Bank Whose President Is Member of Supervising Board**

##### **30. QUESTION:**

Is it lawful to deposit public funds in a bank the president of which is a member of the supervising board by reason of being a county commissioner?

##### **OPINION:**

It is my view in conformity with the original opinion on this question that the fact that the bank president is a member of the supervising board does not prevent his institution from being a public depository. He is but one member of three on the board, and the acts of the board are the acts of a board of supervisors and not of any individual thereof. As county commissioners they are covered by bonds to secure the faithful performance of their duty and as a board it is their duty to approve or reject these securities. The president of the bank in his official position as commissioner has but one vote and cannot by that control the actions of the board and the other two members are equally responsible for the approval or rejection of these securities.

Therefore, it is my opinion that one member of the board being a president of the bank furnishing these securities would not authorize the rejection of them since the board itself is charged with the duty in its official capacity and two other members are able to dispose of the question of approval or rejection without the sanction of the third member who might be interested. As a matter of policy, it would seem advisable that the interested member do not participate in the approval or rejection of these securities and withdraw while the other members deliberate upon and determine the question.

With no prohibition in the law, I cannot hold that being president of the bank submitting the securities should disqualify the institution from having the right to qualify for deposits.

This opinion is, of course, based upon the assumption that the bank has in all other respects complied with the depository act and that the county will be adequately protected in depositing funds in that institution.

*To Mr. A. H. Jensen,  
January 3, 1930.*

W. D. GILLIS,  
Attorney General.

## DOGS

### Dogs Are Property

#### 31. QUESTION:

Under the law of this state, is a dog regarded as property?

#### OPINION:

I beg to advise you that Chapter 211 of the Laws of 1927 of the State of Idaho declares in part pertinent to your inquiry as follows:

"Dogs are property; and when the value of any dog is material in any civil or criminal proceeding in this state, the same may be established under the usual rules of evidence relating to values of personal property."

*To The American Humane Assn.  
July 21, 1929.*

W. D. GILLIS,  
Attorney General.

## ELECTIONS

### The Placing of Party Ticket As to Columns Rests With County Auditor

#### 32. QUESTION:

Under Section 573 of the Compiled Statutes is the County Auditor required to place party columns on the official ballot in the order shown by the form at page 171 of the Compiled Statutes; that is, is it absolutely necessary that the Republican ticket be the first one at the left of the form?

#### OPINION:

Section 573 of the Compiled Statutes, which provides the form and contents of the ballot, reads in part pertinent to this inquiry.

"\* \* \* The face of the ballot and the stub must be in substantially the following form: \* \* \*

Then follows the form of the ballot which shows the Republican ticket in the first column, the Democratic ticket in the second, the Populist ticket in the third, and a vacant column for those who wish to write in names as a fourth column.

We first turn to the question of the meaning of the word "substantially."

In the case of *Edgerton v. State*, (Tex.) 70 S. W. 90, it is said:

"'Substantially' means, not an accurate or exact copy, but one which contains the substance of the instrument copied."

In *Adams vs. Edwards*, (U. S.) 1 Fed. Cas. 112, it is said:

"When we say a thing is 'substantially the same,' we mean it is the same in all important particulars. \* \* \* Change of form is not material, when the form does not contribute toward the new result. When it does, the forms must be alike in all important particulars."

Honorable A. H. Conner, Attorney General of the State of Idaho in 1924, addressed an opinion to Mr. Lewis A. Lee, the Prosecuting Attorney of Bonneville County at that time, in which he held as follows:

"In my opinion it is discretionary with the County Auditor as to which party ticket shall be printed in the first column on the official ballot."

A like opinion was again rendered by General Conner

in 1926 to A. D. Ericksen, then Prosecuting Attorney of Bonneville County.

In the above opinions I concur.

From the foregoing, therefore, it is my conclusion and opinion that it is discretionary with the County Auditor as to which party ticket shall be printed in the first column on the official ballot.

*To Mr. Cleve Groome,  
September 6, 1930.*

W. D. GILLIS,  
Attorney General.

### **Sticker Candidates at General Elections**

#### **33. QUESTION:**

If a man is running on a sticker ticket is the vote for him counted no matter whether the sticker is placed in the Democratic or Republican or Independent column? That is, are these votes all tallied together or must the sticker be placed in the Independent column only?

#### **OPINION:**

Your attention is called to Section 573 of the Compiled Statutes. From that section it will be noted that the ballot must be divided into equal perpendicular spaces, one for each political party represented by the different opposing candidates, in which the tickets of the different parties must be printed, and one similar in which only the names of the different offices to be filled at the election shall be printed, and below which the voter may write the names of the persons he wishes to vote for.

This office has heretofore held on several occasions that a sticker candidate in effect, is the writing in of the name of a candidate. In other words, it is not permitted that a sticker candidate or an independent candidate shall have his name pasted on by the election judges.

This office has also heretofore held in an opinion by my predecessor in office, in which I concur, that if a sticker candidate's name be placed over the name of a regularly nominated candidate that such action would invalidate the vote for such office, but would not invalidate the votes cast by such voter for the candidates for other offices. Such invalidation, however, for the one candidate would not amount to a wilful destruction of the ballot within the meaning of Section 8110, Compiled Statutes.

It would, therefore, follow that the ticket might be

counted for all other offices which he had regularly voted for, except in the case of the office where the sticker was pasted over the name of a regularly nominated candidate.

It would, therefore, follow that the sticker or the writing in of the name of a person must be done only in the column which you have denominated as the "Independent" column, or in reference to the ballot of this year, the third column.

It is, therefore, my opinion that you may not count any other ballots for the so-called "Independent" or "Sticker" candidates, except those which are written in or attached to and within the so-called "Independent" column, there being, it is assumed, a full ticket nominated for each party.

*To Mr. Joe Rabdon,  
October 31, 1930.*

W. D. GILLIS,  
Attorney General.

#### **There Is No Law Requiring Publication of the Official Ballot for a General Election**

##### **34. QUESTION:**

Does the present law require a newspaper publication of an official ballot form?

##### **OPINION:**

A careful examination of the statutes in reference to the general election discloses no provision requiring the publication of the official ballot form except in the case of constitutional amendments.

*To Mrs. Mabel C. Nelson,  
October 15, 1930.*

W. D. GILLIS,  
Attorney General.

#### **Election Boards; Duties and Powers**

##### **35. QUESTIONS:**

1. Are members of election boards free to tell the number of votes cast during voting hours?
2. Are candidates for office privileged to come to the table where the clerks are writing in the names of voters?
3. How often may members of the election board leave their posts of duty to secure food?
4. How many members of the board may be absent during voting hours at one time?
5. Who is in authority on the board?

## OPINION:

Before expressing an opinion upon the several questions propounded, I would state this rule that the courts have quite generally held that any informalities which do not or cannot affect the final result of the election are to be disregarded.

Returning now to the first inquiry, Section 629 of the Compiled Statutes provides that neither the election officers or the party representative allowed to be present at the time of counting shall in any manner directly or indirectly, by word or sign, disclose or communicate the results of the counting until the polls are closed. A penalty is provided for violation.

If, on the other hand, your question refers to the number of votes cast as distinguished from the information as to whom the votes were cast for, I know of no prohibition against giving out the first named information. In other words, there is no prohibition against the election officers stating that fifty people have voted, or whatever the number might be, but if the counting board stated that twenty votes had been cast for Jones and thirty for Smith, that is prohibited.

Replying to your second inquiry, as to whether candidates for office are privileged to come to the table where clerks are writing in the names of the voters, Section 589 of the Compiled Statutes provides that the constable shall not allow any one within the guard line of the polling place except those who come to vote. There is, however, no statutory prohibition, other than the one last mentioned, and I can see no harm in candidates for office coming to the table where the clerks are writing in the names of the voters, provided they do not remain there or interfere in any way with the clerk in the performance of his duties.

Replying to the third inquiry, I know of no prohibition against the members of an election board securing food, provided all voters who present themselves to vote are promptly taken care of and the election carried forward in an efficient manner.

Answering your fourth inquiry, the statute makes no provision in reference to this. It provides only that the polls shall continue open from the time of opening until closing. The law never demands an impossible thing and custom has approved members alternately going for their meals and in such manner as will permit the continuous conduct of the election. A member of the board may leave the room

temporarily; but, on the other hand, he may not absent himself a considerable period of time to attend to other duties or affairs.

Replying to your fifth inquiry, as to who is in authority on the board, while the statute makes no declaration on this subject custom has established that the judges shall be the governing power of the election board.

*To Mrs. Katherine B. Hanford,  
May 23, 1929.*

W. D. GILLIS,  
Attorney General

## PRIMARY ELECTION

### **A County Chairman May Not Legally Certify a Person As a Member of One Party When Such Person Held Office As a Member of Another Party Less Than Two Years Prior to July 6, 1930**

#### 36. FACTS:

In the year 1928 a person was a candidate for a county office on the Progressive party ticket. The said Progressive party at the election in 1928 did not have a state ticket with three nominees for state offices and did not poll five per cent. or more of the total votes cast for three or more candidates on the state ticket at said election. The said person who was such candidate on the Progressive party ticket for such county office in 1928 now desires to become a candidate on the Republican ticket for a county office at the election to be held in 1930.

#### QUESTION:

May the County Chairman of the Republican party legally sign the certificate required by law certifying that such person has been a member of the Republican party for two years last past, as provided by Section 543 of the Compiled Statutes?

#### OPINION:

Section 543 of the Compiled Statutes, which is a part of our primary election law, declares the method in which the name of a person may be placed on a party ticket for nomination at the primary election. It reads in part pertinent to this inquiry as follows:

“\* \* \* In addition to such nomination paper, such candidate shall produce and file with the county recorder at the same time as such nomination paper is filed a written certificate of the

county chairman or a majority of the members of the county central committee; that he is then and has been for two years prior thereto a member of the political party on whose ticket he desires to become a candidate; or the affidavits of at least five reputable members of the party from which said candidate seeks a nomination, who have resided in said county for more than two years immediately prior to signing such affidavit, stating that they have known such nominee for more than two years last past and that said nominee is a member of the party from which he seeks a nomination. \* \* \*"

As the statute above quoted requires that the County Chairman must certify that the person proposing to be a candidate for a party is then and has been for two years prior thereto a member of the political party on whose ticket he desires to become a candidate, it is now necessary to turn to the question of determining what a political party is in this state. Our legislature, recognizing I assume that fact that our form of government is based on political parties, has provided a definition therefor. Section 517 of the Compiled Statutes, as amended by Chapter 83 of the Laws of 1927, defines a political party as follows:

"A political party, within the meaning of this Chapter, is an affiliation of electors, representing a political organization under a given name, which at the last preceding general election cast for any candidate on their ticket, within this State, 5 per cent or more of the total vote cast for all candidates for such office within the state, and upon which ticket there were at least three nominees for state offices, or an affiliation of not less than 1500 electors, who shall, at least 30 days before the date of the primary, file with the Secretary of State a written notice that they desire recognition as a political party, which said notice shall contain: 1. The name of the proposed party. 2. That the subscribers thereto have affiliated one with another, for the purpose of forming such party, and, 3. That the subscribers to such notice intend to nominate at least three candidates for state offices whereupon such affiliation shall, under the party name chosen, have all the rights of a political party whose ticket shall have been on the ballot at the preceding general election."

Keeping in mind the above statutory definition of a political party, we have consulted the records of the Secretary of State, who under our laws is the custodian of the official election returns. His records disclose that the Progressive party at the election in 1926 in this state had three or more nominees for state offices in said ticket and polled at the election for that year more than five per cent.



of the total vote cast for the candidates for such offices within the state. That party, therefore, was qualified as a political organization after the election in 1926 and was entitled, under the provisions of our statute heretofore quoted, to place a full ticket on the ballots for the election in 1928 for both state and county officials.

The records in the office of the Secretary of State further disclose that the Progressive party did not file any nominee for state offices at the general election held in November, 1928, nor, as said records disclose, did said party poll five per cent. or more of the total vote cast in the state for three or more nominees for state offices.

It, therefore, follows that the Progressive party, having failed to meet the requirements of a political party above mentioned, ceased to exist as such on November 6, 1928. It had failed to comply with Chapter 83 of the Laws of 1927.

It is true, and I take notice of the fact, that the Progressive party maintained in several counties within the state a county ticket, but such fact has no qualifying value because of its failure in 1928 to place candidates upon its party ticket coupled with the further failure to secure at the election in November of that year a vote of five per cent. or more of the total vote cast for three or more state candidates.

It now becomes pertinent to consider the intent and statement of Section 543, above quoted. Clearly, its evident purpose is to secure representatives of the political party seeking nominees to be voted upon at the ensuing general election. The evident purpose of a primary for political parties is to secure nominees who are adherents of its political faith and not of some other.

As was stated in the case of Sutphen vs. Enking, 39 Ida. 728:

"There can be no doubt, we think, that it was the intention of the Legislature to provide for a 'closed primary' to the extent of recognizing party nominations and securing to bona fide members of the political parties the absolute right to control the affairs of their respective parties, wholly excluding from such control every person who is not a bona fide member of such party."

It must, therefore, be conceded that the legislative intent is to provide a method whereby only persons who are bona fide members of a political party may become candidates on its ticket.

It, therefore, is required that a person must be a mem-

ber of that party for two years previous to the time he seeks a certificate from the County Chairman of that party as to whether or not he has been so affiliated. It appears that the person involved in this inquiry was a member of the Progressive party, as is shown by the fact that he sought office in 1928 from a local organization of that party. When then did the Progressive party cease to exist under the statutory definition we have quoted above? I can arrive at no other conclusion that that the Progressive party did not cease to exist as a political organization until the close of the general election in 1928.

The primary election law further requires that in order that the name of a person may be placed on the ticket of his party as a candidate for nomination for an office his nomination paper must be signed by him and filed in the office of the County Recorder of the county not more than sixty days nor less than thirty days before the primary election. Such certificate then must be secured not later than July 6, 1930. It, therefore, appears that only one year and eight months will have elapsed between November 6, 1928, and July 6, 1930.

It is, therefore, my opinion that such person has not been a member of the Republican party for two years prior to the date for filing nominations for 1930.

Section 558 of the Compiled Statutes provides a penalty for any person who knowingly swears falsely to any material statement or matter in a nomination paper or certificate or other paper relative to his qualifications as a voter upon registration or at a primary election or *as to his party affiliations*, and said action provides that such person shall be punished for perjury as provided in the Penal Code.

I can, therefore, arrive at no other conclusion than that the Chairman of the Republican party of Canyon County may not legally execute the certificate required by Section 543, above quoted.

The statute does not foreclose such person from becoming a candidate, but requires that he file by petition as an "Independent without party affiliations." His loyalty to the party on whose ticket he seeks nomination may be unquestioned, but the statutory definition eliminates him as a candidate on that party and requires him to seek nomination as an "Independent."

Suggestion is made that our opinion of April 8, 1930, in which we held that persons voting for the state and/or national ticket of one of the major parties which did com-

ply with the statutory definition of a party above described became members of such major party and could, therefore, register and claim affiliation with such major party under Chapter 260 of the Laws of 1929, conflicts with the views above set out.

It is my opinion that the two situations can be readily distinguished and that this opinion in no way conflicts with the one above mentioned. In case of the voter, the prime consideration was that he had voted at a general election and supported generally the candidates of such major party with which he declared he desired to affiliate, but in the instant case the person seeking nomination must show two years' affiliation with the party from which he seeks such nomination.

This office has given careful thought and exhaustive consideration to this question. At my request all of my assistants, except the one coming from Canyon County, have carefully briefed the question. I have done considerable independent research work in the examination of a considerable amount of case law. The office is unanimous in the conclusion above set out. I have reluctantly arrived at the above conclusion because of the fact existing that the person affected by this opinion has in the past received the approval of the voters of his county for an important office, and for the further reason that it is my opinion that we should hesitate in taking from a person the right to secure any real or fancied advantage in securing the approval of the voters in the attainment of a public office. However, as I have said earlier in this opinion, the act does not take from this person the right to be a candidate, as he may secure a position on the ticket as an "Independent."

May I also suggest that Section 543 of the Compiled Statutes apparently provides a summary procedure to present this matter to the courts. While I am firm in my conviction that this opinion is a correct interpretation of the law, still I should welcome a presentation of this matter to the courts. It will be noted by the section last above mentioned that by the filing of five affidavits controverted within five days by other affidavits that the issue thus raised may be heard summarily by your District Court, and after a decision forthwith upon those issues, that such judgment may be summarily reviewed by the Supreme Court of this State.

*To Mr. C. H. Duval,*  
*June 16, 1930.*

W. D. GILLIS,  
Attorney General.

## HIGHWAYS

### Neither State Nor County Is Liable for Damages Arising Because of Detours Provided

#### 37. QUESTIONS:

Would the Department of Public Works be responsible for damages resulting from its order to detour traffic?

Would the county be responsible?

#### OPINION:

It has been repeatedly held by this office, both by my predecessor and myself, that the Department of Public Works, as a department of state government, may not be sued for damages; in other words, that liability for damages does not exist.

The case of *Strickfaden v. Greencreek Highway District*, 42 Ida. 738, 248 Pac. 456, was an action against a regularly organized highway district under the laws of this state, for damages resulting from some construction work upon a public highway. With respect to liability for damages against either the state or county, the court on page 749 of the Idaho report said:

"It is well settled that in the absence of an express statute to that effect, the state is not liable for damages either for nonperformance of its powers or for their improper exercise by those charged with their execution. Counties are generally likewise relieved from liability, for the same reason. They are involuntary subdivisions or arms of the state through which the state operates for convenience in the performance of its functions. In other words, the county is merely an agent of the state and since the state cannot be sued without its consent, neither may the agent be sued, \* \* \*."  
(Authorities are also cited.)

This statement of law does not appear to have been changed or modified by any later decision of the Supreme Court or by any later legislative enactment.

The powers granted the Department of Public Works list no permission to sue it.

It is, therefore, my opinion that neither the state, nor the Department of Public Works, nor the county referred to, is liable for damages by reason of the facts stated in your letter.

*To Mr. Arthur W. Hart,*  
October 29, 1930.

W. D. GILLIS,  
Attorney General.

**Telephone Lines Along Highways****38. QUESTION:**

What action should be taken by this department on applications for permits from telephone and telegraph companies now occupying railroad right of way which has been taken over by the state under lease which telephone companies desire to move their lines to the highway right of way?

**OPINION:**

Section 4832 of the Compiled Statutes reads as follows:

"Telegraph and telephone corporations may construct lines of telegraph or telephone along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of their lines in such manner and at such points as not to incommode the public use of the road or highway, or interrupt the navigation of the waters."

The rule laid down in 37 Cyc. at page 1633, with reference to the construction of telephone and telegraph lines along public right of way is as follows:

"While a municipality cannot exclude from its streets a telegraph or telephone company having authority from the legislature to occupy and use the same, it may make reasonable and proper regulations as to the manner in which such right shall be exercised."

It appears the facts in this case are analogous to the facts upon which the above rule is based.

It is my opinion that the terms of the lease with the railroad do not conflict with the above section. It appears the railroad company gave a lease to the state of a strip of land on its right of way for the purpose only of being employed as a highway. So long as it is used as a highway the telephone companies have the right to construct lines thereon, its authority to do so having been granted through the Legislature by the provisions of Section 4832, supra.

It is my further opinion that your department has the power to make such reasonable regulations as to the construction of telephone or telegraph lines upon such highway so as to provide that the public use of the highway shall not be discommoded.

*To Honorable J. D. Wood,  
Commissioner of Public Works,  
May 11, 1929.*

W. D. GILLIS,  
Attorney General.

**May Not Employ County Apportionment of Vehicle  
License Moneys to Police Highways**

**39. QUESTION:**

May a county expend a portion of the funds received pursuant to Section 1582 of the Compiled Statutes, as amended by Section 8 of Chapter 177 of the Laws of 1925, as amended by Section 7 of Chapter 195 of the Laws of 1929, in conjunction with the Department of Law Enforcement of the state, employing officers to police state highways?

**OPINION:**

Section 1582 of the Compiled Statutes as amended provides in exact detail, and very definitely how such moneys may be expended. It does not include the employment of highway police officers.

As the purposes for which the moneys under this section may be expended are determined in the statute, it is my opinion that the commissioners are not authorized to and may not expend the same for any purpose other than those so declared for, and it, therefore, follows that such moneys may not be expended in conjunction with the Department of Law Enforcement of the state in the employment of officers to police state highways.

*To Mr. Cleve Groome,  
August 15, 1929.*

W. D. GILLIS,  
Attorney General.

**STATE HIGHWAY DEPARTMENT**

**Bidder's Bond on Highway Work**

**40. QUESTION:**

Would the Department of Public Works have authority under existing statutes to require proposal guarantees in the form of certified checks only?

**OPINION:**

Section 1576 of the Compiled Statutes, as amended by Chapter 183 of the Laws of 1921, covers this question. As I interpret the above statute, it seems apparent that the bidder has the option of accompanying his bid with a certified check on some bank in this state or he may accompany the said bid with a bidder's bond.

It would, therefore, follow that your department does

not have the authority to require bidders to submit bids accompanied by certified checks only. If the bidder chooses to submit a bid, he may furnish a bidder's bond, as provided in said section, and it would seem necessary that such bid be considered with the others by your department. The only remedy appears to be a legislative amendment.

To Honorable J. D. Wood,  
Commissioner of Public Works,  
September 25, 1929.

W. D. GILLIS,  
Attorney General.

## STATE HIGHWAYS

### Unused Balances in County Budget Appropriated for State Highway Construction Do Not Lapse

#### 41. QUESTION:

What disposition is made at the end of a fiscal year of unused balances in budgets created by the Board of County Commissioners, under the provisions of Chapter 156, Laws of 1925, which permits a levy of  $2\frac{1}{2}$  mills for exclusive use of the State Highway System?

#### OPINION:

Section 7 of Chapter 232 of the Laws of 1927, as amended by Section 7, Chapter 138, Laws of 1929, provides in part as follows:

"All appropriations other than appropriations for uncompleted improvements in progress of construction, shall lapse at the end of the fiscal year: Provided, that the appropriation accounts shall remain open for a period of thirty days thereafter for the payment of claims incurred against such appropriations prior to the close of the fiscal year. After said period shall have expired all appropriations, except as hereinabove provided regarding uncompleted improvements, shall become null and void and any lawful claim presented thereafter against any such appropriation shall be provided for in the next ensuing budget.

"Within fifteen days after said appropriation accounts are closed, as hereinbefore provided, the County Auditor shall submit to the County Commissioners a complete statement for the preceding fiscal year showing its expenditures against each separate budget appropriation, together with the unexpended balance of each appropriation. Said statement shall also show the total receipts from taxes and, separately, from all sources other than taxes during the same period; Provided, if any un-

completed improvement appropriation has not lapsed said statement shall show the condition thereof as nearly to the date of said statement as practicable."

It is my opinion, from an examination of the statute, that any unused balance would automatically lapse as provided by said statute, unless the same were being used in construction or improvements in the state highway system not then completed, in which event such balance would not lapse.

*To Honorable J. D. Wood,  
Commissioner of Public Works,  
March 17, 1930.*

W. D. GILLIS,  
Attorney General.

## STATE CONTRACTS

### Compensation for Damage Clause

#### 42. FACTS:

There is submitted to this office a copy of a proposed agreement with the Great Northern Railway Company for the construction of a right-of-way for highway purposes upon the right-of-way of the Great Northern Railway Company, and attention is called to that certain provision in said contract, in section five thereof, reading as follows:

"As one of the express considerations for the privileges hereby granted to the State by the Railway Company and as a part of the compensation to the Railway Company for its land and property to be taken and damaged by the State, *the State hereby agrees to reimburse and fully compensate the Railway Company for all costs, charges, losses, expenses, damages, claims, liabilities, and judgments which may in any manner arise or grow out of any injuries to or death of persons, or loss of or damage to the property of the Railway Company, or of third persons, due to the sliding or falling of rocks, or other material or debris by blasting or otherwise, or in any manner caused by the construction or maintenance of the state highway, or by any of the other work contemplated by this contract.*"

#### OPINION:

Section 345 of the Compiled Statutes provides in part as follows:

"The Department of Public Works shall have power; \* \* \*

5. To lay out, build, construct and maintain



state highways at any place within the state of Idaho. \* \* \*

7. To purchase, condemn or otherwise acquire the necessary lands for rights of way, turnouts, fills or excavations for state highways."

Chapter 270 of the Compiled Statutes provides the right of eminent domain. Section 7407 of said chapter provides as follows:

"Before property can be taken it must appear:  
1. That the use to which it is to be applied is a use authorized by law.  
2. That the taking is necessary to such use.  
3. *If already appropriated to some public use that the public use to which it is to be applied is a more necessary public use.*"

Section 10 of Article V of the Constitution of this state provides as follows:

"The supreme court shall have original jurisdiction to hear claims against the state, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the legislature for its action."

It will be noted by Section 5 of said contract that the State of Idaho is required to reimburse the railway company for all costs, charges, losses, expenses, damages, claims, liabilities, and judgments, which may in any manner arise or grow out of any injuries to or death of persons, or loss of or damage to the property of the railway company, or to third persons, due to the sliding or falling of rocks, or other material or debris by blasting or otherwise, or in any manner caused by the construction or maintenance of the state highway, or by any of the other work contemplated by the contract in question.

I find no constitutional or statutory provision giving the Department of Public Works the power to bind the state in such manner, nor any constitutional or statutory provision granting the right to enforce such claims for damages against the State of Idaho, and if this clause were inserted in said contract, the same would not be enforceable against the state because our Supreme Court has said that the state cannot be sued without its express consent and this consent must either be found in the constitution of the state or legislative enactment.

Hollister v. State, 9 Ida. 8;  
Thomas v. State, 16 Ida. 81;  
Davis v. State, 30 Ida. 137.

Our Supreme Court has also held that:

"The state is not liable for the neglect or torts of its officers, servants or employees in the absence of a statute imposing such a liability."

*Youmans v. Thornton*, 31 Ida. 10.

However, such a provision inserted in this contract may be sufficient to support a recommendatory decision under said Section 10, Article V of the Constitution. Our Supreme Court in the case of *Winters v. State*, 5 Ida. 198, held that:

"Plaintiffs, as contractors, built two sections of state wagon road under the supervision of the state engineer. Portions of the road were washed out prior to acceptance of the road by the state. At the direction of the state road commission, plaintiffs rebuilt the portion of the road so destroyed. The original contract price consumed the funds available for the sections built. Held, sufficient to support a recommendatory decision under Const. Article 5, Section 10, that the legislature pay plaintiffs for the extra work."

*Clark's Idaho Dig.* p. 1261.

It will be noted from the above case that should such a clause be inserted in a contract as above referred to that the railway company would be entitled only to a recommendatory judgment and the legislature would be only morally bound to appropriate sufficient money to pay such a judgment.

It occurs to me that the Department of Public Works, having the power to build highways and to condemn for a more necessary public use land already appropriated to some public use, should not accept said condition in its contract, and should the railway company refuse to strike the same from the contract, then the department might condemn the right-of-way, as provided by Section 7407 of the Compiled Statutes. I assume, of course, that the railway right-of-way in question will not be interfered with by the use of the same for highway purposes.

Our Federal Court has interpreted Subdivision 3 of said Section 7407, C. S., and its interpretation has held that:

"Such statute by implication authorizes a second condemnation, and under it a telegraph company may condemn a right-of-way for its line over the right-of-way of a railroad, where the court finds that it is necessary and that it will not interfere with the use of the property for the purpose of

the railroad, and that the second use is more necessary than the first."

O. S. L. R. Co. v. Postal Tel. Cable Co. of Idaho, 111 F. 842.

To Com'r. of Public Works,  
February 18, 1930

W. D. GILLIS,  
Attorney General.

## HIGHWAY BOND ISSUES OF 1930

### Constitutional Questions Involved in Issue of Proposed Highway Bonds of 1930

#### 43. FACTS:

I have the honor to submit herewith, pursuant to your request, my conclusions and opinion on the legal aspects of the several propositions being discussed in reference to financing an enlarged road program for this state.

The several plans may be described briefly as follows:

1. **THE FIVE-YEAR PLAN:** This contemplates the issuance of \$11,000,000 treasury notes to be repaid from and secured by a portion of the receipts from the tax on motor fuels. It proposes the issuance, subject to the control of the State Board of Examiners, of these notes in amounts \$1,000,000 in 1930; \$2,000,000 in 1931; \$2,000,000 in 1932; \$3,000,000 in 1933; and \$3,000,000 in 1934. Repayment is to be made on the amortization plan within twenty years of their issuance, beginning in 1931, and in equal amounts each year thereafter and solely from the so-called "gas tax."

2. **THE ONE-YEAR PLAN:** This takes into consideration only the need to secure sufficient revenue to make certain that the state may attach all Federal funds available for 1930. It contemplates amendment of the present unworkable act as to issuance of treasury notes secured by the motor fuels tax; provides that \$1,000,000 of such notes may be issued, but keeps the whole of the gas tax revenues free from the lien of notes until 1931, then that said million dollars shall be repaid at the rate of \$200,000 and interest per year during a period of five years.

3. **THE GENERAL OBLIGATION PLAN:** This contemplates the combination of one and two with the added feature that to add to the salability (if that be necessary) that the credit of the state be pledged. It assumes the legislature shall, if called in extra session, provide for the needs of 1930 by the adoption of what I have termed the "one-year plan" and then submit to the people the question

of the issuance of notes or bonds in the sum of \$10,000,000 to be issued over a five year period. This plan contemplates making such notes the general obligation of the state as well as providing for their repayment from the motor fuels tax. It intends the repayment of the \$10,000,000 solely from the gas tax, but adds the full faith and credit of the state so that the investor may be assured that if for any reason the hypothecated gas tax money should fail, then repayment would in any event be made by the levy of a tax on the taxable property within the state.

Before passing to the legal questions involved in these propositions, may I comment upon our present Treasury Note Act.

The legislature in 1929 by Chapter 270 authorized the issuance of treasury notes by the state in the sum not exceeding one million dollars in any one year for the purpose of raising money in anticipation of the collection of the tax on motor fuels. The State Board of Examiners at the request of the Commissioner of Public Works was authorized, in its discretion, to issue these. For their repayment the motor fuels tax was pledged.

The act in practice was found to be unworkable. Upon the issuance of any amount of notes, it at once placed a lien upon all the gas tax receipts, and instead of assisting in financing the year's road program, although placing early, it is true, some money at the disposal of the department, yet it required its immediate total repayment so that the department might as well have carried its program forward on credit for in the end it secured only from the issuance of the notes an added interest bill. Clearly the act should at sometime be amended to provide a more workable plan.

Let us now turn to the consideration of the possible legal questions involved in the several proposals.

The "five-year plan" proposes the issuance of \$11,000,000 of Treasury Notes payable from and secured by the motor fuels tax. The first question that suggests itself is:

QUESTION:

WOULD THE AUTHORIZATION OF THIS AMOUNT OF NOTES WITHIN THE PERIOD OF FIVE YEARS VIOLATE THE LIMITATION ON THE PUBLIC INDEBTEDNESS SECTION OF OUR STATE CONSTITUTION, IF SUCH NOTES ARE TO BE REPAID WITHIN TWENTY YEARS AND SOLELY FROM AN APPROPRIATION OF THE MOTOR FUELS TAX?

## OPINION:

Section 1 of Article VIII of our Constitution provides in part pertinent to this inquiry as follows:

"The legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly or in the aggregate, \* \* \* exceed in the aggregate the sum of two million dollars, except in case of war, to repel an invasion or suppress an insurrection, unless the same shall be authorized by law, for some single object or work to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debt or liability as it falls due, and also for the payment and discharge of the principal of such debt or liability within twenty years of the time of the contracting thereof, and shall be irrevocable until the principal and interest thereon shall be paid and discharged. But no such law shall take effect until at a general election it shall have been submitted to the people, and shall have received a majority of all the votes cast for or against it at such election, and all moneys raised by the authority of such laws shall be applied only to specified objects therein stated or to the payment of the debt thereby created, and such law shall be published in at least one newspaper in each county or city, and county, if one be published therein, throughout the state for three months next preceding the election at which it is submitted to the people. The legislature may at any time after the approval of such law, by the people, if no debts shall have been contracted in pursuance thereof, repeal the same."

Couched then, in a simple statement—the legislature may not issue bonds or notes which are the general obligation of the state and which must be repaid by taxes levied on the taxable property of the state in excess of \$2,000,000. If then, we now have, we will say, obligations of this character in the amount of a million dollars, then a legislature could not issue such obligations in excess of another million dollars unless such larger proposals be submitted to a vote of the people. But are the proposed notes such an obligation as to bring them within the prohibition of the section above quoted? It is my opinion they are not.

Probably the leading and the best considered recent case on a question similar to the above is that of *State ex rel. Capitol Committee vs. Clausen*, (Wash.) 235 Pac. 364. At the 1925 session of the legislature of the State of Washington it authorized the issuance of bonds in the amount of \$4,000,000 to run for twenty years and provided that the principal and interest was to be payable out of the

Capitol Building Construction Fund from the revenue raised from sale of leases and contracts of public lands. The Public Building Construction Fund above mentioned had in it moneys from the sale and lease of state lands. The lands mentioned were those coming from the Federal Government at the time the state was admitted. The question we are interested in here is whether or not moneys derived from the sale of leases and sale of lands could be used to pay off these bonds even though the amount of the bonds exceeded the constitutional limitation, were the indebtedness a general obligation.

Washington has a very similar provision in its Constitution to our Article VIII, and it was conceded that if these bonds constituted a general state obligation, they were in excess of the constitutional limitation. The Supreme Court of that State held that the bonds and the debt created thereby did not come within the constitutional provisions of that state. The court said:

"The legislative act under discussion expressly provides that the principal and interest of the bonds authorized shall be payable only from revenues hereafter received from the lease and sale of the granted lands. In no possible way is the credit of the state involved. Not one dollar of its general property can be used to discharge those bonds or the interest on them. Not one dollar of taxes can be put to that purpose. The state is only carrying into effect the trust imposed on it, which is, to use these granted lands or moneys derived from them to construct capitol buildings. Its only obligation under this act is to see that all the revenues hereafter received from the lease or sale of the granted lands shall be applied towards the payment of these bonds and their interest. On no principle of law can it be said that under these circumstances any debt has been contracted 'by or on behalf of this state.'

"Twice before has the Legislature undertaken to raise money on these granted lands, and each time this court has held the acts unconstitutional; but the present law does not contain any of the vicious elements that were found in the former legislation. The case of State Capitol Commission v. State Board of Finance, 74 Wash, 15, 132 P. 861, disposes of chapter 59, Laws of 1911, as amended by chapter 50 of the Laws of 1913. Those laws provided that the state should guarantee the principal and interest of certain proposed capitol building bonds, and we held that such guarantee pledged the general credit of the state and constituted the contracting of an indebtedness in violation of the constitutional provision.

"The case of *State ex rel. Capitol Commission v. Lister*, 91 Wash. 9, 156 P. 858, held that a legislative act of 1915 for the bonding of the capitol building lands, the principal to be paid from the sale of granted lands, but the interest to be paid by an annual tax levy, created a debt in violation of the Constitution. It will be observed that in the first case the state pledged itself to pay both the principal and interest of the bonds, and in the second case obligated itself to pay the interest.

"If it were thought necessary to support our conclusion by authority, we might cite *Allen v. Grimes*, 9 Wash. 424, 37 Pac. 662; *State ex rel. Attorney General v. McGraw*, 13 Wash. 311, 43 Pac. 176. In the first case it was held that warrants drawn on the capitol building fund do not create any debt in the constitutional sense, although there was no money in the fund to meet the warrants. We said:

"There is under the law absolutely no obligation resting upon the state to pay any sum whatever, and those who may receive the auditor's warrants will be limited in their rights to the requirement of the proper officers to perform their duties as prescribed by the statute. \* \* \* Under this condition of affairs, we see no valid objection to the auditor's issuing to the relator the warrant which he prays for, provided that it expresses upon its face the terms and conditions under which it is issued, viz. that it is drawn solely upon the state capitol building fund and payable only as that fund may be accumulated from the sale of lands,".

The Supreme Court of the State of Montana in the cases of *State vs. Cook*, 43 Pac. 928, and *State vs. Wright*, 44 Pac. 89, in situations similar to the above, and construing constitutional provisions quite like our own, arrived at the same conclusion as the Washington court.

See also *Kasch v. Miller* (Ohio) 135 N. E. 813; *Griffin v. Tacoma* (Wn.) 95 Pac. 1107; *Barnes vs. Lehi City* (Utah), 279 Pac. 878; *Uhler vs. Olympia* (Wn.) 151 Pac. 117; *State v. Eagleson*, 32 Idaho, 276; *Franklin Trust Co. v. Colorado* 3 Fed. (2d) 114; *Shelton vs. City of Los Angeles*, 275 Pac. 421.

The Supreme Court of South Carolina was recently called upon to construe an enactment of its legislature which had pledged a portion of its gas tax receipts to the payment of certain debentures issued to carry out its road program. In the case, which is entitled *Briggs vs. Greenville County*, 135 S. E. 153, that court said:

"The proposed reimbursement agreements will

not constitute a general liability of the state. The reimbursements to be made thereunder can be made only from a special fund consisting of the gasoline tax, automobile license tax, and federal aid. No property tax can ever be levied to meet these obligations.

"Is such a limited liability a debt of the state in the constitutional sense? The underlying purpose of the constitutional provisions concerning the creation of state debt was that they should serve as a limit of taxation—as a protection to taxpayers, and especially those whose property might be subjected to taxation. This purpose will be defeated if it should be held by this court that a debt for the construction of a state highway system, payable exclusively from federal aid moneys and special license taxes to be borne by the persons who will derive the principal benefits from the state highway system, is not a debt of the kind required by the Constitution to be approved by the voters of the state before it is incurred. According to the weight of authority in other states, such a debt does not fall within the terms of such a constitutional provision."

Our Supreme Court has spoken upon the question of the issuance of treasury notes.

In 1919 the Fifteenth Session of the legislature enacted Chapter 94 of the laws of that year. That enactment was for the purpose of anticipating the revenue to accrue to the General Fund of the State of Idaho for taxes levied for the current biennium.

This act was before the Supreme Court in the case of *State v. Eagleson*, reported in 32 Idaho, at page 276, for the purpose of construction, and the Supreme Court held that the issuance and sale of treasury notes in conformity with said act does not incur an indebtedness within the meaning of Article VIII, Section 1, of the Constitution, hereinabove quoted; and in said decision, the court quoted with approval the principle laid down in the case of *Stein v. Morrison*, reported in 9 Idaho, at page 426, as follows:

"The appropriations for current expenses and the raising of revenue to meet those appropriations have been treated by the people in framing and adopting the organic law as a cash transaction. The decision of the court upon this point is summarized in the syllabus as follows:

"The public revenues may be appropriated by the legislature in anticipation of their receipt. \* \* \* and it is not necessary to the validity of such an appropriation that funds should be in the treasury at the time to meet the same.

"Such appropriations do not constitute a debt



or liability against the state within the provisions of Section 1, Article 8, of the constitution. \* \* \*."

It is, therefore, my conclusion that the motor fuels tax may be pledged by the legislature for a period of twenty years to secure the repayment of said notes, and such notes if issued in the amount of \$11,000,000 would not be such a debt of the state as to come within the prohibition of the Constitution so long as the enactment providing for such issue does not attempt to pledge the full faith and credit of the state. Should the legislature attempt to pledge not only the gas tax moneys but also the credit of the state to the repayment of such notes, then in my opinion such act would be contrary to the Constitution. See *State ex rel. v. Executive Council (Iowa)* 223 N. W. 737.

May I suggest in passing that in the issuance of such notes they should show on their face that they are to be paid solely out of moneys arising from the tax upon motor fuels. The notes should not read that the State of Idaho "acknowledges its indebtedness," but instead should recite: "The State of Idaho for value received hereby promises to pay," etc.

The next question which arises is whether or not the legislature having pledged such motor fuels tax might

#### MAKE SUCH ENACTMENT IRREPEALABLE

and thereby forbid future sessions from repealing such law with the resulting destruction of the security and revenue pledged for the payment of the notes.

Cooley on Constitutional Limitations, Volume 1, Eighth Edition, page 248, after reciting the general rule that one legislature may not by its acts bind a subsequent one, says:

"There is a modification of the principle, however, by an important provision of the Constitution of the United States, forbidding the States passing any laws impairing the obligation of contracts. Legislative acts are sometimes in substance contracts between the State and the party who is to derive some right under them, and they are not the less under the protection of the clause quoted because of having assumed this form."

25 Ruling Case Law at page 909 says, after referring to the general rule that one legislature is competent to repeal or modify any act of a former legislature:

"But this general principle has exceptions. A constitutional act of the legislature which is equivalent to a contract when performed is a contract executed, and whatever rights are thereby created

a subsequent legislature cannot impair. Where a valid contract with the state has been entered into in pursuance of a legislative enactment a subsequent legislature cannot enact a law which provides for an abrogation of the contract."

To recur to first principles, it will be recalled that in the famous Dartmouth College case the legislature of New Hampshire attempted to alter its charter in a material respect, and John Marshall, speaking for the court, denied the right of the legislature to change or alter the term of a contract.

It is, therefore, my opinion that one of our legislatures might be pledging the motor fuels tax at four or five cents a gallon to repayment of treasury notes thereby creates such a contract between the state and the purchaser of such notes that a subsequent legislature could not lower the rate of the gas tax or repeal the legislation mortgaging it.

You also inquire:

**MAY A PORTION AND NOT ALL OF THE MOTOR FUELS TAX BE CHARGED WITH THE REPAYMENT OF THE SAID NOTES?**

Precedent exists for such a plan. The "Pay-As-You-Go" Act of South Carolina, ((33 Statutes at Large 1193)), provided that three-fifths of a five cent gasoline tax be pledged in a manner very similar to the instant plan. The court apparently approved in the case of Briggs vs. Greenville County, supra, and in Evans vs. Beattie, (S. C.) 135 S. E. 538.

It is my conclusion that our legislature might make such a division, reserving for the use of the Department of Public Works such portion of the tax as might not appear necessary for the retirement of the notes.

Plans 1 and 2 have been covered by the foregoing.

#### **POWERS OF A LEGISLATURE IN SPECIAL SESSION**

Section 9 of Article IV of the Constitution relates to extra sessions of the legislature and is as follows:

"The governor may, on extraordinary occasions, convene the legislature by proclamation stating the purposes for which he has convened it; but when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation; but may provide for the expenses of the session and other matters incidental thereto. He may also, by proclamation, convene the senate in

extraordinary session for the transaction of executive business."

It will be observed that this section does not expressly provide such powers the legislature has when convened in extra session, but that it does expressly limit its power to legislate on subjects specified in the Governor's proclamation. The question then arises, what power does the legislature have when convened in extra session?

36 Cyc. 944, paragraph (b), treating of special or extra session, declares:

"Where there is no constitutional restriction upon the authority of a legislative body in special session, it may enact any law at such session that it might at a regular session."

An examination of a long line of cases declares the rule that would govern in this state that a legislature in extraordinary session may do anything it may do at a regular session, provided the subject of the legislation has been specified in the call made by the Governor.

It is, therefore, my conclusion that at a special or extraordinary session of the legislature of this state the legislature might submit to a vote of the people the question of making the notes provided by the third proposal of a general obligation of the state as well as a lien upon the motor fuels tax.

It is next pertinent to inquire as to whether an issue of \$10,000,000 would violate Section 1, of Article VIII of the Constitution, even though submitted to a vote of the people.

It is, therefore, my opinion that by proper enactment of the legislature duly submitted to the vote of the people in the manner provided by the Constitution an issue of the size mentioned, when approved by the vote of the electorate of the state, would not conflict with the section of the Constitution mentioned. It is my further view that pledging the full faith and credit of the state to the payment of treasury notes would place them, as to the fact of them being a debt and obligation of the state, in the same standing as bonds.

And now to sum up the views herein expressed, it is my opinion:

1. That the legislature may provide for the issuance of \$11,000,000 of treasury notes to be issued over a period of five years and repayable within twenty years, but to do so it may not pledge the credit of the state, but may appropriate the motor fuels tax moneys for that period of time, and such an enactment would be irrepealable by

any succeeding legislature. That if on the other hand the full faith and credit of the state be pledged to their payment in event the gas tax should fail, then such a provision would render the act unconstitutional.

2. That the so-called one-year plan might be enacted providing for the repayment of notes in the amount of \$1,000,000 during the succeeding five-year period.

3. That the so-called General Obligation Plan might be provided at a special session of the legislature and would require an enactment of a law and its submission to a vote of the people.

*To Honorable H. C. Baldrige,  
Governor of Idaho,  
January 14, 1930.*

W. D. GILLIS,  
Attorney General.

## HIGHWAY DISTRICT

### Publication Financial Statement of Highway District

#### 44. QUESTION:

Must the financial statement of a highway district, as authorized by Section 1518 of the Compiled Statutes, be published in itemized detail, enumerating the warrants, item by item, and to whom paid?

#### OPINION:

This question must be distinguished from the publication required in connection with school districts. This office has heretofore held in reference to the reports of school districts that the publication must be itemized because the law, Section 46, Chapter 215, Laws of 1921, provides as follows:

"That the report of any expenditures shall contain the specific items, amounts, the names to whom such expenditures were made."

Doubtless it is from the above provision that the confusion has arisen in the minds of the newspaper men of the state. In connection with a highway district a different situation is presented. In the instant matter, the statute makes no such requirement, it only requiring that a statement be filed giving a full, true and correct statement of the financial condition of the district, containing a statement of the liabilities and assets of the district on the first Monday of January, and that a copy of such statement shall

be published in at least one issue of some newspaper published in the county.

"It is the opinion of this office that the only publication necessary is a statement containing a brief report of the liabilities and assets of the district, and that it is not necessary that such report contain an enumeration, item by item, of each warrant and to whom it was paid.

*To Mr. George L. Ambrose,  
June 5, 1929.*

W. D. GILLIS,  
Attorney General.

### **Territory Which May Be Included in Highway District**

#### **45. QUESTIONS:**

May a highway district be formed, including a Good Roads District and a village?

Is it necessary that the majority of the vote in each unit be in favor thereof?

#### **OPINION:**

Replying to your first inquiry, Section 1502 of the Idaho Compiled Statutes provides as follows:

"Any good road district now or hereafter created under the provisions of Chapter 65 may be organized as a highway district by the affirmative vote of a majority of the qualified electors thereof, or of the proposed highway district, if additional lands are included, voting on the question at an election therefor, regardless of the area of assessed valuation of the territory and regardless of the regularity and validity of the proceedings for the creation and organization of the good roads district. Lands adjacent to the good roads district and not included in any other organized district may be included in the petition for the organization of the highway district if the holders of title or evidence of title to such lands join in the petition. The petition for the organization of a highway district under this section shall be signed by 20 or more holders of title or evidence of title to lands wholly within the proposed district. Upon the organization of such highway district, it shall take over all property and records and shall be liable for all obligations of the previously existing good roads district which shall thereupon and thereby be dissolved. Except as in this section otherwise provided, all the proceedings for the organization of a highway district under this section shall be the same as are or may be provided for the organization of highway districts from unorganized territory."

Section 1491 of the Idaho Compiled Statutes provides in part as follows:

"Whenever 50 or more of the holders of title or evidence of title to lands aggregating not less than 20,000 acres of contiguous territory or consisting of contiguous territory of less extent but having an assessed valuation of at least \$1,000,000 at the last preceding county assessment desire to provide for the organization of the same as a highway district, none of their said lands being included within the boundaries of an already created and organized highway district they may propose the organization of a highway district under the terms of this chapter."

Section 1543 of the Idaho Compiled Statutes anticipates a municipality being included in a highway district.

Sections 1568 and 1569 of the Idaho Compiled Statutes also contemplate that a municipality may be included within such highway districts.

It is, therefore, my opinion that a highway district may be formed including a Good Roads District and a village.

Replying to your second inquiry, Section 1502 of the Compiled Statutes of Idaho in addition to providing that a Good Roads District and other additional territory may be included in a highway district also provides that a majority of the qualified electors of the entire territory must vote in favor of the formation of such highway district. This majority vote is regardless of the area or assessed valuation of the territory.

It is, therefore, my conclusion that it is not necessary that there be a majority vote in each unit in favor thereof but that there must be a majority vote of the whole territory included within the proposed district.

Replying to your last inquiry not included in the above caption I must advise you that this office cannot attempt to give you the detailed steps necessary to accomplish the organization of a highway district. The law provides that an attorney may be employed for such purpose and you should employ counsel in the formation of your highway district.

*To Mr. Walter J. Scott,  
April 3, 1929.*

W. D. GILLIS,  
Attorney General.

### Dissolution of Highway District

#### 46. QUESTION:

1. If a petition properly signed is filed with the Commissioners of a Highway District, for its dissolution, must the board act upon the same?

2. If a county has a bonded indebtedness of \$600,000.00 when a highway district within said county is organized, and which bond issue has not been entirely retired, to what extent is the district obligated for its share of said bond issue?

3. May the county place all funds derived from auto licenses apportioned, including the district's portion, in the Sinking and Interest Fund for retirement of said bond issue, or should the county pay the balance of said funds to the highway district, after deducting a sufficient portion to take care of the highway district's portion of the Interest and Sinking Fund?

#### OPINION:

Replying to your first inquiry, Sections 1570 and 1571 of the Compiled Statutes have to do with the disorganization of highway districts and the duties of the county commissioners therein.

Section 1570 provides that if the proper petition is presented to the highway commissioners, the highway district *shall* within thirty days thereafter, file the petition with the Board of County Commissioners. This petition must state that there is no existing indebtedness, either bonds or otherwise, existing against the highway district for which there are not sufficient funds in such district to pay.

I assume, for the purpose of this opinion, that your highway district has no such indebtedness. That being the case, the highway board must act, within the period provided, upon the petition. If, on the other hand, the said highway district, does have indebtedness for which there are not sufficient funds in the treasury of the highway district to pay, then, of course, the board could not act upon the petition and transmit it to the Board of County Commissioners because the petition would not be sufficient in that it did not comply with the statutory requirements.

It is apparent that it is the intention of the law that a highway district may not be dissolved which has obligations that may not be liquidated and for which it does not have funds to pay at the time of such proposed dissolution.

Replying to your second inquiry, Sections 1524 and 1529 of the Compiled Statutes provide for the apportionment of county road and bridge funds. These sections were considered in the case of LaClede Highway District v. Bonner County, 33 Idaho 476, at 483. In this case, the Supreme Court of the State of Idaho said:

"In other words, the district is not to participate in any of so much of the funds as shall be necessary to satisfy any liabilities which the county has incurred prior to its organization, chargeable thereto. By so providing, the legislature has clearly sought to keep within the constitutional inhibition requiring needed funds to be kept in the county treasury in the fund for which levied."

Section 1569 of the Compiled Statutes provides that highway districts shall supersede all other road districts or parts of districts within the limits of such highway district and provides further:

"\* \* \* Provided, that where, prior to the organization of a highway district, bonds shall have been lawfully issued by the county or by a good road district or by any other body politic or political subdivision including within its territory property afterward included within the highway district, the proper corporate authorities of such county, good road district or other body politic or political subdivision shall continue to levy, collect and apply the taxes necessary to discharge the obligation of such bonds; and nothing in this chapter shall be construed as affecting any power of any incorporated city, town or village, or portion thereof, lying within the limits of a highway district, to issue bonds as empowered by law and to levy, collect or apply the necessary taxes therefor."

I conclude from the foregoing, and it is my opinion that the matter of the payment of the bonded indebtedness existing at the time the highway district within said county is organized, covered by the foregoing sections mentioned being 1524, 1529 and 1569 of the Compiled Statutes, persists and continues while the highway district is in existence and, of course, continues after any dissolution of the district. The district would carry no greater or lesser obligation for its share of the bond issue after dissolution than it did at the time it was organized.

Replying to your third inquiry, the county has the right to place the auto license money in the Interest and Sinking Fund. It is made its duty by the provisions of the statutes above set forth except that where there is a surplusage remaining after the required amount has been placed in



the Interest and Sinking Fund, the highway district's proportion of the balance being credited to such highway district.

To Mr. John Heer,  
March 25, 1929.

W. D. GILLIS,  
Attorney General.

## INDIANS

### Tribal Indians Entitled to Vote

#### 47. QUESTION:

Are tribal Indians entitled to vote within the State of Idaho?

#### OPINION:

Section 3, of Chapter 1, of Title 8, U. S. C. A., grants citizenship to all Indians born within the territorial limits of the United States. This was enacted June 2, 1924. It specifically provided that the granting of citizenship to Indians shall not in any manner affect the right of any Indian to tribal or other property.

Section 3, of Article VI, of the Constitution of the State of Idaho, provides in part as follows:

"No person is permitted to vote, \* \* \* nor Indians not taxed, who have not severed their tribal relations and adopted the habits of civilization, \* \* \*."

The Fifteenth Amendment to the Constitution of the United States, provides in part as follows:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any States on account of race, color, or previous condition of servitude."

Sec. 1, Am. 15, Const. U. S.

It is therefore, my opinion that since the United States government has granted to all Indians born within the territorial limits of the United States, the rights of citizenship, that Indians thus become citizens of the state in which they reside and under and by virtue of the Fifteenth Amendment to the Constitution of the United States, that portion of the Idaho State Constitution herein quoted, becomes in-operative.

It is, therefore, my conclusion that all Indians, whether tribal or not, who have been born within the territorial limits of the United States and have otherwise complied

with the qualifications for voters within the State of Idaho, are entitled to vote within this State.

To Mr. C. W. Leaf,  
September 11, 1930.

W. D. GILLIS,  
Attorney General.

## INSURANCE

### Liens of Taxes on Fire Insurance Loss

#### 48. QUESTION:

Does a law exist making taxes which are not fully paid a lien against a fire insurance loss payment?

#### OPINION:

Section 3270 of the Compiled Statutes, as amended by Section 8, Chapter 263 of the Laws of 1929, relating to losses by fire, declares a lien on the insurance as follows:

"In the event of the destruction of personal property by fire after the second Monday in January of any year the lien of the personal property tax shall attach to and follow any insurance that may be upon said property and the insurer shall pay to the county assessor from the said insurance money all taxes, interest and costs that may be due unless relieved therefrom by the board of county commissioners."

It is my opinion, therefore, that the lien of the personal property tax upon personal property destroyed by fire after the second Monday in January of any year attaches to and follows any insurance that may be upon any such personal property and that the insurer is obligated to pay all taxes, interest and cost that may be due upon such property, from such insurance, unless relieved therefrom by the board of county commissioners.

To Rossi Insurance & Investment  
Company,  
September 25, 1929.

W. D. GILLIS,  
Attorney General.

## IRRIGATION

### Assessments for Community Lateral Ditches

#### 49. QUESTION:

How are the assessments to be made in a Community lateral Ditch as authorized in Chapter 213, Laws of 1927?

## OPINION:

Section 3 of this act provides that the directors of the association and the lateral manager shall make an examination of the ditch or ditches and make an estimate of the cost to repair and improve the same and to maintain the flow of water therein for the season, together with all other expenses of the ditch association and the cost thereof shall be pro-rated to each water user from said lateral in the following manner:

If the water is for agricultural lands, then in proportion to the water which the owner is entitled to receive from such ditch, or if it is for lots within any city or village, then the assessment must be made upon the basis of each lot, the same to be uniform upon lots of the same size.

It appears that the directors referred to by you in your letter have proceeded in the manner authorized by law, and have used the discretion vested in them under said Section 3. If you believe they have abused their discretion, then your recourse is to the courts to have the matter tried out as to whether or not there was an abuse of discretion on the part of the directors and manager.

I can give you no opinion as to the influence, you state you fear is involved, of the "strangely domineering, red-headed grass-widow." I can only suggest for your consolation in that respect that Cleopatra, Madam DuBarry, and several other women who have wrecked thrones, were red-headed. What one of them might do to an irrigation district board is beyond even conjecture.

W. D. GILLIS,  
Attorney General.

February 15, 1929,

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**Decrees res Judicata of Water Rights****50. QUESTION:**

In reference to the adjudication of the waters of Snake River, as covered by the decree entered in the case entitled "Rexburg Irrigation Company, et al, vs. Teton Irrigation Company, et al," in which case numerous awards were made and particularly to some lands which are sub-irrigated in the vicinity of St. Anthony and Rexburg, in some of which cases the quantity of water decreed is larger than is ordinarily required, due to the sub-irrigation above mentioned, could any of said water right owners be required to relinquish a part of their rights because of the fact that they

actually employ amounts of water per acre greatly in excess of that employed in usual irrigation projects?

Stating the proposition in another way—are parties and their successors in interest to an action involving the right to the use of waters in this state conclusively bound by a judgment and decree entered and rendered in such actions?

OPINION:

Actions involving water rights are civil actions in this state and are commenced in the District Court which has absolute jurisdiction over such actions with the right of appeal therefrom to our Supreme Court. (See Section 7032, Compiled Statutes.)

Section 7036 of the Compiled Statutes provides for a summary supplemental proceeding for the adjudication of water rights.

With reference to the adjudication of the use of water in this state, our Supreme Court in the case of Joyce vs. Murphy Land and Irrigation Company, 35 Ida. 549, 208 Pac. 241, laid down the following doctrine:

"In an action upon the same claim or demand as litigated in a former action between the same parties, the former adjudication concludes parties and privies, not only as to every matter offered and received to sustain or defeat the claim, but also as to every matter which might and should have been litigated in the first suit."

See also Shields vs. Johnson, 12 Ida. 333, 85 Pac. 972;

King vs. Co-operative Sav. etc. Assn., 6 Ida. 766, 59 Pac. 557.

The above is the doctrine of other jurisdictions and seems to be the general rule.

Long on Irrigation (2nd Ed.) Sec. 232, has the following to say:

"The decrees of a court of competent jurisdiction in a suit for the adjudication of water rights, when final and unreversed, like decrees in other suits, are res judicata of the subject-matter of the suits, as between the parties thereto and their successors in interest. And this is true, whether the court based its opinion and decree upon a correct or an erroneous view either of the law or of the facts. \* \* \*"

Wiel on Water Rights in the Western States, (3rd Ed.) at Sec 1233, says:

"The decrees are not open to collateral attack. They are conclusive upon the parties. \* \* \*"

It is, therefore, my conclusion and opinion that the decrees you mention, where the water is diverted to a beneficial use, even though it is seemingly an excessive amount may not be collaterally attacked, and the water rights in question are res judicata of the subject-matter of the suits, as between the parties thereto and their successors in interest.

*To Myron Swendsen,  
Assistant Commissioner of  
Reclamation,  
July 30, 1929.*

W. D. GILLIS,  
Attorney General.

### Filings on Subterranean Water

#### 51. QUESTION:

1. May one file on subterranean waters underlying government land which is subject to homestead entry and upon which no entry has been made?
2. Assuming the answer to question one to be in the affirmative, what are the rights of a person who subsequently makes homestead entry upon said land or acquires said land, to this water as against the original appropriator?

#### OPINION:

The first question to be determined here is whether or not one can acquire by appropriation, water as against a subsequent patentee.

In the case of *Keiler v. McDonald*, 37 Idaho 573, 218 Pac. 365, it was held that the water of a spring situated wholly upon government land was subject to appropriation for beneficial use, and that such appropriator might restrain a subsequent patentee of such land or his successor in interest from any interference with the use of such water or the easement over which the same was conducted to his premises. In that case the Supreme Court used the following language:

"The facts of this case and the legal questions involved are quite analogous in many respects to those involved in *Short v. Fraisewater*, 35 Ida. 691, 208 Pac. 844, wherein it is held that the waters of a spring situate upon government land are subject to appropriation, and that after the same have been appropriated and applied to a beneficial use, one who thereafter secures title from the government takes such title:

"Subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized by the local laws, customs and decisions of courts, etc."

Section 5558 of the Idaho Compiled Statutes provides as follows:

"The right to the use of the waters of rivers, streams, lakes, springs, and of subterranean waters, may be acquired by appropriation."

Section 5559 of the Idaho Compiled Statutes provides as follows:

"The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases."

Section 5561 of the Compiled Statutes provides:

"As between appropriators, the first in time is first in right."

In *Wiel on Water Rights in the Western States*, at Section 257, we find the following rule:

"No matter what the character of the later land grant, it is not divested of prior rights of appropriation of water or rights to ditches acquired while the land was public. This is true under both the California and Colorado doctrines of water law (except that the latter does not rest it upon the act of 1866, but upon local law alone). \* \* \*"

"This is a point now no longer questioned, and it is hard today to appreciate that it furnished the early controversy in the Western water law. The Nevada court once held otherwise, on the ground that appropriators were trespassers, but Congress settled the contrary in the acts of 1866 and 1870 and the supreme court of the United States held that the appropriation prevailed even before that act. The Nevada case was overruled, and today a public land diversion is in all jurisdictions a vested right, which is protected whether the later land patent was issued before or after 1866, and whether it does or does not contain a clause reserving accrued water rights. Successors in interest of the original appropriator are protected, notwithstanding the patent did not reserve any vested or accrued water right, but land patents now contain a clause expressly reserving existing water rights, the origin of which excepting clause is shown in the note. The same thing applies to rights of way."

From a consideration of the above authorities it is apparent that the one making the prior appropriation for

beneficial purposes has the right to that water, even though it be on government or public lands and this right is good as against a subsequent entryman or patentee or any one who may acquire such property.

The next question to be considered is whether or not subterranean waters or percolating waters may be appropriated in the same manner as the water from springs or streams. This question in my opinion has been definitely decided by both the California and the Colorado cases which hold that the source of the water is immaterial whether it be from a spring, stream or underground or percolating water.

It is, therefore, my opinion and conclusion that one may file on subterranean water underlying government lands and that a person subsequently making homestead entry upon said lands acquires no rights to such water or ditches or easements employed for carrying of water as against the original appropriator.

*To Honorable Geo. N. Carter,  
Commissioner of Reclamation,  
May 16, 1929..*

W. D. GILLIS,  
Attorney General.

## IRRIGATION DISTRICTS

### Public Depository Act Applicable to Irrigation Districts

#### 52. QUESTION:

Are irrigation districts such taxing districts as to come under the Public Depository Act, for which county auditors must act as custodians for their securities in the protection of their moneys on deposit in banks?

#### OPINION:

Section 2 of Chapter 256 of the Laws of 1921 known as the Public Depository Act provides that it is designed to safeguard and protect the funds of all political subdivisions and of all municipal and quasi-municipal corporations of the state, having the power to levy taxes or assessments, and that it applies to such subdivisions now existing or hereafter created whether organized under the general laws or any special law of the state. The Supreme Court of the State of Idaho in the case of *Gem Irrigation District v. Van Deusen*, 31 Idaho 779, and in the case of *Storey & Fawcett v. Nampa, etc. Irrigation District*, 32 Idaho 713, holds that irrigation districts are municipal corporations.

Section 4 of the Depository Act as amended by Chapter 45 of the Laws of 1925 provides specifically that irrigation districts are to be considered as a depositing unit.

It is, therefore, my opinion that an irrigation district is a depositing unit under the Public Depository Act and that the county auditor must act as custodian for its securities.

*To Mr. B. F. Wilson,*  
*May 6, 1929.*

W. D. GILLIS,  
Attorney General.

## JUSTICE COURTS

### Justice of Peace May Not Commute Sentence

#### 53. QUESTION:

May a justice of the peace commute a sentence?

#### FACTS:

The facts I take from the minutes of the court as signed by the justice of the peace, which you submit. They are as follows:

"A deputy game warden filed a complaint charging defendant with hunting Chinese pheasants out of season. The defendant appeared and pleaded guilty to the charge. The court adjudged the defendant guilty and later assessed a \$25.00 fine and costs in the amount of \$8.00, and ordered the gun of the defendant sold in accordance with law."

It appears that the court transmitted \$5.00 to the Department of Fish and Game and made an entry remitting \$20.00 of the fine.

From the foregoing, the following questions arise:

1. "Has a justice of the peace authority to commute such sentence under the law?"
2. "Has a justice of the peace authority to remit to a defendant any portion of a fine levied against him?"

#### OPINION:

The penalty for the violation of Chapter 126, known as the Fish and Game Law, is provided for by Section 2302 of the Idaho Compiled Statutes, which provides as follows:

"Any person or persons, company or corporation, agent or employee who shall violate any of the provisions of this chapter shall be guilty of a misdemeanor and, upon conviction thereof, shall except where a special penalty is provided, be fined in a sum of not less than \$25.00, nor more than \$300.00 and the cost of the prosecution or by imprisonment



in the county jail for not less than 30 days nor more than six months, or may be punished by both such fine and imprisonment, within the discretion of the court."

An examination of the foregoing shows it to be mandatory and does not permit the court to assess a fine of a lesser amount than \$25.00 upon a plea of guilty.

The question presented then is whether or not a justice's court may fix such a fine and reduce the same or remit a portion thereof to the defendant.

This office in an opinion written by my predecessor to Wright A. Stacey dated June 24, 1927, held:

"Chapter 104 of the 1915 Session Laws extended the right of suspension and withholding of judgment *in criminal cases only to the district court*. The 1915 Act was amended by Chapter 134 of the 1919 Session Laws and certain portions of the 1915 act were omitted but it is the opinion of this office that it was not the intention of the legislature to extend the right of parole and extension of sentence at the time of pronouncing judgment to justices of the peace and probate courts."

In that opinion I concur.

In the matter of the application of H. C. Jennings for a Writ of Habeas Corpus, 46 Ida. 142, 267 Pac. 227, our Supreme Court held that a probate court has jurisdiction to impose a fine of \$200.00 and a 90 day jail sentence for violation of the prohibition law, and that such part of the sentence was valid, but that an attempt to exercise a power of parole constitutes a nullity. The court further held that an order suspending a sentence without authority and made a part of a judgment or attached to it is a surplus charge and will be disregarded, and it was held that the court had the power to require execution of the original judgment insofar as it was valid.

Our Supreme Court in the above entitled case said:

"Appellant contends that the judgment of the Probate court is void. Respondent concedes that that portion of the judgment wherein the court attempted to exercise the power of parole is an absolute nullity.

"The court had complete jurisdiction to impose the fine and imprisonment and that part of the sentence was therefore valid. It is a general rule that where a sentence consists of a void portion and a valid portion, which are severable, the courts will give effect to the valid portion.

"An order suspending sentence without authority, made part of a judgment or attached to it, is surplusage and will be disregarded.

"The remaining question is whether the probate judge had the power to require the execution of the original judgment, insofar as it was valid, long after the judgment was rendered and after the time when the term of imprisonment specified in the judgment had expired.

"There is a conflict of authority but a consideration of the cases leads us to believe that by the great weight of authority, where the court makes an unauthorized order suspending the execution of the sentence imposed by the judgment, such order does not prevent the subsequent enforcement of the valid portion of the sentence at a later date."

It is a fundamental rule of criminal law that when a judgment is entered it may only be satisfied by compliance by the defendant with the actual serving of the time of imprisonment or by paying the fine imposed unless the same be remitted by death or by some executive power within which the right of pardon or remission of fine is lodged.

In the case of *Ex Parte Collins*, 97 Pac. 188, it appears that one Collins pleaded guilty to a charge of vagrancy and a judgment of imprisonment for a term of six months in the county jail was imposed. The judgment was not executed at that time. The justice of the peace entered in his docket the following: "Commitment withheld," and allowed the defendant to have his liberty. Later a commitment in execution of said judgment was issued by the justice and the sheriff took this defendant into custody and confined him in the county jail. In denying the discharge of the defendant, the court said:

"It may even be conceded that the rule declared in those cases in which the plea of guilty or verdict of conviction has been entered, but no sentence imposed, to-wit, that an agreement or condition that the defendant may remain at large unsentenced is void, and that the suspension of the sentence entered by consent is unauthorized \* \* \* is applicable here, and the invalidity of the subsequent order staying execution be admitted for that reason, yet this would not avoid the original judgment \* \* \*. It would still be a valid, substituting, unexecuted judgment. The time at which a judgment or sentence shall be carried into execution forms no part of the judgment of the court. The judgment is the penalty of the law, as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution. Where the penalty is imprisonment the sentence of the law is to be satisfied only by the actual suffering of the imprisonment imposed,

unless remitted by death or by some legal authority. The expiration of time without imprisonment is in no sense an execution of the sentence.\* \* \*

"Where the convicted defendant is at liberty and has not served his sentence, if there be no statute to the contrary, he may be re-arrested as an escape, and ordered into custody upon the unexecuted judgment. \* \* \*"

From an examination of these authorities, it is apparent that the justice of the peace exceeded his authority in attempting to reduce the minimum fine which he could levy, and as a plea of guilty by this defendant amounted to a conviction, it was the duty of the justice of the peace to levy a fine of not less than \$25.00 or not to exceed \$300.00, or to sentence him to not less than thirty days or more than six months in the county jail, or both such fine and imprisonment. The justice of the peace having adjudged the minimum sentence of \$25.00 and ordered the sale of the gun might not thereafter remit any part of the sentence or order modification of the judgment as to the sale of the gun.

*To Honorable R. E. Thomas,  
State Game Warden,  
April 10, 1930.*

W. D. GILLIS,  
Attorney General.

## STATE LANDS

### Lessee of State Lands May Enjoin Trespassers and Sue for Damages

#### 54. QUESTION AND OPINION:

In answer to your letter of June 18, 1930, regarding trespassing upon state lands leased by you, will say that our Supreme Court, in the case of Azcuenaga Brothers etc. Land Company v. Cortra, reported in 19 Idaho 537, held that a lessee of state lands has such an interest in the property, as to enable him to maintain an action to enjoin and restrain trespassers from entering upon the property and committing waste.

You also have the right to bring an action to recover any damages committed by such trespassers.

*To Mr. E. C. White,  
June 26, 1930.*

S. E. BLAINE,  
Assistant Attorney General.

### Dedication of Streets Thru State Lands

#### 55. QUESTION:

Did the State Board of Land Commissioners have the power to dedicate for public use the streets shown upon the plat of Island Park Subdivision in Section 36, Township 14 North, Range 43 East? If the said State Board of Land Commissioners had the authority to dedicate the streets to a public use, has the board authority to vacate that part of Hawley Street intersecting blocks 15 and 16 of said subdivision?

#### OPINION:

As I have the facts in connection with this question they are as follows: The State of Idaho filed for record in the office of the Recorder of Fremont County, Idaho, on December 30, 1912, a plat of Section 36, Township 14 North, Range 43 East, laying out in lots and blocks the lands just mentioned. You advise this office that you are unable to find anything in your office to indicate how the streets were dedicated, if at all. You state that the acreage was sold in lots and apparently did not include that land set apart for streets. We may, therefore, fairly assume that the State Board of Land Commissioners at the time of filing said plat intended to dedicate such streets shown upon said plat to a public use. It appears that blocks 15 and 16 have been sold and that the owner of lot 59 of block 16 and the owner of lot 60 of block 15, which lots are adjacent to Hawley Street, now desire to vacate the street dividing the lots just mentioned.

Section 4 of the Idaho Admission Bill provides:

"That sections numbered 16 and 36 in every township of said State, and where such sections or any parts thereof, have been sold or otherwise disposed of by or under the authority of any Act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the Legislature may provide, with the approval of the Secretary of the Interior."

Section 5 thereof provides that:

"That all lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the

support of said schools. But said lands may, under such regulations as the Legislature shall prescribe, be leased for periods of not more than five years, and such lands shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

Section 8 of Article IX of the Constitution of the State of Idaho provides in pertinent part as follows:

"It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to the state by the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount therefor: PROVIDED, That no school lands shall be sold for less than ten dollars per acre. \* \* \*"

The legislature made the following provision for the sale of state lands, said provision being found in Section 2913 C. S., which was the law in effect at the time of the platting of said land:

"The State board of land commissioners may at any time direct the sale of any state lands in such parcels as they shall deem for the best interest of the state. All sales of state lands shall be advertised in four consecutive issues of some weekly newspaper in the county in which such land is situate, if there be such paper, if not, then in some newspaper published in an adjoining county, and in such other paper or papers as the board may direct. \* \* \* No land shall be sold for less than its appraised value nor for less than \$10 per acre. \* \* \*"

Section 4087, C. S., provides in pertinent part as follows:

"When any owner or proprietor of any tract or parcel of land wishes to lay out a town site or an addition to any town, village or city or *sub-division of out lots*, he shall cause the same to be surveyed and a plat thereof made, which shall particularly and accurately describe and set forth all the streets, alleys, commons or public grounds. \* \* \*"

Section 4088, C. S., provides in pertinent part as follows:

"The correctness of said plat must be certified to by the surveyor making the survey, \* \* \* and the owner or owners of the land \* \* \* must also make a deed of donation of all streets and alleys, shown on said plat, \* \* \*"

"No plat, \* \* \* or subdivisions of out lots, shall be accepted for record by the recorder of any county unless said plat shall have first been sub-

mitted to the city council, board of trustees or other governing body of the town, village or city to which said \* \* \* subdivisions of out lots belong, \* \* \*."

It is my opinion from an examination of the Admission Bill and our Constitution in reference to the sale of lands granted to the state by our federal government that the land in question herein cannot be disposed of in any manner except by the sale thereof at public auction, as provided by Section 2913, C. S., or by eminent domain, as provided by Chapter 270, C. S., or under the provisions of Chapter 133, C. S., which relates to rights of way over state lands.

The Supreme Court of Idaho, in the case of *Newton vs. State Board of Land Commissioners*, 37 Ida. 58, held that:

"Sec. 5 of the Idaho Admission Bill, which provides that 'all lands herein granted for educational purposes shall be disposed of only at public sale,' and sec. 8, art. 9 of the constitution, which provides that 'no school lands shall be sold for less than ten dollars per acre,' are mandatory and prohibitive, and the state board of land commissioners is without authority to effect an exchange of state school lands after the same have been surveyed for other lands with the government of the United States."

See also *Idaho-Iowa Lateral & Reservoir Co. vs. Fisher*, 27 Ida. 695;

*Balderston vs. Brady*, 17 Ida. 567.

From the foregoing, it is my opinion that the State Board of Land Commissioners had no authority to dedicate any of the state lands described in the plat herein to a public use, and, it therefore, follows that the title to the lands purported to have been dedicated on said plat as streets still vests in the State of Idaho, and cannot be disposed of except by public sale or in the manner as provided by Chapter 133, C. S., or Chapter 270, C. S.

*To Honorable I. H. Nash,*  
*State Land Commissioner,*  
*August 12, 1929.*

*W. D. GILLIS,*  
*Attorney General.*

#### Sale of Purchaser's Interest for Water Assessments

##### 56. QUESTION:

May the interest of a state land certificate be transferred by a tax sale for water assessments in an irrigation district?

## OPINION:

It appears the interest in said certificates is now held by the Center Irrigation District, the title to the same having been quieted in them, through action brought for that purpose.

Section 2914 of the Compiled Statutes as amended by Chapter 218 of the Laws of 1927, provides in pertinent part to this inquiry as follows:

"\* \* \* Whenever a purchaser of state lands shall have complied with all of the conditions of the sale, and paid all purchase money with the lawful interest thereon, he shall receive a deed for the land purchased. \* \* \*"

Section 2918 of the Compiled Statutes provides as follows:

"Whenever a certificate of purchase shall be lost or wrongfully withheld by any person from the owner thereof, the state board of land commissioners may receive evidence of such loss or wrongful detention, and upon satisfactory proof of the fact, may cause the certificate of purchase, or deed, as the case may be, to issue to such person or to his grantees or assigns, as shall appear to them to be the proprietor of the land described in the original certificate of purchase."

It is the opinion of this office that the interest of the purchaser of state lands can be transferred. This is confirmed by Section 2918, *supra*, where it states that a deed may be issued to the purchaser or to his grantees or assigns.

In the instant case, it appears that the state lands in question are situated within an irrigation district. The purchaser and his assigns failed to pay the assessments levied by the district, and the lands were sold for delinquent assessments. Thereafter a tax deed was issued to the Center Irrigation District covering the interest of the purchaser from the state.

It is my opinion that upon presentation by the said Center Irrigation District of a certified copy of the decree quieting title to said lands that such decree is sufficient evidence for the State Board of Land Commissioners to issue a certificate for said lands to the said irrigation district. The said irrigation district would, of course, receive such certificate of purchase burdened with all sums that the state might not have received from the original purchaser.

To Mr. Edwin Snow,  
May 28, 1929.

W. D. GILLIS,  
Attorney General.

**Equity of Purchaser Taxed As Personal Property:  
Penalty for Delinquency Applies.**

**57. QUESTIONS:**

1. Are taxes on the equity of a purchaser of state lands taxed as personal property taxes?
2. Can penalties be added after delinquency?

**OPINION:**

Replying to your first inquiry:

Section 2920 of the Compiled Statutes provides in part as follows:

"All lands sold under the provisions of this chapter shall be exempt from taxation for and during the period of time in which the title to said land is vested in the State of Idaho, but the value of the interest therein of the purchaser may be taxed, which interest shall be determined by the amount paid on such land and the amount invested in improvements thereon at the date of such assessment."

Section 3102, C. S., provides in part as follows:

"Personal property for the purpose of taxation shall be construed to embrace and include, without especially defining and enumerating it, \* \* \* equities in state lands, \* \* \*."

Section 3282, of the Compiled Statutes, provides in part as follows:

"Equities in state land shall be assessed at that proportion of the full cash value of the land which the amount paid thereon bears to the total amount of the purchase price. \* \* \*"

Under the above section failure to pay taxes upon equities in state lands forfeits the certificate.

Section 3268 of the Compiled Statutes as amended by Chapter 263, Laws of 1929 at page 589 provides in part as follows:

"All personal property subject to assessment and taxation must be assessed at its full cash value for taxation \* \* \* and \* \* \* shall be a first and prior lien upon the personal property within the county belonging to the same owner and no personal property of any kind shall be exempt from such lien, \* \* \*."

Turning now to your second inquiry:

Section 3284-B, C. S., as amended by Chapter 263, Laws of 1929, at page 593, provides as follows:

"All taxes shown on the personal property assess-



ment roll and on any subsequent roll, shall become and be due and payable to the assessor on demand and, if unpaid, shall become delinquent on the fourth Monday of December of said year, together with a penalty of 10 per centum of the amount of such taxes as shown on the assessment roll."

From the foregoing, it is my opinion that equities of a purchaser in state lands are taxed as personal property, and if not paid on the fourth Monday of December of the year in which they are assessed, that they become delinquent and a penalty of 10% of the amount of the taxes is added thereto.

To Mr. Paul Penrod,  
February 18, 1930.

W. D. GILLIS,  
Attorney General.

## LEGISLATORS

### Vacancies in Office

#### 58. QUESTION:

Does a member of the Idaho legislature automatically vacate such position when he changes his residence from one county to another?

#### OPINION:

Section 453, Compiled Statutes, reads in part as follows:

"Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows:

\* \* \*

5. His ceasing to be a resident of the state, district or county in which the duties of his office are to be exercised, or for which he may have been elected."

This section, while not identical in language to the section in California, is identical in substance. The California statute, Section 996 of Kerr's Political Code, reads as follows:

"An office becomes vacant upon the happening of either of the following events before the expiration of the term:

\* \* \*

"5. His ceasing to be an inhabitant of the state, or if the office be local, of the district, county, city or township for which he was chosen or appointed or within which the duties of his office are required to be discharged."

The California section has been construed in the case

●f *People ex rel. Tracey v. Brite* 55 Cal. 79. The Court said:

"When the relator ceased to be an inhabitant of the third district, he ceased to be supervisor for that district and a vacancy occurred."

This case is directly in point with the proposition that when a legislator ceases to be an inhabitant of his legislative district or county, or ceases to be a resident thereof, and in this case the word "resident" and the word "inhabitant" are synonymous, he ceases to occupy the office to which he was elected, and there is a vacancy thereby created.

It is, therefore, my opinion that when a member of the Idaho legislature changes his residence from one county to another a vacancy arises in his office in the county from which he removed.

*To Governor of Idaho,*  
*February 11, 1930.*

W. D. GILLIS,  
Attorney General.

## LEGISLATIVE ACTS

### Amendment May Not Be Enacted Enabling the Execution of Leases to State Land for Longer Period Than Five Years

#### 59. QUESTION:

You request an opinion upon a proposed amendment to the law relating to the leasing of state lands which contain minerals.

#### OPINION:

The proposed Act purports to authorize the State Land Board to lease for an indefinite period, certain lands containing minerals. Section 5 of the Idaho Admission Bill has a provision pertinent to this inquiry, which reads:

"That all lands herein granted for educational purposes shall be disposed of only at public sale, \* \* \*. But said lands may, under such regulations as the Legislature shall prescribe, be leased for periods of not more than five years\* \* \*"

You advise me that it is your interpretation of Section 13 of said admission bill that mineral lands are exempted from the provisions of Section 5. I am unable to arrive at such an interpretation, it being my view that the Federal Government reserved the mineral lands from the grant to the State of Idaho.

It is, therefore, my opinion that the proposed Act is contrary to the provisions of said admission bill, in that it proposes to give the State Land Board the right to lease state lands for more than a period of five years, which may not be done.

*To Mr. J. B. Eldridge,  
February 13, 1929,*

W. D. GILLIS,  
Attorney General.

### Departments May Not Employ Counsel to Draft Bills

#### 60. FACTS:

There has come to my desk a claim of a firm of attorneys, certified by one of the Departments, covering the following:

"To services in drawing Senate Bill No. 166  
and advising as to the law regarding amendments  
contained therein . . . . . \$75.00."

#### OPINION:

This office must advise that it is clearly not within the powers of a Department to employ legal services of this character in the drafting of legislation. The drafting of new legislation is a legislative function. The Legislature at each session expends considerable sums in employing counsel for this purpose. The statutes also provide that the Attorney General's office shall assist and advise the Legislature.

It is, therefore, the opinion of this office that a Department may not employ outside counsel and pay them for the drafting of proposed legislation.

*To Honorable E. G. Gallet,  
State Auditor,  
April 27, 1929.*

W. D. GILLIS,  
Attorney General.

## LEGISLATURE

### When Enactments Go Into Effect

#### 61. QUESTION:

When do approved bills, not having an emergency provision, of the Twentieth Session of the Idaho Legislature, go into effect?

#### OPINION:

The Twentieth Session of the Idaho Legislature, pur-

suant to House Concurrent Resolution No. 3, adjourned at the hour of 4 p. m., March 7, 1929. (See page 698, Laws of 1929.) Section 22 of Article III of the Constitution of Idaho reads as follows:

"No act shall take effect until 60 days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law."

The Supreme Court has spoken in connection with this question in the case of Idaho Power Company v. Blomquist, 26 Ida. 222, 141 Pac. 1083, in which it was held that the Public Utilities Act passed at the Twelfth Session of the Idaho Legislature, which session adjourned on the 8th day of March, 1913, went into effect 60 days after the adjournment of said Session. The court said in this connection:

"Said act \* \* \* was passed at the twelfth session of the legislature and was approved by the governor on the 13th of March, 1913. It contained no emergency clause, and under the provisions of sec. 22, art. 3, of the constitution did not take effect until sixty days after the end of the session at which it was passed, which session adjourned on the 8th day of March, 1913; hence, the act did not take effect until the 8th day of May, 1913. By the provisions of sec. 10, of art. 4 of the constitution, every bill passed by the legislature shall before it becomes a law be presented to the governor, and 'If he approve, he shall sign it and thereupon it shall become a law.' Under that provision of the constitution, said act became a law on the 13th day of March, 1913, but did not go into effect until the 8th day of May."

It is apparent that the court determined that the full sixty day period after adjournment must elapse before an act takes effect.

It is, therefore, my opinion that all of the non-emergency legislation enacted by the Twentieth Session of the Idaho legislature approved by the governor, will go into effect on the 7th day of May, 1929.

To Mr. Preston L. Grover,  
May 6, 1929.

W. D. GILLIS,  
Attorney General.

## MARRIAGE

### **Void Between Whites and Mongolians**

**62. QUESTION:**

Is there any legislation in the State of Idaho forbidding Japanese contracting marriage with a white girl, contrary to the wishes of her parents?

**OPINION:**

Chapter 115 of the Laws of 1921 provides as follows:

"All marriages hereafter contracted of white person with mongolians, negroes, or mulattoes are illegal and void, and all marriages between first cousins are prohibited."

A Japanese is a mongolian. It, therefore, follows that the marriage of your wife's sister to this Japanese would be void under the laws of Idaho.

W. D. GILLIS,  
Attorney General.

August 14, 1929.

### **Girls of Age of Twelve May Contract Marriage With Consent of Parent or Guardian**

**63. QUESTION:**

I have the honor to comply with your request that I advise you as to the statement made by F. Emerson Andrews in his article in the North American Review entitled "The Mills of Marriage," in which he lists Idaho as one of eleven states which still permits the marriage of girls of twelve years. The editors of this magazine suggest that there may be some extenuating circumstances attendant upon this situation.

**OPINION:**

Section 4592 of the Idaho Compiled Statutes, as amended by Chapter 221 of the Laws of 1921, provides as follows:

Any unmarried male of the age of 18 years or upward, and any unmarried female of the age of 18 years or upward, and not otherwise disqualified, are capable of consenting to and consummating marriage. Provided, That where either of the parties to the contract are under the age of 18, the license shall not issue except upon the consent in writing, duly acknowledged or sworn to, of the father, mother or guardian of any such parties, if there be any such."

You will note that the above section provides that where either of the parties are under the age of eighteen, the license shall not issue except upon the consent of the father, mother, or guardian, if there be any such. This affixes no minimum age limit, therefore the common law rule will apply. Under the common law, an infant was not permitted to contract in marriage until he had attained the age of legal consent, which in the case of males was fourteen and in the case of females twelve years.

In the case of *Green v. Green*, (Fla.) 80 So. 793, the Supreme Court of Florida quoted the following rule from 9 R. C. L. 272:

"At common law the age at which persons were deemed competent to contract a valid marriage was 14 years for the man and 12 years for the woman; these periods having been adopted because at such an age the parties were deemed to have attained puberty, with capacity to consent on the part of females and to commit rape on the part of the males. And in the absence of statute this rule is adopted as a part of the common law of this country."

From an examination of the above statute and the authority quoted, it is my opinion that the common law rule applies in Idaho, and that a girl at the age of twelve years may marry upon the consent of the parent or guardian, given in the manner prescribed by the statute quoted, and in case there be neither parent nor guardian, that she may be allowed to marry at or above that age.

*To Governor of Idaho,*  
*June 27, 1929.*

W. D. GILLIS,  
Attorney General.

## MOTOR FUELS TAX

### Counties Are Not Entitled to Exemptions From Payment of Motor Fuels Tax

#### 64. QUESTION:

Is a county within the State of Idaho entitled to an exemption from payment of the five cent excise tax on motor fuels purchased by said county?

#### OPINION:

An examination of the statute relative to this excise tax discloses that it does not expressly provide that the municipalities of the state shall be subject to the tax, nor

is there any provision or language found in the act which indicates the intent of the legislature to exempt or relieve counties or cities from paying the tax imposed on all who use motor vehicle fuels. It must be admitted that the purpose of the legislation and the directions contained in the act as to the disposition of the funds so raised not only fail to indicate an intention on the part of the legislature not to exempt municipalities from payment of the tax, but negative any inference that such municipalities and counties were intended to be relieved from the payment of the tax.

This identical question was passed upon recently by the Supreme Court of Utah in the case of *Crockett, Secretary of State, vs. Salt Lake County*, decided under date of March 28, 1928, 270 Pac. 142. In that case the contention of the county was that the gasoline tax law did not impose a tax upon gasoline used by the county in discharging its public works. The court said, in interpreting a statute very similar to our own:

"It thus appears that the tax is not for the purpose of raising revenue for the payment of the usual and ordinary expenses of state government, but for the construction and maintenance of public highways. These highways are open, not only for the use of the citizens of the state, but for others traveling within the state and for the counties and cities in the discharge of their public duties."

The court then concluded by holding that a county was liable for the excise tax on the sale or use of gasoline imposed to maintain its highways.

I believe the above case, which is well reasoned, declares what our court would do, and it is, therefore, my conclusion and opinion that a county is not exempt from payment of the excise tax on motor fuels which are purchased for consumption by it.

*To Mr. John McGrath,  
March 6, 1930.*

W. D. GILLIS,  
Attorney General.

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### Exemptions

#### 65. FACTS:

The Boise Irrigation Project claims exemption from the payment of the gasoline tax on the basis that that body exercises functions belonging to the United States government.

## QUESTION:

Should I allow refund of the gasoline tax?

## OPINION:

Section 2 of Chapter 172 of the Laws of 1923, as amended by Section 1 of Chapter 185 of the 1925 Session Laws as amended by Section 1 of Chapter 87 of the Laws of 1927, reads in part pertinent to this inquiry:

"\* \* \* provided, that said dealer shall not be required to pay a license tax on motor fuels sold by him to the government of the United States or any department thereof, but shall make a report of such motor fuels sold."

It is evident, of course, that the board of control of the Boise Irrigation Project is not the United States Government. The question then arises, is said board of control a department of the United States Government within the meaning of said law. The word "department" as related to the United States Government, is defined by 18 Corpus Juris at 490 as:

"One of the divisions of the executive branch of government."

In the case of *U. S. v. Germaine*, 99 U. S. 508, 25 L. Ed. 482, the Supreme Court in considering Section 2 of Article II of the United States Constitution relating to the executive branch of our government gives considerable expression to a definition of the word "department," but does not include such an organization as the Boise Irrigation Project.

It is my opinion that the board of control of the Boise Irrigation Project as defined by you is not a department of the United States Government within the meaning of the section quoted above, and, therefore, no exemption from the payment of a license tax on motor fuels should be allowed.

*To Honorable Fred E. Lukens,  
Secretary of State,  
May 25, 1929.*

W. D. GILLIS,  
Attorney General.

## MOTOR VEHICLES

### Chauffeurs' Licenses

## 66. QUESTION:

Are the drivers of trucks owned by wholesale companies,



and used in the distribution of their products, required to secure a chauffeur's license?

OPINION:

It is my opinion that such drivers of trucks are not required to secure a chauffeur's license under the provisions of Section 1606, Compiled Statutes, and Section 1607, Compiled Statutes, as amended by Chapter 154 of the Laws of 1923, since the vehicles driven by these employees are not vehicles operated on the public highway for rent or hire.

*To Comm'r. of Law Enforcement,*  
*September 20, 1929.*

W. D. GILLIS,  
Attorney General.

## MUNICIPALITIES

### Municipalities May Not Enact Business License Ordinances For the Purpose of Producing Revenue

67. QUESTION:

The council of the City of St. Maries proposes to enact an ordinance imposing a license tax of \$5.00 per day on theatres with a seating capacity not exceeding 300, and \$10.00 per day where the seating capacity does not exceed 500 and \$15.00 per day where the seating capacity does exceed 500. Has the city council authority to enforce such an ordinance?

OPINION:

Our Supreme Court in the case of *State vs. Nelson*, 36 Idaho 713, has spoken quite emphatically and fully on this subject. There it was held that ordinances which show and intend to be revenue measures may not be enacted. It seems apparent to me that the type of license mentioned above is not a regulatory measure, but is for the purpose of raising revenue and, therefore, does not fall under the provisions of Section 2, Article XII of the Constitution, but being exclusively a revenue measure, is prohibited by reason of the constitutional provision relating to the raising of revenue and the rule announced in the case above mentioned, wherein the court held that while municipalities such as cities and villages, may pass regulatory measures which may incidentally raise revenue, such municipalities cannot, in the exercise of their police power, levy and collect a license tax upon individuals or businesses.

It is, therefore, my opinion that the license tax proposed

to be imposed by the ordinance you mention is contrary to law and unenforceable.

*To Mr. Charles Brebner,  
January 27, 1930.*

W. D. GILLIS,  
Attorney General.

### Vacancies in Office of Village Trustee

#### 68. QUESTION:

Does a village trustee who is appointed to fill a vacancy which occurred in the Board of Trustees, hold office until the end of the term of the trustee whose vacancy he was appointed to fill, or only until the next village election?

#### OPINION:

Section 457 provides as to the portion pertinent to this inquiry:

"Section 457, VACANCIES: HOW FILLED  
\* \* \* In city and village offices by the mayor and council or board of trustees."

Section 467 of the Compiled Statutes provides as follows:

"Section 467, TENURE OF APPOINTEE. Any of the said officers that may be elected or appointed to fill vacancies may qualify and enter upon the discharge of the duties of their offices immediately thereafter; and, if elected, they may hold the same during the unexpired term for which they were elected, and until their successors are elected and qualified; but if appointed they shall hold the same only until their successors are elected and qualified."

A long line of authorities holds to this effect and definitely established the rule of law that the question of an officer holding office by appointment should be returned to the people for decision as soon as possible.

It is, therefore, the opinion of this office that a trustee appointed to fill a vacancy would hold office only until the next village election at which trustees were elected when the vacancy would be filled by the person elected by the voters of the municipality.

*To Mr. Walter Youngkin,  
April 27, 1929.*

W. D. GILLIS,  
Attorney General.

## NOMINATIONS

### Procedure Where Man Nominated on Two Tickets

#### 69. FACTS:

A candidate regularly nominated on the Republican Ticket has his name written in more times on the Democratic ticket than another man whose name is also written in.

#### QUESTIONS:

Is there a vacancy on the Democratic Ticket? If so may the Democratic County Central Committee fill same?

#### OPINION:

Section 525 Compiled Statutes makes the general provisions of the election laws applicable to primary elections and in part provides, that:

"The provisions of the general laws relative to the holding of election \* \* \* the counting of ballots and making returns of the results, the canvassing of returns and all other provisions relating to general elections shall apply to primary elections insofar as they are applicable and consistent with the provisions of this chapter. \* \* \*"

Section 534 Compiled Statutes relating to the canvassing of the votes of primary election, in part provides:

"The votes of such primary election shall be canvassed in the manner provided by the general election laws as nearly as practicable.

"\* \* \* The judges shall count the ballots and shall carefully enter the number of votes for each candidate on the tally sheet provided therefor, and when the count is completed shall ascertain the total vote cast for each candidate and publicly announce the result.

"The judges shall also mark on a sample ballot the total vote received by each candidate, shall enter thereon the name of the precinct, and shall immediately mail the same to the county auditor who shall keep it on file for public information and reference until after the official canvass by the county commissioners of the votes cast at the said election."

Section 632 Compiled Statutes relating to general elections and particularly to the canvass of returns by the county commissioners requires them as the board of canvassers of election, on the tenth day after any general or special election to:

"\* \* \* proceed publicly, at their office to open the

returns and canvass the votes of said election, and make up abstracts thereof \* \* \* and it shall be the duty of the auditor of the county immediately to make out a certificate of election to each of the persons having the highest number of votes for county and precinct officers respectively and cause such certificate to be delivered to the person entitled to it."

From the foregoing sections it will be seen that after the judges of a primary election have made their return and the county commissioners have canvassed the same, that it is the duty of the county auditor to make out a certificate of election to each person having the highest number of votes for a county auditor in preparing the official ballot for the general election, to cause to be printed in the ballot the name of every candidate whose name has been so certified.

Section 573 Compiled Statutes relating to the form of contents of the ballot for general election, provides among other things:

"\* \* \* Every ballot shall contain thereon the names of every candidate whose nomination for any office specified on the ballot has been certified or filed according to the provisions of this title, but no name shall appear thereon more than once."

It will be observed that with respect to the candidates in question who receive the highest number of votes on both the republican and democratic primary ticket, that it is necessary that a certificate of election be issued to him by the county recorder for nomination upon both tickets.

Section 573 Compiled Statutes already referred to, however, prevents the county auditor from placing the name of such candidate on the ballot for the general election more than once. This raises the query upon which ticket, the republican or democratic, must the name of such candidate be placed.

Section 553 Compiled Statutes as amended by Chapter 6, Laws of 1927, relating to the declination of nomination, is as follows:

"Decline nominations. Whenever any person nominated for a public office shall in writing signed by him and by him acknowledged before a proper officer or attested by the signature of two competent witnesses, and filed in the office in which the certificate of his nomination was filed, state that he declines the nomination, such nomination, shall thereafter be of no effect. In nominations

relating to all officers \* \* \* declinations must be filed not less than 20 days before the election."

This section, it will be observed, permits a person nominated for public office to decline such nomination and upon so doing the nomination shall thereafter be of no effect.

Manifestly, then if the candidate in question declines his nomination on the democratic ticket such nomination shall thereafter be of no effect; but his nomination on the republican ticket will still be effective; and vice versa if he declines his nomination on the republican ticket.

Assuming then that the candidate in question declines his nomination on the democratic ticket the question then arises is there a vacancy on that ticket? Clearly there is because as already pointed out, the candidate in question received the nomination upon the democratic ticket, having received the highest number of votes for the office in question, and having received a certificate to that effect.

But, suppose the candidate in question fails to decline his nomination upon either the democratic or republican ticket, what is the result? By the provisions of Section 31, of House Bill No. 16, of the 1909 Laws, found on page 207 thereof and relating to primary elections, it was provided:

"\* \* \* In case a person is nominated upon more than one ticket, he shall file with the proper officer a written declaration indicating the party designation under which his name is to be placed on the official ballot."

This latter section, however, was repealed by Section 47, Chapter 107 of the Laws of 1919.

The court had this question under consideration in the case of *State v. Dunbar*, 39 Ida. 691, 230 Pac. 33, calling attention to the repeal just mentioned on page 696 of the Idaho Report and on the same page pointing out that by the provisions of Section 38, of said Chapter 107, 1919 Laws, a provision was enacted providing for the declination of nomination by persons nominated for public office. Section 553 Compiled Statutes hereinbefore referred to is a re-enactment of that provision. The court's discussion as to the proper procedure in a case such as the one before us, is to my mind, a splendid solution of the question presented here, which I wish to quote at some length from the opinion beginning on page 700:

"Pursuing this thought further, however, petitioner points out that there is no express statutory provision which makes it the candidate's duty to elect on which ticket his name shall appear, or which expressly confers upon him the right to do

so. There is no statute which directs how the auditor shall determine the matter. Thus, says the petitioner, we are confronted by a dilemma in which the statutes prohibit the appearance of the name more than once on the ballot and yet fail to provide a method of determining on which ticket the name shall appear. For this reason he contends that the law is so uncertain and unworkable as to be void. It will be noted, however, that the alleged uncertainty does not inhere in the prohibitory provision of the statute which we are considering. It arises rather from the situation resulting from an enforcement of that prohibition. The auditor will have no difficulty in obeying the prohibition of the statute and refusing to place petitioner's name on more than one ticket. The question is: What shall he do?

"C. S. Sec. 553, expressly gives the candidate a right to decline any or all nominations. If he exercises this right by declining all but one of the nominations, it solves the problem and determines on which ticket his name shall be placed on the ballot.

"He is not compelled by statute to exercise this right. However, if he does not do so, the auditor may place his name on the ticket of any one of the parties which has nominated him. Thus the statute does provide a method for determining how the candidate's name shall be placed on the ballot. Whether a better or more adequate method could have been, or should have been provided, is not for the court to determine or even to consider. In the light of the above facts we have no right to hold that the provision of the statute in question is absolutely unenforceable and therefore void. As a court we are concerned only with the provisions of the statute as we find them. However, we think it proper to suggest that, if a candidate is nominated by more than one party and does not exercise his statutory right to decline, but, before the ballots are printed, makes a request of the auditor that his name appear on a certain ticket, the statute does not prohibit the latter's complying with the request."

We will now turn to the question of whether or not the democratic county central committee may fill the vacancy mentioned in the event the candidate in question declines his nomination on the democratic ticket, Section 519 C. S. relating to the powers of the county central committee is decisive of this question. It provides in part that; the county central committee of each party when duly organized shall

have the usual powers vested in such committee, including the power to fill vacancies in the committee and upon their respective party ticket.

*To Forest E. Robb,  
August 19, 1930.*

W. D. GILLIS,  
Attorney General.

## STATE OFFICES

### Expenses Incurred While Traveling Without State

#### 70. QUESTION:

Referring to Chapter 258, Laws of 1929, will you kindly advise me if said Chapter obviates the necessity of Justices of the Supreme Court or representatives designated by the Governor securing from the Governor permission to incur expense while traveling outside of the state?

#### OPINION:

In order to answer your inquiry, it is necessary to examine paragraph 2 of Section 1 of Chapter 71, Laws of 1923, as amended by Section 2 of Chapter 201, Laws of 1927, as amended by Section 1 of Chapter 258, Laws of 1929. The amendatory matter of said Chapter 258 reads as follows:

"Provided, that the actual and necessary expenses of the Justices of the Supreme Court, the Governor and of such other person or persons as the Governor shall designate in writing as his representative or representatives, when traveling to and from points outside of the state, shall be allowed and paid."

An examination of the above quoted amendatory matter discloses this apparent intent of the legislature—that certain classes be created who may travel outside of the State of Idaho having no limitation on their expenses, save that such expenses be "actual and necessary" expenses, and those classes are (a) "the Justices of the Supreme Court," (b) "the Governor," and (c) "such other person or persons as the Governor shall designate in writing as his representative or representatives."

The persons coming under class (c) must have the written consent of the Governor in that he must designate them as his representatives. The person mentioned in class (b), that is the Governor, carries no restriction.

We now turn to those included in the first class (a), being the Justices of the Supreme Court. Section 1, Article

II of the Constitution declares the divisions or departments of our government. That section reads as follows:

"The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."

It seems apparent the legislature intended that this portion of the judicial division of the state government, to-wit: the Justices of the Supreme Court, should not be restricted in this matter by the requirement that the executive consent must be secured before such expenses might be incurred. The fair and reasonable interpretation is that the legislature intended that the Governor might not restrict this class of this separate division of our government, and we may properly assume that the legislature concluded that a situation might at sometime arise in our state when a Governor not politically or otherwise in accord with the Supreme Court of the state should not have the power to control this coordinate branch of the government in this respect.

It is, therefore, my opinion and conclusion that Chapter 258 of the Laws of 1929 obviates the necessity of Justices of the Supreme Court securing from the Governor permission to incur expense while traveling outside of the state. Representatives designated by the Governor must of necessity secure such consent at least to the extent of having themselves designated as representatives.

It is my further opinion that under said amendment the following persons, to-wit: the Justices of the Supreme Court, the Governor and such representative or representatives as the Governor may designate may travel without the State of Idaho receiving actual and necessary expenses of said travel, even though such actual and necessary expenses exceed the five dollar a day limitation.

The limitation as to the Justices of the Supreme Court is only that such expenses incurred by them be their "actual and necessary expenses." This opinion assumes, of course, that the legislature has made an appropriation for such purposes.

*To State Auditor,  
July 30, 1929.*

W. D. GILLIS,  
Attorney General.



**Vacancy—Lieutenant Governor**

**71. QUESTIONS:**

Does a vacancy exist in the office of Lieutenant Governor of this state because of the death of the late W. B. Kinne?

If such be the case, in what manner is the office filled?

**OPINION:**

Section 1 of Article IV of the Constitution creates the office of Lieutenant Governor. Section 13 of said Article IV provides:

"The lieutenant governor shall be president of the senate, but shall vote only when the senate is equally divided. In case of the absence or disqualification of the lieutenant governor from any cause which applies to the governor, or when he shall hold the office of governor, then, the president pro tempore of the senate shall perform the duties of the lieutenant governor *until the vacancy is filled or the disability removed.*"

Before we proceed further, attention is called to the above italicized sentence reading "until the vacancy is filled."

Section 6 of Article IV of the Constitution declares as follows:

"The governor shall nominate and, by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law and whose appointment or election is not otherwise provided for. *If during the recess of the senate, a vacancy occurs in any state or district office, the governor shall appoint some fit person to discharge the duties thereof until the next meeting of the senate, when he shall nominate some person to fill such office.* If the office of a justice of the supreme or district court, secretary of state, state auditor, state treasurer, attorney general, or superintendent of public instruction shall be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified in such manner as may be provided by law."

Section 453, Compiled Statutes, declares how vacancies in civil offices occur. It reads in part pertinent to this inquiry:

"Every civil office shall be vacant upon the happening of either of the following events at

any time before the expiration of the term of such office, as follows:

\*\*\*

"2. His death.\* \* \*"

Section 12, 13 and 14 of Article IV provide for the succession to the office of Governor so that at this time, without and before the filling of this vacancy, in the event of the death or other disability of the Governor, or his absence from the state, the duties of the office of Governor would devolve upon the President Pro Tem of the Senate, *but these sections do not, nor do any others, provide a succession for the office of Lieutenant Governor.*

California has a Constitution whose provisions are almost exactly similar to our sections 12, 13 and 14 above referred to. At least twice it has had a vacancy in this office arising either from death or resignation. Each time the vacancy has been filled by appointment by the Governor.

In the case of *People vs. Budd*, 114 Cal. 168, 45 Pac. 1060, it was said by Justice Caroutte in a situation arising that time upon the death of a Lieutenant Governor of that state:

"The constitution provides that the powers and duties of the office of governor, in case of vacancy, shall devolve upon the lieutenant governor for the residue of the term, or until the disability shall cease. The constitution further provides that in case of a vacancy in both the office of governor and lieutenant governor the president pro tempore of the senate shall act as governor until the vacancy be filled. The constitution does not provide that the present pro tempore of the senate shall perform the duties of the office of lieutenant governor in case a vacancy exists in that office. And this omission to so provide is, to my mind, an unintentional lapse on the part of the framers of the constitution. Such appears to be plain when we consider that there is an express provision of that instrument casting upon the president pro tempore of the senate authority to perform the duties of the office of governor if there be no lieutenant governor, taken in connection with the many other provisions of that instrument which all point to that conclusion. But no authority is found in the constitution vesting the president pro tempore of the senate with the duties of the lieutenant governor when a vacancy occurs in that office, and hence any such question is foreclosed.

"The foregoing conditions being present, a vacancy occurred in the office of lieutenant governor upon the death of the incumbent, and the governor had the power to fill such vacancy by virtue

of section 8, art. 5 of the constitution. That section reads as follows: 'When any office shall from any cause become vacant, and no mode is provided by the constitution and law for filling such vacancy, the governor shall have the power to fill such vacancy by granting a commission \* \* \*'

It is, therefore, my conclusion and opinion from an examination of the above sections and the case cited that a vacancy exists at this time in the office of Lieutenant Governor.

We turn now to your second question. Section 128 of the Compiled Statutes provides the powers of the Governor, and subdivision 3 thereof reiterates the power granted to him under Section 6 of Article IV. This section of the statute reads:

"To make the appointments and supply the vacancies provided by law."

Our Supreme Court in the case of *In re Inman*, 8 Idaho 398, 69 Pac. 120, in construing Section 6 of Article IV, quoted earlier in this opinion, said:

"\* \* \* Section 6 of Article IV, supra, points out the manner of filling offices whose appointment or election is not otherwise provided for by law. \* \* \*"

It is then my opinion in reference to your second inquiry that the power rests with the Governor to fill by appointment the vacancy now existing in the office of Lieutenant Governor.

The conclusions above arrived at are the result of an extensive examination of the authorities.

*To Governor of Idaho,*  
October 17, 1929.

W. D. GILLIS,  
Attorney General.

## PROBATE COURT

### A Person Other Than a Licensed Attorney May Not Practice Before Probate Court

#### 72. QUESTION:

Does Section 3 of Chapter 63 of the Laws of 1929 permit a person other than a licensed attorney to practice in the Probate Courts of this state?

#### OPINION:

Chapter 63 of the Laws of 1929, Section 1 thereof,

which amended Section 6565 of the Idaho Compiled Statutes, reads as follows:

"Any resident of this State who is a citizen of the United States, or has bona fide declared his intention to become a citizen of the United States, of the age of 21 years, of good moral character, and who possesses the necessary qualifications of learning and ability, may, under such rules as the Supreme Court may prescribe be admitted as an attorney and counselor in all courts of this State."

Section 3 of Chapter 63 of the Laws of 1929, which amended Section 6571 of the Idaho Compiled Statutes, reads as follows:

"If any person shall practice law or hold himself out as qualified to practice law in this State without having been admitted to practice therein by the Supreme Court and without having paid all license fees now or hereafter prescribed by law for the practice of law he is guilty of contempt both in the Supreme Court and District Court for the District in which he shall so practice or hold himself out as qualified to practice. Provided, that any person may appear and act in a Justice Court as representative of any party to a proceeding therein, but shall do so without making a charge or collecting a fee therefor."

The first section above quoted prescribes the qualifications for an attorney who may practice in all the courts of the state. The second section provides a penalty for the practice of law or holding oneself out as qualified to practice law. The penalty provided is contempt both in the Supreme and District Courts. The second section above quoted also declares that a person may appear and act in a Justice Court as representative of any party without charging a fee.

From the foregoing, it is my opinion that it was clearly the intent of the legislature not to include any other courts than the Justice Court wherein a layman may represent a party. Having specifically included the Justice Court, all other courts are excluded.

It, therefore, follows that a layman may not represent a party to a proceeding in the Probate Court either with or without charging a fee. Only a licensed attorney has such right. It is my opinion that any layman or unlicensed person attempting to practice law in the Probate Court or holding himself out as qualified to practice in such court would be just as guilty of contempt of court as he would

be in case he attempted to practice either in the Supreme Court or our District Courts.

To Mr. Samuel Adelstein,  
September 4, 1929.

W. D. GILLIS,  
Attorney General.

### A Charge May Not Be Made By Probate Court For Issuance of an Execution

#### 73. QUESTION:

May the Probate Court make a charge for issuance of an execution?

#### OPINION:

Chapter 91 of the 1927 Session Laws provides, in part, as follows:

"The Probate Court shall charge and collect the following fees* * *	
For all services in each civil cause, excepting trial on issues of fact and attachment proceedings .....	\$3.00
For each day of trial of civil cause on issues of fact .....	\$3.00
For each attachment proceedings, including writ of attachment .....	\$2.00"

It is then necessary to consider the question of whether or not an execution is included within the term "all services in each civil cause." In other words, whether this term includes the method of enforcing the judgment entered by the court.

The authorities seem to consider the issuance of an execution as a necessary and requisite feature to the enforcement of the judgment as entered by the court.

In 23 C. J. 306, under Executions, we find the following:

"The term has also been applied to the last state of a suit whereby possession is obtained of anything recovered, and as including the acts done under the writ."

Under Note 19 we find this definition:

"The putting one in possession of that, which he has already acquired by judgment of law.

"Putting the sentence of the law in force. The act of carrying into effect the final judgment or decree of a court."

In 10 R. C. L. 1218, we find this statement:

"Since a case in which execution has been issued is regarded as still pending, the jurisdiction of the court continues until all orders concerning the prop-

erty of the execution debtor have been obeyed, where proceedings in aid of execution are regularly instituted before it."

In the case of *Humiston vs. Smith*, 21 Cal. 134, we find this statement:

"The act expressly declares that 'There shall be in this State but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs;' and the terms 'civil action' include the remedies provided for the enforcement of judgments."

From an examination of Section 1 of Chapter 16 of the 1925 Session Laws it will be observed that the 1927 amendment applied the \$3.00 charge to all services in any civil case, excepting the trial of the issues of fact and attachment proceedings and then provided a fee of \$2.00 for the attachment proceedings which includes the writ of attachment. This was probably done to clarify any question as to whether or not any attachment proceedings would be in addition to the \$3.00 charged and the regular district court or justice of the peace fee should apply.

Section 6910 of the Idaho Compiled Statutes provides as follows:

"The party in whose favor judgment is given, may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement."

No question should arise as to the fact that an additional charge is made for the issuance of a writ of attachment as it is issued for the purpose of enabling the sheriff or other officer to seize and hold the property pending the final outcome of the case and an execution would then have to be issued by the court in order that the judgment be carried out or enforced.

Therefore, it is the opinion of this office that no extra charge should be made for the issuance of a writ of execution out of the Probate Court under the provisions of said Chapter 91 of the 1927 Session Laws.

*To Mr. C. E. Crowley,*  
*July 23, 1929.*

FRED J. BABCOCK,  
Assistant Attorney General.

**May Not Suspend Sentences or Remit Fines**

**74. QUESTION:**

May a probate judge impose a fine and then remit the same to the defendant conditional upon his future good conduct?

**OPINION:**

The remission of a fine is a suspension of sentence and authority to suspend a sentence is not granted to the justice and probate courts. Section 9258 of the Compiled Statutes provides for imprisonment pending the payment of a fine. This statute reads as follows:

"When a judgment is entered imposing a fine, or costs, or both fine and costs, or ordering the defendant to be imprisoned until the fine, or costs, or fine and costs, be paid, he must be held in custody during the time specified in the judgment, unless the fine, or costs, or fine and costs, are sooner paid."

Section 9041 of the Compiled Statutes grants authority to suspend sentence or parole a defendant at the time of pronouncing sentence but it appears that this power is limited to our district courts. The legislative act which granted this power constitutes Chapter 104 of the 1915 Session Laws. The title of that act is as follows:

"AN ACT TO AMEND SECTION 7991 OF THE REVISED CODES OF THE STATE OF IDAHO AND TO GRANT TO THE DISTRICT COURT THE POWER TO SUSPEND OR WITHHOLD JUDGMENT IN CRIMINAL CASES AND TO PUT A PERSON CONVICTED OF A CRIMINAL OFFENSE ON PROBATION IN THE CHARGE OF A PROBATION OFFICER OR OTHER PROPER PERSON."

It will be noted, therefore, that apparently it was not the intention of the Legislature to extend the right of suspension of sentence to the probate courts. It appears that prior to 1915 even the district courts did not have this power.

It is, therefore, the opinion of this office that a probate court does not have the authority to suspend sentence or remit fines. It follows that a fine once imposed must be served out by the defendant. Lacking the power to remit a fine, clearly remission of it could not be made contingent upon the future good conduct of the defendant.

*To Hon. Harry J. Lamson,  
January 9, 1929,*

*W. D. GILLIS,  
Attorney General.*

## INTOXICATING LIQUOR

### Federal Permits to Sell "Tonics"

#### 75. FACTS:

There is being sold in the drug stores of Idaho at various places a "tonic" which is advertised to contain not less than 22% alcohol and as being made from old wine. Should it develop that this "tonic" is being imported into this state and sold under a federal permit, and assuming that the advertised statements are true—

#### QUESTIONS:

Is it lawful to sell this "tonic" in the State of Idaho?

Would the federal permit make its sale lawful in the State of Idaho?

#### OPINION:

Section 2604 of the Compiled Statutes reads as follows:

"Traffic in intoxicating liquors prohibited. The manufacture, disposal and transportation of intoxicating liquors for beverage purposes are prohibited in the State of Idaho."

Section 2605 of the Compiled Statutes provides:

"Intoxicating liquors defined. The words 'intoxicating liquors' as used in this chapter shall be deemed and construed to include spirituous, vinous, malt and fermented liquors, and all mixtures and preparations thereof, including bitters and other drinks that may be used as a beverage and produce intoxication."

Section 2606 of the Compiled Statutes provides:

"Traffic in and possession of liquor unlawful: Regulation of alcohol traffic. It shall be unlawful for any person, firm, company, or corporation, its officers or agents, to sell, manufacture or dispose of any intoxicating liquor or alcohol of any kind or to have in his or its possession or to transport any intoxicating liquor or alcohol unless the same was procured and is so possessed and transported under a permit as hereinafter provided: Provided, That nothing in this article shall be construed to apply to the manufacture, transportation or sale of wood or denatured alcohol."

Section 2621 of the Compiled Statutes reads:

"Acquisition, transportation, sale and possession unlawful. It shall be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors except as in this article provided."



Because of frequent inquiries coming to this office in reference to malts, "Virginia Dare" tonics, "Wine Elixir" tonics, bitters and other mixtures and preparations, advertised usually as medicines and also admitting on their labels or formulas a considerable content of alcohol, this opinion will attempt to cover their field as well as the specific case presented by the inquiry.

From a reading of the above sections of the Idaho Compiled Statutes, it is, at once, apparent that if these preparations contain enough alcohol to produce intoxication, and are sold as a beverage, they are in violation of the statutes.

The next question we then have to consider is whether or not these preparations, if not sold or dispensed as a beverage and sold by a registered pharmacist as a tonic or medicine, constitutes a violation of the above prohibition laws. There also appears in this question, whether the granting of a federal permit for the preparation affects the case.

In the case of *State v. Lillard*, 78 Mo. 136, the Court said:

"It has been expressly held elsewhere, that neither the payment of the United States excise tax, nor a license from the United States Internal Revenue Collector, will justify the sale of intoxicating liquors in violation of the laws of a state. \* \* \*

In the case of *State v. Wilson*, 80 Mo. 303, the Court said:

"\* \* \* When the admixture results in a compound falling under the popular designation of 'bitters' and as such may be called for and used as an alcoholic beverage, it clearly falls within the prohibition of the act, although it may possess some intrinsic remedial qualities. \* \* \*

In the case of *State v. Gauthier* (Me.) 118 Alt. 380, involving a preparation called "Bosak's Horke Vino," which was shown to contain 18% alcohol, and the purchaser had declared that it was "pretty good stuff," but that he could only buy one bottle at a time, the court said that the evidence showed that it was sold in this case as a beverage. The respondent showed that the preparation contained an undisclosed percentage of various ingredients in some unclassified degree of laxative, and the content was classified as a medicant. The court said:

"This is not decisive. A liquid may be in some small degree laxative and be classed as a medicine, and still be intoxicating in fact and capable of use as a beverage."

In the case of *State v. Certain Intoxicating Liquors* (Iowa) 185 N. W. 145, the question of these preparations is considered. Certain quantities of Old Reserve and other tonics were seized under a search warrant. The National Selright Association, a wholesale drug firm in the State of Iowa, appeared and claimed to be the owner, and that the liquors seized were bona fide medicinal preparations, and not intoxicating liquors, and incapable of being used as a beverage, and asked the return of the liquors.

The trial court held that Old Reserve and Beef Iron Wine were intoxicating liquors, capable of being used as a beverage, and that they were banned under the Iowa Law, notwithstanding the federal statute, and the certificate or permit; and the liquors were ordered destroyed. Evidence was introduced tending to show that Old Reserve had been dispensed and used as a beverage and that it contained about 20% alcohol, and that persons had become intoxicated from drinking the same. The claim was made that the Old Reserve Distributing Company had a federal permit under which the preparation was manufactured, and contended, further, that the state had no right to interfere with its distribution and sale. The state did not claim that it had the right to interfere with the distribution of this preparation for medicinal purposes, but urged that it might interfere where the article containing alcohol might be sold and used as a beverage. The Supreme Court of Iowa said:

"Conceding that the liquids in question, and more particularly perhaps the Old Reserve, and its formula, be recognized by the United States Pharmacopoeia, National Formulary, or the American Institute of Homeopathy, this does not control the action of the court in determining whether or not a liquor is intoxicating, and capable of being used as a beverage. The fact that the defendant had such a permit does not guarantee its immunity from prosecution in case it manufactured an intoxicating liquor fit for use for beverage purposes, either under the federal act or the statutes of Iowa, nor would it grant immunity from prosecution to this defendant when it undertook to keep for sale, and sell, the manufactured product of the manufacturer of Old Reserve, when that product is in fact an intoxicating beverage."

Our Supreme Court has considered this question in the case of *In Re. Lockman*, 18 Idaho 465. In this case the evidence showed that four quart bottles of malt liquor had been sold. The chemical analysis showed it to contain 1.28%

alcohol. It was shown to contain enough alcohol to intoxicate only in rare instances. The court said:

"The only question to be determined in this case is whether or not the liquor or beverage called 'near beer' falls within the purview of the local option statute as the words 'intoxicating liquors' are defined by Section 31, (now section 2605 Idaho Compiled Statutes.)"

The court said further:

"It is not to be presumed that the legislature (referring to Section 2605) would have entered into an enumeration of certain drinks commonly known and understood to contain the element of alcohol and to be intoxicating if they had in fact intended that the test in all cases should be whether or not the drink is such as will produce intoxication. There would have been no reason for or object in enumerating these various liquors, distilled, vinous, malt, and fermented, if the legislature had intended that in all cases the test should be whether or not the drink is in fact such as will produce intoxication. The legislature in the enactment of this law evidently had in mind a two-fold object; First, that of discouraging and as far as possible preventing intoxication, and intemperance in the use of intoxicants; second, and equally important, that of protecting and preventing the boys and young men of the state from acquiring a taste for intoxicants, and the habit of indulging in drinks and beverages that contain the intoxicating element. \* \* \* They therefore concluded when writing this statute defining the words 'intoxicating liquors' to declare as a matter of law that all 'spiritous, vinous, malt and fermented liquors' are intoxicating, irrespective of the amount of alcohol they may contain and whether or not the particular kind of drink will in fact produce intoxication."

The court held that Section 2605 of the Idaho Compiled Statutes, contains two definitions or classifications of liquid beverages:

First: "Spirituous, vinous, malt and fermented liquors" which are declared as a matter of law to be intoxicating and for which no proof is required except to show that they come within the enumeration; and,

Second: Those other mixtures and beverages not enumerated but which will in fact produce intoxication."

In the second classification the state must prove that the beverage is such that it may be used as a beverage and produce intoxication.

From this ruling of our Supreme Court, it is apparent

that the question of whether or not any of these "tonics" or preparations might be an intoxicating liquor would be a question of fact, and the burden would be on the state to prove that it might be used as a beverage and produce intoxication, unless it came within the enumerated class of being a distilled, vinous, malt and fermented article.

It is, therefore, the opinion of this office that any preparation containing alcohol capable of being used as a beverage in intoxicating liquor under the law of this state. The state, having proved that the preparations were being sold as beverages, there could be no question but that such sales would be in violation of the statutes.

The federal permit would have nothing to do with making the sale lawful within the State of Idaho.

*To Hon. A. L. Freehafer,  
February 5, 1929*

W. D. GILLIS,  
Attorney General.

## PUBLICATION

### Compulsory Education Act Must be Published in Full

#### 76. QUESTION:

Is it necessary that the compulsory education statute referred to by you as "School Attendance Notice" be published in full in the newspaper?

#### OPINION:

Section 991, Compiled Statutes, designates the compulsory education law, as the provisions of Section 1018, Compiled Statutes. Section 992 Compiled Statutes, makes it the duty of the county superintendent to publish this law for four weeks, in at least two newspapers of the county before the opening of school in September.

Section 1018 was repealed by Section 105, Chapter 215, Laws of 1921, and by Section 75½ of the same chapter there was enacted what is designated as the "compulsory education" statute; and this in most respects is identical with Section 1018, C. S., as repealed.

When the legislature required Section 1018, C. S., to be published for the time stated, it clearly intended that the entire section should be published and not a part thereof.

In view of the fact that Sections 991 and 992, C. S., have been neither amended nor repealed, but that Section 1018 has been repealed, and Section 75½ of Chapter 215,

Laws of 1921, apparently enacted in its place, it is my opinion that the legislature intended that the requirement of Section 992 that the compulsory education law be published should be applicable to said Section 751½, and that it is intended that that section be published in full and not in part.

*To The Richfield Recorder,*  
*August 18, 1930.*

W. D. GILLIS,  
Attorney General.

## PUBLIC ADMINISTRATORS

### Duty on Expiration of Term of Public Administrator

#### 77. QUESTIONS:

1. When an estate is in the course of settlement by a public administrator at the expiration of his term of office should he continue to act as such administrator or do these duties devolve on his successor?

2. If the successor in office takes over the duties of administrator upon assuming office, what should be done as the first steps in settling the estates?

#### OPINION:

It is my opinion that upon the expiration of the term of office of a county treasurer who is ex-officio Public Administrator, that he should make return of each estate of decedents which he is handling, the value of the same, the money which has come into his hands, and what he has done with it, and the amount of his costs or expenses incurred, and the balance, if any, remaining in his hands, and at the same time, petition the court for a revocation of his letters of administration and his discharge as such administrator, and the exoneration of himself and his sureties on his administrator's bond or bonds, and also petition the court for the issuance of letters of administration to his successor in office.

The other inquiry is likewise covered above in that your predecessor having petitioned the court for a revocation of his letters of administration and the issuance of letters of administration to you, you should then proceed to perfect your appointment and continue the administration of the estate.

*To Miss Dorothy E. Fowler,*  
*May 25, 1929.*

W. D. GILLIS,  
Attorney General.

## PUBLIC UTILITIES

### A Power Company May Not Be Required to Supply Electric Current To Be Used in Competition to Itself

#### 78. QUESTION:

May a power company be required to furnish a city or village with electric current which the said city or village will use in competition with said power company when the power company is now serving the inhabitants of said city or village with current?

#### OPINION:

An examination of this question, together with the following rule referred to, which reads as follows:

"In no case will service be furnished at wholesale for resale purposes where the company itself furnishes retail service of the same class or classes in the municipality or other territory served or proposed to be served by the applicant or consumer of such wholesale service;"

gives rise to two questions.

First, if the city or village, hereinafter referred to as the municipality, constructs and operates an electrical distributing system, is this a governmental function, or is the municipality acting in a proprietary capacity?

The case of *Los Angeles v. Los Angeles Gas & Electric Corporation*, 64 L. Ed. 121, 251 U. S. 32, was an action in which the corporation brought suit to declare invalid and restrain the execution of an ordinance of the City of Los Angeles providing for a municipal electric street lighting system and which provided for the removal and relocation of poles and other property in the public streets of the city "when necessary in order that the municipal electric street lighting system may be constructed, operated and maintained." In determining the question of whether or not the city was acting in a governmental or proprietary capacity the Supreme Court of the United States said:

"The court reasoned and concluded that what the city did was done not in its governmental capacity, —an exertion of the police power,—but in its 'proprietary or quasi private capacity;' and that therefore the city was subordinate in right to the corporation, the latter being an earlier and lawful occupant of the field. The difference in the capacities is recognized, and the difference in attendant powers pointed out, in decisions of this court."

There is a long line of authorities which holds that a municipality is acting in a proprietary capacity and has no greater rights than any other company with which it is competing, unless expressly so given by statute, which statute, of course, would have to have been enacted prior to the issuance of the franchise under which the corporation or public utility might be operating.

The second question for consideration is whether a public service corporation, which is bound to render to the public certain services, appropriate to its particular function, must permit its property to be subjected to use by a rival corporation.

In this case, the power company is selling electric current which is an item of property and is furnishing the inhabitants of a certain municipality with this property in accordance with rates and charges approved by your commission. If the municipality desires to construct and operate its own distributing system in competition with the power company it does not seem right or just that the power company should be forced to furnish current to this municipality at wholesale for such resale purposes.

In the case of *People v. Public Service Commission*, P. U. R. 1920C, 526, we find the following quotation from Elliott on "Railroads," at page 531, we find the following language by the Supreme Court of the State of New York:

"So, it is said that, 'while a public service corporation, like a railroad company is bound to render to the public certain services appropriate to its particular functions, it is not bound to permit its property to be subjected to use by a rival corporation, unless by express statutory enactment and by due process of law thereunder.'"

In the case of *Evansville & H. Traction Co. v. Henderson Bridge Co.* 134 Fed. 973, at page 978 we find the following language used by the Federal Court:

"And while fully recognizing the well-known doctrine that public service corporations are bound to render to the public certain services appropriate to the particular functions of the corporation, that doctrine has not been supposed to reach far enough to make the corporation serve the purposes or be subjected to the uses of a mere rival in business. One water company or one telephone company or one telegraph company or one street railway company or one railroad company, while bound appropriately to serve the general public, cannot unless under express statutory enactment and by due process of law thereunder, be compelled to give its property to the uses and benefits of a rival except

by some form of condemnation. The rival is not, ordinarily, to be included in the term 'general public.' "

From an examination of the above authorities, it is the opinion of this office that the power company cannot be required to furnish a municipality with electric current at wholesale for resale purposes when such municipality proposes to use this current in competition with such power company in supplying inhabitants of the municipality.

*To Public Utilities Commission,* FRED J. BABCOCK,  
August 13, 1929. Assistant Attorney General.

## REALTORS

### Term "Deed of Trust" in Realtor Act Is Surplusage

#### 79. QUESTION:

What is the meaning of that portion of Section 4 of Chapter 184 of the Laws of 1921, as amended by Chapter 108, Laws of 1925, as amended by Chapter 206, Laws of 1927, which, after enumerating the different persons who are exempt from the provisions of said act, reads as follows: "Nor to any person selling under a deed of trust"?

#### OPINION:

Words & Phrases, 1st Series, Vol. 8, page 7125, defines a deed of trust as follows:

"A deed of trust is an assignment or transfer of property to a trustee for the purposes therein declared, usually made by a debtor to secure some or all of his creditors, either equally or preferentially. It is in the nature of a mortgage, and both are equally within the provisions of the registry laws of North Carolina, and in many respects are governed by the same principles of law. Means v. Montgomery (U. S.) 23 Fed. 421, 424; In re Anderson (U. S.) 23 Fed. 482, 491."

All deeds of trust contain in substance a provision about as follows, to-wit:

"If default shall be made on the payment of any of said sums of principal or interest when due in the manner stipulated in said promissory note or in the reimbursements of any amounts herein provided to be paid, then the said party of the second part (trustee) his successors or assigns on application of the party of the third part (mortgagee) or his assigns shall sell the above granted premises or so much thereof as in his discretion he shall find it necessary to sell in order to accomplish the object of these trusts."



These deeds of trust then provide that the trustee may advertise the property for sale and proceed with the sale of the same without any court action, the trustee being empowered to advertise and sell the property and execute a deed to the purchaser.

It, therefore, follows that the words you refer to specifically refer to the trustee under a deed of trust, and that such phrase intends to exempt such trustee from the provisions of the Real Estate Brokers Law.

Our law provides that there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, and specifically provides the procedure therefor.

The Supreme Court of the State of Idaho in the case of *Brown vs. Bryan, et al.* (Idaho) 51 Pac. 995, had under discussion the procedure for the enforcement of a lien under a deed of trust within this state, and after referring to the statutes of the State of Idaho, the court stated in part as follows:

"We feel compelled to hold that the instrument in question must be treated and regarded as a mortgage. \* \* \* Under the statutes cited supra, no contract creating a lien upon specific property for the payment of a debt can convey the legal title. A mortgage, or any contract in the nature of a mortgage merely creates a lien, and leaves the legal title in the mortgagor or grantor, which can only be passed out of him by judicial sale, in a proper action under the statute, after which such grantor or debtor may redeem within the time provided by law for redemption of property from execution sale."

From the foregoing, it is my opinion that a sale cannot be made by the trustee under a deed of trust in the State of Idaho without judicial process.

It is then my opinion that the phrase "nor to any person selling under a deed of trust" refers to a trustee selling property under strict foreclosure enforcement of a mortgage lien, and that such sale is prohibited by the laws of the State of Idaho. Therefore, the phrase is merely surplusage in said Real Estate Brokers Act and has no real purpose therein.

*To Mr. Chas. Laurensen, Director,  
Bureau of License,  
Department of Law Enforcement,  
May 14, 1930.*

W. D. GILLIS,  
Attorney General,

**Residents of Foreign State****80. QUESTION:**

May a realtor resident in another state deal in Idaho real estate without securing a license?

**OPINION:**

Section 5 of Chapter 184 of the Laws of 1921 of the State of Idaho provides as follows:

"It shall be unlawful for any person to engage in the business or act in the capacity of real estate broker within this state without first obtaining a license therefor."

Paragraph (e) of Section 9 of the above chapter provides the method for a non-resident of the state to become an applicant for a license.

From reading the foregoing provisions, it is my opinion and conclusion that a Washington realtor dealing in Idaho real estate must comply with the provisions of Chapter 184 of the Laws of 1921, and must secure a license before dealing in or engaging in the business or acting in the capacity of a real estate broker.

*To Gridley Investment Company,  
Inc.,  
August 2, 1929.*

W. D. GILLIS,  
Attorney General.

**RECORDER****Collection of Filing Fees for Deeds, Mortgages, Easements  
From the Departments of the State****81. QUESTION:**

May the Department of the State of Idaho require you to file and record an easement without the payment of the recording fee?

**OPINION:**

The only exception to the fee schedule found in the statutes of this State or upon which a State Department might depend reads as follows:

3713. "EXCEPTIONS TO FEE SCHEDULE:  
HABEAS CORPUS: WHERE STATE A PARTY.  
No fee or compensation of any kind must be charged or received by any officer for duties performed or services rendered in proceedings in habeas corpus; nor shall any county officer charge any fee against, or receive any compensation whatever from, the

state for any services rendered in any action or proceeding in which the State of Idaho, or any state board, or state officer in his official capacity, is a party."

It is apparent that the only words in this section which might be implied to warrant the recording of an easement without requiring the payment of a fee would be the words "any \* \* \* proceeding."

We find the word "proceeding" defined in Volume 6, First Series, of Words and Phrases, page 5632, as follows:

"In its general acceptation, 'proceeding' means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments and of executing. Ordinary proceedings intend the regular and usual mode of carrying on a suit by due course of common law." *Erwin v. United States* (U. S.) 37 Fed. 470, 488, 2 L. R. A. 229."

Also in Baldwin's Century Edition of Bouvier's Law Dictionary, page 987, we find the following definition of "proceeding":

"In New York the code of practice divides remedies into actions and special proceedings. An action is an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. Every other remedy is a special proceeding."

In the case of *Ex parte McGee* (Ore.) 54 Pac. 1091, we find the following definition of the word "proceeding":

"'Proceeding' is defined by Black as follows: 'In a general sense, the form and manner of conducting judicial business before a court or judicial officer, regular and orderly progress in form of law; including all possible steps in an action, from its commencement to the execution of judgment. In a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages or for any remedial object.'"

It is, therefore, the opinion of this office that it is incumbent upon the county recorder to charge and receive a fee for the recording of easements or other papers tendered by the State departments or State officer in his official capacity when such papers do not form a part of any action or proceeding.

*To Mr. Forrest E. Robb,  
February 27, 1929.*

W. D. GILLIS,  
Attorney General.

## SCHOOLS

### The Length of the School Day Is Not Fixed by Statute

#### 82. QUESTIONS:

1. Is the length of the school day fixed by law to be from 9:00 A. M. to 4:00 P. M?
2. May the teacher detain pupils after 4:00 P. M. as punishment for lack of preparation in their assignments?

#### OPINION:

At the outset, it should be said that the hours of a school day are fixed neither by statutory law in this state nor by regulation of the Department of Education. Custom appears to have fixed the period from 9:00 A. M. to 4:00 P. M. with an hour's intermission at noon and one fifteen minute period in the forenoon and also in the afternoon, as the period during which instruction shall be given. However, those hours appear to have been employed or arrived at solely from the fact that school systems have determined that a certain amount of instruction should be given in the so-called grade system and that the normal pupil may accomplish that measured amount of instruction in nine months of time of the hours I have mentioned, but neither by statute nor regulation of the department of Education are the number of hours fixed. Custom, and the reason I have above mentioned, dictates the ones you mention.

For the secondary schools, the Department of Education has declared or defined an accredited high school as one having an academic year of not less than 36 weeks, but shall include in the aggregate not less than the equivalent of not less than 120, sixty-minute hours of class room work. Two hours of manual training or laboratory work being equivalent to one hour's class room work. But this, it will be noted, is not confined between any particular hours of the day.

I therefore conclude, and it is my opinion that neither by statute nor by regulation of our State Department of Education, is it required that the school day begin at 9:00 A. M. or end at 4:00 P. M.

Subdivision 2, of Section 46, Chapter 215, of the 1921 Session Laws empowers the Board of Trustees of all school districts in the state to:

"Make by-laws and rules and regulations for its government and that of the district not inconsistent with the laws of the State or with the rules and

regulations promulgated by the constituted authorities."

It is, therefore, my conclusion that the district trustees might establish the hours between which school shall be taught within the district.

Section 1044 of the Idaho Compiled Statutes provides that the school month is four weeks of five days.

Recurring now to your second question, as to whether a teacher may detain a pupil after 4:00 P. M., subdivision 13, of Section 46, Chapter 215 of the 1921 Session Laws, authorizes the trustees of school districts to determine the discipline for disorderly and insubordinate pupils.

Section 944 of the Idaho Compiled Statutes, makes it the duty of every school teacher to:

"\* \* \* hold pupils to a strict account for disorderly conduct or improper language in or about the building, on the playgrounds, and on the way to and from school; shall keep himself or herself without reproach, and endeavor to impress upon the minds of the pupils the principles of truth, justice, morality, patriotism, and refinement, and to avoid idleness, falsehood, profanity, vulgarity and intemperance; \* \* \*"

24 R. C. L. 644, under section 102, treating of detention after school hours says:

"The detention or keeping in of pupils for a short time after the rest of the class has been dismissed, or the school has closed, as a penalty for some misconduct, shortcoming or mere omission, has been very generally adopted by the schools, especially those of the lower grade, and it is now one of the recognized methods of enforcing discipline and promoting the progress of the pupils. However mistaken a teacher may be as to the justice or propriety of imposing such a penalty at any particular time, it has none of the elements of false imprisonment about it, unless imposed from wanton, wilful or malicious motives. The recognized doctrine now is that a school officer is not personally liable for a mere mistake of judgment in the government of his school. To make him so liable it must be shown that he acted wantonly, wilfully or maliciously."

24 R. C. L. 573, under Section 21, says:

"The law commits the government and conduct of the schools in general, to the discretion of the board of education of the district, and places it beyond that of the patrons. Let the results be good or bad, there is no remedy, so long as the board acts within the limits of its legal power and authority. \* \* \*"

The limitation upon such detention or penalty is that it must be reasonable.

It is, therefore, my opinion and conclusion that a pupil may be detained after school hours or after 4:00 P. M., if that be the usual hours of dismissal of school, as a penalty for lack of preparation in their assignments, providing such detention is reasonable under all circumstances surrounding the pupil.

*To Mr. C. P. McGregor,*  
*October 16, 1930.*

W. D. GILLIS,  
Attorney General.

### Employment of Relative of School Trustee As Teacher

#### 83. QUESTION:

May the trustees of a common school district employ the step-daughter of a sister of one of the board members?

#### OPINION:

Subdivision 14 of Section 46, Chapter 215, of the Laws of 1921, reads as follows:

"No trustee of any school district of any kind in the State of Idaho shall vote to elect any relative of his or of his immediate family to the position of superintendent, principal, or teacher of any school within his district, and in case such relative of his own or his immediate family shall be an applicant for such position in any school within his district, the question of whether or not such relative shall be employed shall be determined by the remaining members of the Board."

It will be noted at the outset that the statute merely prohibits a trustee from voting to elect any relative of his immediate family. I am assuming that, from your letter, Weston School district No. 10 is a common school district, having three members on its board. It would, therefore, require, if one member were disqualified, that both of the remaining members vote in favor of such applicant.

We now turn to the question of the relationship: The word "relative" is evidently used in a general or broad sense because there is nothing in the statute to indicate that it is used in a particular or restricted sense. No limitation as to relationship is prescribed. Apparently the degree of relationship is not material. The statute appears to embrace any relative. Both near and distant relatives are included.

The New Standard Dictionary defines "relative" as one that is connected by blood or affinity.

Affinity is a legal relationship which arises as a result of marriage or a state resembling it between each spouse and the consanguineal relatives of the other. The term has been generally defined as the connection existing in consequence of marriage between each of the married persons and the kindred of the other; the connection formed by marriage which places the husband in the same degree of propinquity to the relations of the wife as that in which she, herself, stands with them, and gives to the wife the same reciprocal connection with the relations of the husband, (2 C. J. 377).

The step-daughter of the member's sister, is, therefore, a relative by affinity. It is, therefore, my opinion that the word "relative" is used in said statute in a general or broad sense and includes relationship by affinity as well as consanguinity, and both near and distant relationships.

My conclusion, therefore, is that said school member is prohibited from voting upon the election of the said step-daughter to the position of a teacher, and that it would be necessary for both of the other members on the school board to vote in favor of such election to regularly employ her.

Without a legal contract, the teacher, of course, could not draw a salary, and if the board persisted in issuing the same, they would be personally liable.

*To Miss Cora H. Jensen,  
June 7, 1929.*

W. D. GILLIS,  
Attorney General.

#### **Trustees May Act Only in Regular, Special or Adjourned Meetings**

##### **84. QUESTIONS:**

1. Have two trustees the right to hire teachers without a called meeting, or without notifying the chairman?
2. Will the contracts of these teachers be valid?

##### **OPINION:**

Replying to your first question, Section 46, of Chapter 215 of the 1921 Session Laws provides, among other things, that the board of trustees of all school districts shall have the power to employ certified teachers by written contract on forms approved by the State Board of Educa-

tion, a copy of which contract shall be filed with the County Superintendent.

Section 38 of the above enumerated chapter relates to the meetings of the board and provides that a quorum of the board of trustees of common and joint common districts shall consist of two trustees. This section also provides that regular meetings of the board of trustees shall be held on the last Monday of March, June, September and December, and special or adjourned meetings of said board shall be held from time to time as the board advises or determines. In the case of special meetings, written notice thereof must be given to the members at least twenty-four hours prior to said meeting.

The board can act only as a meeting, either regular, special or adjourned; and the law clearly contemplates that individuals acting as school trustees shall perform such duties at a properly called meeting.

It is, therefore, the opinion of this office that two members of a board of trustees, without notifying the third member, may not contract to hire teachers, where they do not create such contract at a regular, adjourned or special meeting of such board, as they would not, in fact, be functioning as trustees and in compliance with the statutes.

Replying to your second inquiry, it is my opinion that the contracts of these teachers would not be valid unless later ratified by the board of trustees at a regular, adjourned or special meeting, after due notice in the case of a special meeting. I do not see that the vote of the people of the district mentioned in your letter would have any bearing upon the legal aspect of the case.

To Mrs. Myrtle R. Davis,  
State Superintendent of Public  
Instruction,  
May 4, 1929.

W. D. GILLIS,  
Attorney General.

### **Athletic Teams May Not Be Supported by School Moneys**

#### **85. QUESTION:**

When the citizens of Independent School District No. 4, vote a special levy to maintain the upkeep of the Dubois High School Gymnasium and to promote its various activities, may such be legally done?

It is further stated:

"In this particular locality this is our only vis-



ible means of support and as you know in this day and age, the development of the recreational is conceded to be nearly as important as a proper course of study."

OPINION:

The opinion you refer to was to this effect that there is no statutory authorization which would permit a school board to include the expenses of a high school athletic team in making trips. I concede your statement in regards to the stress that is placed these days on the development of the recreational.

I am regretful that in your locality a levy upon the taxpayers appears to be "the only visible means of support" for your athletic teams. However, after a re-examination of the authorities and the statutes in connection with this problem this office can only affirm the opinion rendered your Mr. Leonardson.

Paragraph 5 of Section 47 of Chapter 215 of the 1921 Session Laws provides the authority for school districts:

"\* \* \* to levy for the proper maintenance and care of the gymnasium and grounds a special tax which shall not exceed one mill on the dollar."

Clearly that section does not empower your district to employ the taxpayers' money in the transportation of athletic teams. If at the special election there was added to the question the matter included in your letter which reads:

"\* \* \* to promote its various activities."

such addition to the question would merely be surplusage because it would be beyond the power of your trustees even by the vote of the qualified electors of the district to authorize the expenditure of money voted in the manner you mention.

The right to grant power to school districts to the support of athletic teams clearly rests solely with the legislature but until such a statute is enacted your district may not lawfully expend its funds for that purpose.

To Mr. Paul Hinchliff,  
May 6, 1929.

W. D. GILLIS,  
Attorney General.

Qualifications of Trustees

86. QUESTION:

What are the necessary qualifications for a person to be a candidate for the office of trustee in an independent school district?

## OPINION:

Section 33 of the Chapter 215 of the Laws of 1921 provides as follows:

"Every school district shall be governed by a Board of Trustees consisting of three members who at the time of their election and *during tenure of office must be qualified voters of the district*; one of whom shall be elected at each regular annual school election. \* \* \* Provided, however, That in rural high, joint rural high, independent, independent Class A, joint independent Class A, and joint independent school districts, the Board of Trustees shall consist of six members, two of whom shall be elected annually."

All trustees in all districts, it is my opinion, must have the same qualifications.

It is my opinion that no legislative change has been made as to the qualifications for voters at school elections except in school bond elections.

Paragraph 2 of Section 7 of Chapter 62 of the Laws of 1929 reads:

"At such meeting and election no person shall be allowed to vote who is not a qualified elector of such school district, having the qualifications prescribed in Section 19 of Chapter 215 of the 1921 Session Laws of Idaho."

Section 19 above referred to provides that in all elections in all school districts voters must have the following qualifications:

"1. Electors within the meaning of Article VI, Section 2 of the Constitution of the State of Idaho.

"2. Residents of the district at the time of election.

and in addition to the above, must be:

a. "Parents or guardians of a child or children when such child or children are under twenty-one years of age, and when such child or children and the parents or guardians thereof are residents of the district at the time of the election; or

b. "A person who pays taxes within the district, and the husband or wife of such taxpayer,  
\* \* \*"

A person who pays poll tax does not thereby qualify.

It is, therefore, my opinion that a person possessing the above qualifications is a qualified elector in the school district for all elections except bond elections as provided for in Chapter 198 of the Laws of 1929 which appears to provide limited qualifications for voters at such elections.

The property qualifications as provided for in the last mentioned chapter should not be construed as limiting the eligibility to run for school trustees to taxpayers only.

In conclusion we may sum up that the qualifications necessary for a person to be a candidate for trustee in an independent school district are that he must be an elector within the meaning of Article VI, Section 2, of the Constitution of Idaho, a resident of the district at the time of election; and, in addition to the above qualifications, must be the parent or guardian of a child or children of school age when such child or children and the parents or guardians are residents of the district at the time of the election, or be taxpayers in the district or the husband or wife of a taxpayer.

*To Mrs. Myrtle R. Davis,  
State Supt. of Pub. Instruction,  
May 23, 1929.*

W. D. GILLIS,  
Attorney General.

#### **Contracts of Employments for Longer Period Than One Year Permitted Only to Certain Districts**

##### **87. QUESTION:**

May an independent school district, not a Class A district, make a contract for the employment of a superintendent for a term of more than one year?

##### **OPINION:**

Section 46 of Chapter 215, Laws of 1921 enumerates the powers of the board of trustees of each school district and among other things provides that they shall have the power to employ teachers. Section 47 of the same act provides for additional powers to be vested in trustees of independent and joint independent districts. Section 47-A provides further additional powers for trustees in independent Class A and joint independent Class A districts. Among these additional powers provided for these two classes of districts is the one to hire a school superintendent for a period of not to exceed three years.

If the right to employ a superintendent for three years is granted to independent Class A and joint independent class A districts, then it is my opinion that such power is denied to districts of a lesser rank.

It is, therefore, my opinion that a school district in this state not ranking as an independent Class A and joint in-

dependent Class A district may not enter into a contract with a superintendent for a longer period than one year.

*To Mrs. Ross Haddock,  
February 27, 1930.*

W. D. GILLIS,  
Attorney General.

**Prosecuting Attorney Not Required As Part of  
His Duties to Advise School Districts**

**88. QUESTION:**

May a school district call upon the prosecuting attorney of that county for legal services to be rendered as one of his official duties?

**OPINION:**

Section 3655 of the Compiled Statutes provides the general duties of the prosecuting attorney. Subdivisions one and two provide that he shall prosecute and defend all actions, both civil and criminal, in the district court of his county in which the people or the state or the county are interested or are a party.

Subdivision three provides that he shall give advice to the county commissioners and other public officers of his county, when requested, in all public matters in which the people or the state or the county are interested or a party.

Subdivision four provides that he shall appear before any grand jury for the purpose of examining witnesses, to draw indictments, etc.

Subdivision five provides for a settlement on the first Monday of each month with the auditor for any moneys received by him.

A school district is defined by Section 3, of Chapter 215, of the 1921 Session Laws, as a "body corporate," which is organized by those maintaining the schools. Subdivision 15, of Section 46 of said Chapter 215, Laws of 1921, gives the trustees of school districts authority to employ legal counsel.

It is, therefore, my opinion that the prosecuting attorney may properly collect a fee from your district for legal services rendered.

*To Mr. Chas. Gaskill,  
February 28, 1930.*

W. D. GILLIS,  
Attorney General.

**Contracts in Excess of \$500 Must Be Let Only After Bids**

**89. QUESTION:**

If a school district desires to repair a school building and the estimated cost will be about \$500.00, must the Board call for bids or may it employ a person to do the same without first advertising for bids?

**OPINION:**

If the work calls for an expenditure of \$500.00 or more, the contract cannot be let without first advertising for bids. This is required under Section 48 of Chapter 215 of the Laws of 1921. That section requires that the contract be let to the lowest responsible bidder, provided, however, if, after advertising three times as provided in said section, no satisfactory bids are received the Board may proceed under its own direction, subject, however, to the approval of the State Board of Education.

*To State Supt. of Pub. Inst.  
May 20, 1929.*

W. D. GILLIS,  
Attorney General.

**Activity Fund Fee May Not Be Required**

**90. QUESTION:**

May a school board require students registering to pay an activity fund fee or an athletic fund fee as a prerequisite to their being admitted to high school?

**OPINION:**

It is my opinion that there is no way by which the parents may legally be compelled to pay the student body activity fee. Only such fees may be charged as are authorized by statute, and the fee in question is not authorized by statute. The student activity fee is not a tuition fee. It appears to be a charge or fee for participation in an activity outside of the regular course of school work and neither the directors of the district nor the superintendent have the expressed or implied authority to compel payment of such a charge. The authorities cannot exclude the children of such parents from school for refusal to pay such a fee.

*To Mr. D. T. Williams,  
September 17, 1929.*

W. D. GILLIS,  
Attorney General.

**A District May Not Erect a School Building  
Jointly With Another Association**

**91. QUESTION:**

School District No. 12 at Thornton, Idaho, is constructing a recreation hall and gymnasium as part of their high school. The building is not completed. The District is bonded to the limit. They are, therefore, unable to finish the building and make it available for use. A request has been made to Heber J. Grant, President of the Church of Jesus Christ of Latter Day Saints, for a contribution sufficient to finish the building. The district is willing to enter into a contract with the ward organization for the use of such building by such organization if funds are provided by said church for the completion of the building. You request an opinion as to whether or not said school district has authority to enter into such an agreement.

**OPINION:**

At the outset it must first be noted that the problem submitted involves a question of joint ownership and control of the building mentioned. It is my opinion that a school district in this state has neither express nor implied authority to enter into an agreement of this character.

Our Supreme Court in the case of *Olmstead vs. Carter*, 34 Ida. 276, 200 Pac. 134, had before it the question of whether or not a rural high school had the power to expend its funds in the completion of a school building upon the property of and belonging to a common school district under an arrangement whereby the two districts should enjoy the building when completed. The court held that under the statutes of this state there was neither express nor implied power in a school district to expend its funds for such a purpose. While the facts involved were different, it is my opinion that the principle involved is the same as the one which would be included in the proposed agreement suggested for the instant situation. The court in the case above cited relies upon the case of *Stewart vs. Gish* (Kan.) 198 Pac. 259, and quoted with approval the following language from the last mentioned case:

"Inasmuch as the rural high school district and the ordinary school district are separate organizations we think that without express legislative authority they have no power to join in the erection of a school house for their common benefit. The situation that would be so created, involving a divided control, no provision being made for determining

what course should be pursued if a difference of opinion should arise in some matter of policy relating to the use or the care, preservation, or improvement of the building, is so anomalous that we cannot regard the authority to enter into such an arrangement as fairly inferable from that granted to each to erect a schoolhouse for its own use. It is true that in a particular case no difficulty in administration might ever in fact arise. But the possibility of such an occurrence is so obvious, and the advisability of the plan here sought to be followed out is so open to debate, that we feel constrained to hold that until further legislation on the subject a single building may not be erected by the two districts for their common use."

As further authority for the court's conclusion, it held that the following subdivisions of Section 46, Chapter 215 of the Laws of 1921, are inconsistent with the idea of joint control of school property by separate districts:

"8. To have charge of all school property in their district and to receive and hold in trust all real estate or other property conveyed to said district.

"9. To convey by deed duly executed and delivered all the estate or interest of their district in any schoolhouse, school property or school site when directed to do so by a majority vote of the qualified electors of said district. \* \* \*"

The court further said that the case appears to be one from which hardship may result, and as to this the court said:

"But it seems that the hardship grows out of the failure of the trustees of the common school district to observe the law. They have commenced the construction of a building which they do not have funds to complete. Under the law they are required to let contracts for the construction of buildings upon competitive bids, and it is difficult to understand how this situation arose. The court can do nothing but interpret and construe the laws as they are and is powerless to afford relief when to do so involves a violation of law."

I must, therefore, reluctantly conclude that an agreement such as mentioned may not be entered into under our statutes.

*To Bagley, Judd & Ray,  
September 24, 1929.*

W. D. GILLIS,  
Attorney General.

**Rural High School Districts Have No Power  
to Levy for Transportation**

**92. QUESTION:**

What is the maximum amount which a Rural High School District may levy for the purpose of transportation of pupils within the district to and from its high school?

**OPINION:**

In reply to your inquiry, we wish to call your attention to the provisions of Section 52 of Chapter 215, of the 1921 Session Laws, as amended by Chapter 162 of the Laws of 1927, which reads in part as follows:

"The board of trustees of independent, independent Class A, joint independent, and joint independent Class A districts maintaining rural routes may levy an additional tax not to exceed four (4) mills upon each dollar of assessed valuation of all property within the district for the purpose of maintaining such rural routes; when such districts, or either of them, are united with other school districts to form a rural high school district of any class, the tax for any such districts so included in a rural high school district for the support of such rural routes, together with the levy, if any for maintaining rural routes for the grade schools of each district, shall not exceed four mills and the board of trustees of such district or districts so included may determine what portion, if any, of the tax so raised shall be used in maintaining rural routes to the rural high school and what portion, if any, shall be used in maintaining rural routes to the grade school or schools of the district or districts so included and in excess of such amount so raised no sum shall be expended for maintenance of rural routes by the board of trustees."

It is the opinion of this office that Rural High School Districts are not delegated the authority to make any tax levy whatever for the purpose of transportation of its pupils. The Boards of Trustees of Independent, Independent Class A, Joint Independent and Joint Independent Class A Districts have the power to make an additional levy not to exceed four (4) mills for the transportation of pupils within their respective districts, and it is entirely within their discretion what portion of this tax, if any, shall be used in maintaining a rural route to the Rural High School. In other words, each district is responsible for the transportation of its pupils within its district to the Rural High School. Such authority, however, does not appear to have been granted trustees of common and joint common school



districts. The above Act is limited in its application to the districts mentioned therein.

The only provision for the transportation of pupils within common school districts is found in Section 50 of Chapter 215 of the 1921 Session Laws, as amended by Chapter 169 of the 1923 Session Laws, which provides as follows:

"Provided, That it shall be lawful for the trustees of a common school district to expend from the funds of the district for the transportation of any child or children of school age belonging to the district who reside not less than one mile from the school house a sum or sums not exceeding the rate of ten dollars per school month for any one such child."

The authority is not given in this section to prorate this expenditure in providing an additional route to a rural high school, and for that reason, it is our opinion that the authority is denied to the trustees to do so.

The matter is one that could be remedied by legislative action.

*To Mr. Samuel E. Vance,  
January 22, 1929.*

LEON M. FISK,  
Asst. Attorney General.

### Furnishing of Transportation Is Discretionary

#### 93. QUESTION:

Is the furnishing of transportation for school pupils by the district a discretionary power of the Board of Trustees?

#### OPINION:

Section 52 of Chapter 215 of the Laws of 1921, as amended by Chapter 62 of the Laws of 1929, provides that the Board of Trustees of independent districts may levy a certain additional tax for the purpose of maintaining rural routes. The section, however, does not require them to do so. Clearly, it is discretionary with the board as to whether or not it shall provide such service. It would only be possible to require a board to maintain a rural route by showing a grave abuse of its discretionary powers in this connection, and such might be shown only by bringing a civil action against them.

*To Mr. Dan Cross,  
September 24, 1929.*

W. D. GILLIS,  
Attorney General.

**Application of Law When Children Move From  
One District to Another**

**94. QUESTION:**

School children who have been residents of a school district for about two weeks and who were included in the census for that district go to another district where they reside for a period of a year or more. The second district bills the first district for tuition. Is this a proper charge against the first district?

**OPINION:**

For the purpose of this opinion, it will be assumed that both of these districts are common school districts.

The statute makes no provision for the payment of a claim of this character.

It would also appear that this family is of the transient type, and their actual place of residence would be wherever they have stopped long enough to acquire one.

The provisions of Section 828, Compiled Statutes, as amended by Chapter 235, Laws of 1929, would not be applicable as it is not a question of pupils living in the first district and obtaining permission from the County Superintendent to attend school in the second district. Neither would the provisions of Section 998, Compiled Statutes, apply, nor the provisions of Section 999, Compiled Statutes.

It is, therefore, my conclusion that the bill of the second district directed to your district would not be a proper charge and should not be paid by you. The legislature has made no provisions for the same and until it does, tuition payments of this character may not be required.

*To Mr. Charles Lynch,  
January 31, 1930.*

W. D. GILLIS,  
Attorney General.

**Transfer of Pupils**

**95. QUESTION:**

In the event a County Superintendent makes an order transferring pupils to another district must such district accept the pupils?

**OPINION:**

Chapter 235 of the Laws of 1929 which amended Section 828 of the Idaho Compiled Statutes provides that the County Superintendent of Schools shall conduct a hearing after

the giving of a specified notice and quoting from the portion pertinent to your inquiry, said chapter provides:

"If at such hearing the county superintendent finds that it is for the best interest of said pupil to attend school in any other district in the county, he shall make an order to that effect and the county superintendent of schools is hereby designated as the sole judge of necessity for making such change."

From an examination of the foregoing section, it is my opinion that if the County Superintendent of Schools, as the sole judge of necessity, determines that a child should go to another district, that such other district must receive such pupil.

*To Mr. Bash L. Bennett,  
September 17, 1929.*

W. D. GILLIS,  
Attorney General.

#### Items Making Up Tuition Charge

##### 96. QUESTIONS:

In connection with Chapter 235 of the Laws of 1929, which amended Section 828 of the Compiled Statutes of Idaho, which provides that the County Superintendent, where pupils are transferred from one district to another, shall certify the per capita cost of education in the district where the pupil is permitted to attend school, what items are used in estimating the cost of education in the district?

Would it include any transportation?

Would it include any capital outlay such as playground equipment, maps, etc.?

Should average daily attendance, number enrolled, or census lists be used to find the per capita cost?

##### OPINION:

May I say at the outset that the opinion of the former Attorney General to which you refer is not applicable. That opinion had to do with a law greatly differing in terms from the present one.

Your inquiry has been given very serious and careful consideration. It is one of administration rather than legal interpretation. In considering it, we have gone to a number of sources of information outside of the law books.

Chapter 235 of the Laws of 1929 reads in part pertinent to this inquiry, as follows:

"\* \* \* The county superintendent of the coun-

ty wherein such pupil resides shall certify to the board of trustees of the district wherein the pupil resides a statement of the per capita cost of education in the district where the pupil is permitted to attend school. Upon receipt of such statement said board of trustees shall cause an order for a warrant to be drawn on its school funds in an amount equal to the cost of education as shown in the county superintendent's certificate, and the amount of such warrant shall be credited to the funds of the district in which such pupil attends school."

The first question, therefore, which presents itself is that of the per capita cost of the education of the pupil in the district to which he has been transferred. This cost is borne by the district from which he transfers. In determining what the per capita cost shall be, we have adopted the plan accepted by the United States Government in making computations of this character, and it is our opinion that the per capita cost herein mentioned should include all items of expenses, save those represented by capital outlay, and capital outlay we limit and refine as the money invested in school buildings through bond issues. It follows, therefore, that bond issues, and interest on sinking funds and levies for sinking funds should not be included in the per capita cost. The items which should be included will be roughly stated as follows:

1. Total outlay for teachers' salaries.
2. Cost of textbooks, if furnished free.
3. Supplies for instructions.
4. School nurse, music teacher, etc.
5. Pro rata cost administration superintendent and Clerk.
6. Cost of heat, light, power and water.
7. Cost of janitor service.
8. Cost of supplies for operation.
9. Cost of warrant interest.
10. Insurance.
11. Cost of repairs.
12. Cost of transportation, if furnished.

The above items of cost must necessarily be computed on an annual basis. The Superintendent having determined the total cost of education in the year, must then compute it for the individual student. Having determined the total cost of education in a given district, in order to ascertain the cost per pupil, or the per capita cost, it is necessary to determine the number of pupils educated. Section 37 of Chapter 215 of the Laws of 1921, as amended by Chapter 95 of the Laws of 1927, requires the clerk of the board of trustees of each district within fifteen days after the

fourth Tuesday of September in each year to enumerate all children in his bona fide residence, and report such enumeration to the County Superintendent. It is our opinion that this census record should be the basis for the County Superintendent to determine the per capita of the individual student. Having determined the number of pupils in a given district, presumably educated therein, this number may be divided into the total cost of education for a given year and the result will be the per capita cost of education in the district in question.

It is, therefore, my conclusion and opinion that among the items employed in estimating the cost of a school in a district, transportation would be included, but that capital outlay should not be included. It is my opinion that maps and supplies are costs of operation but playground equipment would not be.

*To State Supt. of Pub. Ins.*  
September 10, 1929.

W. D. GILLIS,  
Attorney General.

#### School Districts May Not Refund Warrants

##### 97. QUESTION:

May the warrant indebtedness of a common school district when changed to an independent school district be refunded?

##### OPINION:

As appears from the Auditor's letter, I assume that Common School District No. 44 of Valley County was changed to a school district of higher rank and is now Independent School District No. 2 of said county, and that Common School District No. 44 did not lapse, as indicated in his letter. Therefore, Section 25 of Chapter 215, Laws of 1921, relating to the refunding of warrant indebtedness by the Board of County Commissioners does not apply. Section 24 of Chapter 215, Laws of 1921, defines a lapsed district. This is further borne out by the fact that the common school district was raised to a higher rank. Therefore, it could not lapse.

It, therefore, follows that the character of the district has been changed, the change having been made as provided by Sections 5 and 6 of Chapter 215, Laws of 1921.

It is my opinion that the liability of the former district still exists although the character of the district has been

changed. I am unable to find any provision of our statutes giving a school district, independent or otherwise, the right to refund its warrant indebtedness.

There was an emergency act passed by our legislature in 1925 known as Chapter 199, Laws of 1925, giving a school district such right, but such act expired on January 1, 1927, and no law has been enacted since that time giving a school district the power to refund its warrant indebtedness.

To Mr. E. M. Hoover, Commissioner of Public Investments,  
October 29, 1930.

W. D. GILLIS,  
Attorney General.

#### "Lapsed" District Defined

##### 98. QUESTION:

What is the meaning of the word "lapsed" in connection with the school law relating to lapsed districts?

##### OPINION:

Section 24 of Chapter 215, Laws of 1921, reads in part pertinent to this inquiry as follows:

"A school shall lapse when for a period of one (1) school year it fails to maintain school for at least four (4) consecutive school months or when for a period of one (1) school year it fails to keep up its organization or officers, or when it has an average attendance for six (6) consecutive months of only five (5) pupils or less."

Once a district lapses it ceases to exist and the territory included therein is the same as unorganized territory, except, however, it is properly assessable to pay off any unpaid bonded or warrant indebtedness.

Since the territory may be considered as unorganized territory, it could properly join another district. This, however, would not affect its bonded indebtedness fixed thereon prior thereto. Under Section 25 of Chapter 215, Laws of 1921, the original district would be assessed annually for the unpaid indebtedness until the same was paid. This would mean, of course, that if the territory of such lapsed district was attached to another, the portion of which had lapsed would be liable for the amount of the bonded indebtedness it had created while a subsisting district and its portion of the current obligations of the district to which it became attached.

It is, therefore, my opinion (first), that a lapsed district

may be joined to another district, and (second) that its original boundaries remain intact for the levying of taxes to liquidate its obligations incurred prior to the time it lapsed.

*To Mr. Harlan D. Heist,  
July 2, 1929.*

W. D. GILLIS,  
Attorney General.

### **Tax Anticipation Notes of a School District May Not Be Refunded**

#### **99. QUESTION:**

May tax anticipation notes of school districts be refunded?

#### **OPINION:**

Section 1 of Chapter 187 of the Laws of 1925 provides, in pertinent part, as follows:

"A taxing district, within the meaning of this Act, is any \* \* \* independent school district, specially chartered school district, now or hereafter organized."

The amendment made by the legislature of 1927 did not change this materially, so far as the question herein is affected.

Section 3 of said Chapter 187 provides as follows:

"A taxing district may borrow money for the purpose of meeting current expenses, interest and sinking funds on bonds and for the other lawful corporate purposes, not in excess of sixty-five per cent of the unexpended taxes levied for the current year, issuing therefor negotiable notes of such taxing district bearing interest at the lowest rate obtainable not exceeding six per centum per annum."

Section 4 of said Chapter 187 provides as follows:

"In the event that the revenue in any one year is not sufficient through delinquency in the payment of taxes, or any other cause, to pay the debts of any taxing district mentioned in this Act, such taxing district shall, in addition to other levies now provided by law, levy in the next succeeding year a tax sufficient to pay all of such outstanding debts; Provided, that such extra tax shall not exceed 5 mills on each dollar of assessed valuation. Such taxing district may borrow money in anticipation of the collection of such extra tax to pay such indebtedness."

Section 5 of said Chapter 187 provides as follows:

"To provide for the payment of such notes or bonds and interest at maturity, there is hereby created a special fund to be known as the 'Treasury Note Redemption Fund.' \* \* \*"

Section 6 of said Chapter 187 provides as follows:

"The notes authorized by this Act shall not run longer than July first of the year following that in which the levy is made or determined upon."

Section 61 of Chapter 215, Laws of 1921, provides as follows:

"The Board of Trustees of any school district of the State of Idaho may issue negotiable coupon bonds of said district for the purpose of paying, redeeming, funding, refunding, purchasing and redeeming the outstanding bonded indebtedness of said district whenever the same can be done to the profit and advantage of the district and without the district incurring any additional indebtedness or liability. No bond, however, shall be sold at less than its par value and the proceeds thereof must be devoted to the payment, redemption, or refunding of the outstanding bonded indebtedness of the district.\* \* \*"

The language of Section 4 of Chapter 187, Laws of 1925, is such as to indicate that it was never contemplated by the legislature in providing for the issuance of negotiable notes that the same might be refunded. It will be noted that this section provides:

"In the event that the revenue in any one year is not sufficient through delinquency in the payment of taxes, or any other cause, to pay the debts of any taxing district \* \* \*, such taxing district shall, in addition to other levies now provided by law, levy in the next succeeding year a tax sufficient to pay all of such outstanding debts: \* \* \*"

This mandatory provision is limited only by the provision that the extra tax shall not exceed five mills.

Chapter 187 is a special act, and its evident intention is that the taxing districts, including independent school districts, may have the privilege of putting their districts on a cash basis for the maintenance and operation of the schools.

An independent school district may issue notes not in excess of sixty-five per cent of the unexpended taxes levied for the current year. It, therefore, follows that to allow a school district to refund notes in the amount of sixty-five per cent of the unexpended taxes for a period of twenty years would not put the district on a cash basis.

It is, therefore, my conclusion and opinion that an inde-



pendent school district does not have authority to refund its negotiable notes issued in anticipation of the collection of taxes.

*To Comr. of Public Investments,*  
*June 26, 1929.*

W. D. GILLIS,  
Attorney General.

## SCHOOL BONDS

### Proposed Bond Issues for Erection of School Buildings and a High School Gymnasium Should Be Submitted Separately

#### 100. QUESTION:

The Independent School District of Boise City desires to submit to the qualified electors of the district the question of voting a bond issue in the amount of \$295,000.00, for the purpose of "making needed additions to the Roosevelt, Washington and Whitney grade buildings, and the erection of a new Whittier grade building" and also for the erection of a high school gymnasium.

May the district submit the above as one proposition or should the same be placed before the voters as separate questions?

#### OPINION:

Section 14 of Chapter 38, Laws of 1929, provides in part pertinent to this inquiry as follows:

"The laws of the State of Idaho now applicable to school districts of the class to which the Independent School District of Boise City would belong, if organized under the general laws or as the same may be hereafter amended or enacted, in relation to:

"\* \* \*

"(b) The issuance and refunding of bonds by such districts, the form and plan of the bonds to be issued, the registration and sale thereof; the redemption of bonds and the calling of bonds for payment,

"\* \* \*

"(d) The public depository law and other laws relative to the safe-keeping and protection of the funds of the District, insofar as the same may not be inconsistent with the provisions of this Chapter, shall apply to and govern said Independent School District of Boise City."

The above mentioned Chapter 38 amends the charter of Independent School District of Boise City, originally grant-

ed by the legislature assembly of the Territory of Idaho. In my opinion the foregoing quoted reference would be construed by the courts to mean that the general school laws are applicable in reference to the Independent School District of Boise City in connection with the issuance and refunding of bonds; in other words, that those powers granted by Sections 46, 47 and 47-A of Chapter 215, Laws of 1921, may be exercised by the Independent School District of Boise City.

While there is nothing before me in reference to the class of your school district, I think we can properly assume that it is of the same class as an independent Class A district. Such a district must employ at least twenty teachers and contain within its limits at least \$2,500,000 of current assessed valuation of property. It is common knowledge that your school district would qualify as to those requirements.

We now turn to an examination of the statutes applicable to an independent class A district, which grant the power to issue bonds to acquire or purchase school sites, and to build or provide one or more schoolhouses.

Section 57 of Chapter 215, laws of 1921, as amended by Section 1, Chapter 121, Laws of 1927, provides in pertinent part as follows:

"The purpose for which bonds may be issued is to acquire or purchase school site or sites, to build or provide one or more schoolhouses or other needed buildings in said district, or to add to or repair said building or buildings or to provide or furnish the same with all furniture, apparatus, or equipment including lighting and heating, necessary to maintain and operate the school or schools, or any and all of said purposes. \* \* \*"

Section 14 of Chapter 215, Laws of 1921, as amended by Section 1 of Chapter 100, Laws of 1925, and as amended by Section 1, Chapter 259, Laws of 1927, provided in part as follows:

"Notice of all school elections of whatever nature or for whatever purpose \* \* \* must be given by posting notice of said election \* \* \*. Said notice \* \* \* must contain a *brief but clear statement* of the purpose of said election, \* \* \*. \* \* \* and in case of bond election, the amount of the issue, purpose and period of issue, and form and plan thereof. \* \* \*"

Section 47 of Chapter 215, Laws of 1921, provides in part as follows:

"In addition to and supplementary of the pow-

ers and duties prescribed in Section 46, the Board of Trustees of Independent and joint independent districts, shall have the power and it is their duty:

"\* \* \*

"(5). To purchase or otherwise acquire grounds or sites for playgrounds and gymnasiums and build and erect gymnasiums in their districts, either in connection with school buildings or as separate buildings; to equip and maintain all such playgrounds and gymnasiums with all necessary apparatus and fixtures; to issue and sell bonds in the manner as provided by law to raise money for the purpose of buying such grounds, sites and building such gymnasiums and purchasing apparatus and fixtures therefor; \* \* \*."

The legislature in the year 1923 amended Section 47 of Chapter 215 of the Laws of 1921, which amendment, insofar as the question is at issue herein, made no change in the law, that is, Subdivision 5, above quoted, was in no wise amended, and the law now appears to be that an independent Class A school district has the power to purchase or acquire grounds or sites for gymnasiums, and to issue and sell bonds therefor.

Insofar as my investigation has gone it indicates that for the first time in 1921 school districts of the class mentioned were empowered to bond for the construction of gymnasiums.

We now turn to this pertinent fact—that from the foregoing it will be noted that there are two sets of statutes in relation to the question at issue herein; one is to the effect that the board of trustees of any school district within the state may issue bonds—

"\* \* \* to build or provide one or more school-houses or other needed buildings in said district, or to add to or repair said building or buildings, or to provide or furnish the same with all furniture apparatus, or equipment, including lighting and heating necessary to maintain and operate the school or schools, or any and all of said purposes. \* \* \*"

The other is that the boards of trustees of independent class A districts have the power—

"\* \* \* To purchase or otherwise acquire grounds or sites for playgrounds and gymnasiums and build and erect gymnasiums in the districts, either in connection with school buildings or as separate buildings; \* \* \* to issue and sell bonds in the manner as provided by law \* \* \*."

The issuance of bonds for the building of school houses and the issuance of bonds for the building of gymnasiums

being provided for in separate statutes, I am inclined to the view that they are separate and independent purposes, and being such, may not be voted upon as one proposition or question.

Our Supreme Court has not directly passed upon this question. It did, however, in the case of *Ostrander v. City of Salmon*, 20 Ida. 153, employ language in my opinion applicable to your inquiry. At page 162 of said case it is said:

"No doubt it often occurs that where several proposed improvements are to be paid for by bond issue, one or more may be favored by a majority of the voters, while others may be strongly opposed, and rather than defeat the proposition favored, the voter will be forced to accept the proposition which he honestly opposes, if different and distinct purposes could be incorporated in each separate submission. But where the subjects are different, and have no natural or necessary connection, and the questions submitted indicate different purposes, such questions cannot be submitted as one question, and this is specially true under the provisions of the statute which enumerates said purposes as independent and separate purposes. There is no provision in the statute which prohibits the submission of a number of propositions or questions at one time, providing such ordinance specifies each separate question or proposition as such, and provision is made by which the voters are given opportunity to vote upon each specific proposition or question independent of the other questions submitted at the same time. This may be done upon a single ballot, but the ballot must state each proposition separately, so that the voter may be able to express his will with reference to each question. \* \* \* The designation that \$30,000 of the proposed bond issue would be used for the purchase of the water system of the Salmon City Water Company, and not to exceed \$15,000 to be used to enlarge and extend said system, states one general purpose, that of acquiring and improving a water system for said city, and both relate to the same subject matter, and constitute but one purpose as defined by the statute, and might well be submitted as one proposition; but the construction of a municipal building, having no connection whatever with the acquiring or constructing of a water system, and not being a part of the same, should have been submitted as a separate and independent proposition, \* \* \*"

I note from your statement that one of the purposes of issuing these bonds is for—

"\* \* \* making needed additions to Roosevelt,

Washington and Whitney grade buildings, and the erection of a new Whittier grade building \* \* \*."

The cases of *King v. Independent School District No. 37*, 46 Ida. 800, and *Howard v. Independent School District*, 17 Ida. 537, clearly declare the rule that the inclusion of the making of those additions and the erection of this school building in one question is authorized, but it is my view that the erection of a gymnasium being authorized by a separate statute and being a different purpose, should be included in a separate question.

To summarize: It is my opinion that the purposes for which the bonds are to be issued by the Independent School District of Boise City should not be voted upon as one proposition, but that the same should be submitted to the voters in two questions, the one reading in substance as follows:

"for the purpose of making needed additions to the Roosevelt, Washington and Whitney grade buildings, and the erection of a new Whittier grade building,"

and the other:

"for the purpose of erecting a high school gymnasium."

It is my further opinion that these two questions may be submitted at the same time. This may be done upon a single ballot, but the ballot must state each proposition separately so that the voter may be able to express his will on each question separately.

*To Board of Education,  
Boise Public Schools,  
May 27, 1930.*

W. D. GILLIS,  
Attorney General.

## SCHOOL BOND ELECTIONS

### When Amount of Bonds Voted Exceed Limit Permitted a Lesser Amount May Be Issued

#### 101. QUESTIONS:

1. When a school bond election authorizes an issue of bonds in an amount which when added to the present indebtedness of the district, exceeds 6% of the assessed valuation of the district, may the district issue bonds in a lesser amount which does not bring the total debt past this limit?

2. What is meant by warrant indebtedness?
3. May a bond issue be voted, a portion of the proceeds of which is to be issued for improvements provided by statute, and the balance to retire warrant indebtedness?

OPINION:

Answering your first inquiry: Section 56 of Chapter 215 of the 1921 Session Laws, as amended by Chapter 185 of the 1927 Session Laws, gives the board of trustees of a school district power to submit to the qualified voters the question as to whether or not the board shall be empowered to issue negotiable coupon bonds of the district in an amount and for the period of time to be named in the election. The amount of bonds in common, joint common, independent and joint independent school districts shall not exceed at any time, including outstanding indebtedness in the aggregate, 6% of the assessed valuation of the taxable property of said district.

In the case of *Shover v. Buford* (Colo.) 208 Pac. 470, having to do with a situation similar to that involved in the first question, the court used the following language:

"The parties themselves are in accord that the substantial question involved is whether the vote of the electors at the called meeting to instruct the school board to issue bonds in the sum of \$20,000 for building a schoolhouse, which sum is in excess of the statutory limit, prevents the board from issuing bonds for the lesser sum of \$14,160, which is within the limit?" \* \* \*

"In *Stockdale v. School District No. 2 of Wayland*, 47 Mich. 226, 10 N. W. 349, in an opinion by Judge Cooley, it was held that a vote of the electors of a school district in favor of the issuance of bonds beyond the statutory limit nevertheless was valid to the extent that would have been admissible had the limited sum been proposed and voted, and cites *McPherson v. Foster Bros.*, 43 Iowa, 48, 22 Am. Rep. 215. In the Iowa case there is an elaborate discussion by the court of this proposition. The court said that, where a school district may become indebted in a certain amount by bonds, and the electors of the district authorize a debt in excess of that amount, such authorization is void only as to the excess and valid as to the sum which it is within the power of the district to issue. That decision seems to us directly in point and is authority for the judgment entered below authorizing an issue only of a lesser amount than that voted, because it was within the power of the district to vote such lesser sum, and such authority to issue the lesser is included in the vote for the

larger sum, a part of which is invalid.

"In *Vaughn v. School District No. 31*, 27 Or. 57, 39 Pac. 393, the court decided that, where two-thirds of a proposed expenditure by a school district for building a school house is the measure of the power to issue district bonds, and the school board, although instructed by the electors to issue such bonds in the sum of \$3,000, had no authority to issue them in behalf of said district in a greater sum than \$2,000, but the vote of the electors was sufficient authority for the issuance of bonds to the extent of the lesser sum, and the board was permitted to issue them in that proportion."

It is apparent from the quotations from the above cases, that the board would be authorized to issue bonds in a lesser amount than the amount authorized by the election, provided this lesser sum when added to the other indebtedness did not bring the aggregate above the 6% of the assessed valuation.

Replying to question Number 2, the warrant indebtedness of any year would be the maximum amount of unpaid warrants outstanding at any time during that year.

Replying to your third inquiry which has to do with the question as to whether or not a bond issue may be voted, a portion of the proceeds of which is to be employed for improvements provided by statute and the balance to retire warrant indebtedness, Section 57 of Chapter 215 of the 1921 Session Laws, as amended by Chapter 121 of the 1927 Session Laws, declares the purpose for which bonds may be issued but it does not include as a purpose the retiring of warrant indebtedness.

From an examination of Mr. Atwood's letter, based on the assumption gained therefrom, that after May 1st, their bonded indebtedness would be considerably decreased, it would seem that it might be advisable for the board of trustees to call a new election for the issuance of bonds at which time, having paid off \$1,000.00 of their indebtedness on May 1st, then it might be that their outstanding indebtedness, added to the amount they would need to issue, might not exceed 6% of the assessed valuation of the taxable property of said district.

I add this suggestion, that the Twentieth Session of the Legislature by Chapter 198 of the Session Laws, amending Section 56 of Chapter 215 of the Session Laws of 1921, as amended by Section 1 of Chapter 185 of the Session Laws of 1927, provided new qualifications for electors at bond elections. A voter at such bond election must be a qualified elector of the district and a bona fide resident thereof.

for more than 30 days prior to the election, and a taxpayer or the wife or husband of a taxpayer. A taxpayer is defined as a person whose name appears on the tax rolls of the county and is there assessed with unexempt real or personal property owned and subject to taxation within the boundaries of the district. It continues the requirements that two-thirds of the votes cast at such election must be in favor of the issuance of the bonds and that the same may be issued at any time within two years from the date of such election.

This opinion has been held up to include the new legislation on the subject.

*To Honorable W. D. Vincent,  
Commissioner of Education,  
April 17, 1929.*

W. D. GILLIS,  
Attorney General.

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## SCHOOL BUSES

### School Districts Operating Buses Need Not Carry Liability Insurance

#### 102. QUESTION:

Are school districts liable for injuries to passengers or others incurred by reason of the operation of school buses which are operated under contracts with the districts by private concerns?

#### OPINION:

It is the opinion of this office that the transportation of school children to and from school is a governmental function for which the school district is not liable. If an injury results because of the driver's negligence, he is personally liable.

It is, therefore, my opinion that there is no reason for the district carrying liability insurance since no liability can attach to it.

*To Mr. Benj. F. Harrison,  
August 14, 1929.*

W. D. GILLIS,  
Attorney General.



## SCHOOL DISTRICTS

### **An Independent School District Does Not Automatically Lapse By Reason of Failure of Some Required Requisite of Its Organization**

#### 103. QUESTIONS:

A school district met all the qualifications for an independent Class A district including the one that prescribes 20 teachers as a requisite, and accordingly was given such rating and classification. The district now has but 18 teachers.

1. Does the district continue as an independent Class A district or (a) automatically lapse to a common district, or (b) through some process of law lapse to a common district?

2. Has the County Superintendent any duty in connection with such a condition?

#### OPINION:

Subdivision (d), Section 6, Chapter 215, Laws of 1921, relates to the procedure to create an independent Class A school district or a joint independent Class A district.

Section 13 of said chapter provides for the approval or modification of such petition by a majority of the board of county commissioners and the subsequent submission of the question of organization to the voters of the territory affected.

Section 6A of said chapter relates to independent districts being changed to common districts and provides the procedure by which electors of the district may reduce an independent district to a district of a lower classification.

Section 24 of said chapter relates to the lapsing of school districts.

Subdivision (d) of Section 6 of said Chapter is the only section which relates to independent Class A districts and as to the requirement of their having twenty teachers. It will be observed that this is merely a requisite showing required for the creation of such a district, but it is not required that an independent Class A district after its organization must continue to employ at least twenty teachers as a requisite to its continued existence, nor do I find any other section of the statute making this requisite a requirement for the continued existence of an independent Class A district.

It is, therefore, my conclusion and opinion that even

though an independent Class A school district does not after its organization continue to employ at least twenty teachers; which is necessary for its organization, that such district does not by reason of that fact lapse automatically into a common school district, or through process of law become a district of a lower classification. To become a district of a lower classification, the procedure provided by Section 6A, above referred to, must be complied with, which requires in short that fifty qualified electors of the district petition the county commissioners for dissolution of the district and substitution in its place of a common school district.

Replying to your second question, it is my opinion that the County Superintendent has no duty to perform in connection with such a condition.

*To Honorable W. D. Vincent,  
Commissioner of Education,  
October 23, 1930.*

W. D. GILLIS,  
Attorney General.

#### **Districts May Not Consolidate Which Do Not Join Each Other**

##### **104. QUESTION:**

Would it be possible for two school districts to consolidate if their territory is separated by an existing district between the same?

To perfect the consolidation in the instant case, it would be necessary for the one district to transport children through the existing district, which will not consolidate, in order that the children may reach the district in which they will attend school.

##### **OPINION:**

Section 4 of Chapter 215, Laws of 1921, reads in part pertinent to this inquiry as follows:

"New districts may be created out of unorganized territory or by consolidating two (2) or more existing districts; or by annexing to an existing district or districts units of unorganized areas; or by annexing to an existing district or districts, part or parts of any existing district or districts; or by annexing to an existing district or districts, part or parts of an existing district or districts and units of unorganized territory; or by reducing an existing district to a lower rank than that into which it was originally organized; or by dividing an existing district in two (2) or more parts; but all pro-

ceedings for this purpose must follow the procedure and meet the requirements set forth in this act."

Section 5 of this chapter gives the power to the Board of County Commissioners to affirm or create the district. There are no specific limitations as to the boundaries.

Referring again to Section 4, and placing the usual construction on the words "consolidating" and "annexing," we find in Words and Phrases, Vol. 2, 1st series, at page 1451, the following definition of the word "consolidate":

"To 'consolidate' means something more than rearrange or redivide. In a general sense, it means to unite into one mass or body, as to consolidate the forces of an army or various funds."

We find the definition of the word "annexing" in Words and Phrases, Vol. 1, 1st Series, page 399, as follows:

"The word 'annexed' has been legally construed to mean physically joined."

From these definitions it would appear that the legislative intention was that the districts in order to be united into one must be adjacent.

It is my view that clearly this was the intention of the legislature when it authorized districts to unite. Were this not true, it would be possible to have a district in one end of the county united with a district on the other side of the county, with a number of districts intervening. Of course, such an illustration amounts to an absurdity, but not impossible if we held otherwise.

My conclusion, therefore, is that the territories must not be separated by that of another district.

*To Mrs. Myrtle R. Davis,  
State Superintendent of Public  
Instruction,  
July 31, 1930.*

W. D. GILLIS,  
Attorney General.

#### May Not Build Gymnasium by a Levy

##### 105. QUESTION:

May a Board of Trustees of an Independent School District construct a gymnasium from moneys raised by a levy on the taxable property within the district?

##### OPINION:

Paragraph 5 of Section 47 of Chapter 215 of the Session Laws of 1921, as amended by Chapter 21 of the Laws of 1923 provides that Boards of Trustees of Independent

and Joint Independent Districts may purchase and acquire grounds and sites for such purposes and erect buildings thereon,

“\* \* \* to issue and sell bonds in the manner as provided by law to raise money for the purposes of buying such grounds, sites and building such gymnasiums and purchasing apparatus, and fixtures therefor; \* \* \*”

After erection of such buildings it is provided that a levy may be made on all the taxable property within the district not exceeding one mill, to maintain the same.

It is, therefore, my opinion that the trustees do not have the power to provide and erect the building from moneys obtained from a general levy.

Such money, it is intended, should be provided by a bond issue which, of course, must be authorized by the requisite number of voters in the district.

It is, therefore, my opinion that a school board may not construct a gymnasium from moneys raised by levy on the taxable property within the district.

Section 50 of Chapter 215 of the Session Laws of 1921 as amended by Chapter 52 of the Laws of 1923 and Chapter 169 of the Laws of 1923 is not applicable to an independent school district as it is confined to common school districts.

*To Mr. Floyd R. Barber,*  
*April 25, 1929.*

W. D. GILLIS,  
Attorney General.

## SCHOOL DISTRICT SINKING FUND

### An Independent School District May Not Invest Its Sinking Funds in Its Own Warrants

#### 106. QUESTION:

Independent School District No. 19 at Ammon, Bonneville County, Idaho, has an overdraft in its general fund due to delinquent taxes in years past. These warrants are being held by Anderson Brothers' Bank and the district pays seven per cent on them. Each year the district is placing \$4000 in the sinking fund for which the bank pays interest at three and one-half per cent. The question arises: May the district legally invest its sinking fund in its own warrants, thus saving considerable interest?

## OPINION:

Section 1, Chapter 119, Laws of 1925, as amended by Chapter 123, Laws of 1929, relates to the investment of the sinking fund.

It will be noted from an examination of this section that the warrants of the district are not listed among those securities in which the sinking fund of the district may be invested. It provides specifically that you may purchase for your sinking fund, as to your own obligations, only bonds originally issued or assumed by your district and keep the same alive in the sinking fund. It does not authorize an investment in outstanding warrants.

Statutes of this kind must of necessity be strictly construed, and it is, therefore, the opinion of this office that your district would not be permitted to invest its sinking fund in its own warrants.

I quite appreciate the motive that suggested such an investment and the benefits that your district would derive, but I must conclude that it is not permitted under the present declarations of the statute.

*To Mr. R. T. Magleby,  
December 31, 1929.*

W. D. GILLIS,  
Attorney General.

## SCHOOL ELECTION

### Qualification of Voters at School Elections

## 107. FACTS:

A person resides within a school district, is a member and shareholder in a corporation operating in said district and which corporation pays taxes therein. However, neither said person nor his wife are taxpayers within said district nor are they parents or guardians of a child or children within such district.

## QUESTION:

Would such person be entitled to vote at a school election within such district for the election of its trustees?

## OPINION:

Section 19 of Chapter 215 of the 1921 Session Laws of Idaho provides the following qualifications for voters in all elections in all school districts:

“(1) Electors within the meaning of Article

VI., Section 2 of the constitution of the State of Idaho.

"(2) Residents of the district at time of election.

"That in addition to the foregoing requirements, said voters in all instances must possess one of the two following qualifications:

"(1) Parents or guardians of a child or children when such child or children are under twenty-one years of age, and when such child or children and the parents or guardians thereof are residents of the district at the time of the election; or

"(2) A person who pays taxes within the district, and the husband or wife of such taxpayer, in case the taxpayer is married. A payer of poll tax is not a taxpayer within the meaning of this act."

It is apparent from a reading of the above section that the person mentioned does not qualify as required by the above section. It is, therefore, the opinion of this office that a person owning stock in a corporation which pays taxes within such district is not such a taxpayer under the law as to qualify him to vote at a school election.

To Mr. C. A. Doschades,  
April 27, 1929.

W. D. GILLES,  
Attorney General.

### Ties in School Elections

#### 108. QUESTIONS:

1. Where a school district election results in a tie and it later appears that one of the persons voting at such election was not a qualified elector of the district, may the election be declared invalid?

2. May the county superintendent require that the two candidates draw lots to determine who shall serve?

3. May the trustees call another election?

#### OPINION:

It is the opinion of this office that the election may not be successfully contested on the ground that an illegal vote was cast.

In a former opinion of this office in which I concur, this ruling was given:

"\* \* \* that the county superintendent does not have the right to go behind the returns. The County Superintendent therefore cannot declare an annual meeting void and under no circumstance has she any power to call another meeting. She has no power to do anything further than ascertaining and declaring the apparent result of the election

by adding or compiling the votes cast for each candidate as shown on the face of the returns, and filing the same.

\* \* \* the County Superintendent does not have the power to throw out such votes as are alleged to be illegal."

There is no procedure and no provision for the contesting of school elections. (Ashley v. Richard, 32 Idaho 551.)

Replying to your second inquiry: pursuant to opinions of this office, in which I concur, it is my opinion that the county superintendent may not require the respective candidates to draw lots to determine who should serve.

Replying to your third inquiry: there is no authority for the school trustees to call another election. The election of trustees in common and joint common school districts is one of the matters to be transacted at the annual school meeting as provided by Section 42 of Chapter 215 of the Laws of 1921.

Section 45 of Chapter 215 of the Laws of 1921 provides that all questions properly coming before the annual meeting shall, unless otherwise specifically provided, be determined by a majority vote of the qualified voters present and voting thereat.

If, as stated in the inquiry, at the annual school meeting in the above district a majority of the voters did not vote for either candidate, there was no election.

Section 40 of Chapter 215 of the Laws of 1921, provides that on the failure of a school district to elect a complete board of trustees at an annual meeting, the county superintendent is directed and empowered to complete the board by appointment, said appointee to hold office until the next annual meeting.

In view of the holding of the Supreme Court that there is no statutory provision providing for the calling of another school election; and there being no power vested in the county superintendent to reject alleged illegal votes; and no majority having been cast for either of said candidates it is, therefore, the opinion of this office that no trustees were elected, and the county superintendent should, by appointment, fill the vacancy, or vacancies, caused by the failure to elect.

*To State Supt. of Pub. Inst.*  
May 20, 1929.

W. D. GILLIS,  
Attorney General.

## SCHOOL TRUSTEES

### Power to Exclude Children From School in Time of Epidemics

#### 109. QUESTION:

May a person who refuses to allow the Health Department of his City to take a culture for Spinal Meningitis be forbidden the right to attend school until such culture has been given?

#### OPINION:

Section 1655, Compiled Statutes, makes the Board of County Commissioners a County Board of Health for their County, with jurisdiction co-extensive with its boundaries. They are empowered to make local rules and regulations, not inconsistent with law or the regulations of the Department of Public Welfare, and to establish such rules and regulations as they deem necessary and proper to prevent the outbreak and spread of dangerous, contagious and infectious diseases.

Funk & Wagnall's Dictionary defines Cerebro-Spinal Meningitis as "an acute infectious disease." It should be kept in mind at the outset, that the question is not as to whether the county board of health may compel the taking of a culture, but as to its power to require, as a prerequisite to attendance at public schools within an area under quarantine because of an epidemic of this disease, that the pupil allow the taking of such culture or a showing made satisfactory to the Board that such taking is unnecessary.

In the case of *Hutchins v. School Committee of Town of Durham*, 49 S. E. 46, the Supreme Court of North Carolina said:

"This is not a question of compulsory vaccination, under the legislative authority \* \* \* but simply whether, if a child is not vaccinated, the school board can, as a precautionary measure, exclude all such from the school, by a resolution, \* \* \*."

This rule laid down in 24 Ruling Case Law, 632, paragraph 90:

"\* \* \* Even without legislative sanction, local bodies may, during an epidemic of smallpox, or an apprehended outbreak thereof, refuse admission of unvaccinated children to the public schools, or may in their discretion direct that the schools be temporarily closed during such emergency, regardless of whether or not the pupils thereof refused to be vaccinated. In the absence of an epidemic, the



board has like powers in the case of a child who has been exposed to the contagion, and this power of exclusion exists even though there be a statute expressly providing against compulsory vaccination."

There are many cases upholding the constitutionality of a statute compelling vaccination as a prerequisite for attendance at public school.

It is, therefore, my opinion that a County Board of Health has a broad and comprehensive grant of power to do all acts and make all rules and regulations necessary for the preservation of the public health; and, if from the facts and exigencies of any particular situation where an epidemic of cerebro-meningitis is in progress, or where there is reasonable fear or apprehension of an outbreak through exposure, the Board of Health may make a rule prohibiting the attendance at public schools or other public gathering places or other gatherings of children until cultures have been taken.

It is my further opinion that the board does not have authority to mandatorily require all children to submit to the taking of such cultures in the absence of a statute giving them this authority, but it may require their exclusion from school under a situation described in the inquiry. Authority to exclude children from school after exposure is, of course, specifically granted by statute by Section 1666 of the Compiled Statutes.

*To Mr. E. L. Shattuck,*  
*February 24, 1930.*

W. D. GILLIS,  
Attorney General.

## PRISON SENTENCES

### Maximum Sentences

#### 110. FACTS:

Robert M. DeLoer was sentenced by the Judge of the Seventh Judicial District for Washington County to serve a term of not less than one nor more than two years for the crime of bringing stolen property into Washington County.

#### QUESTION:

Is this a legal sentence?

#### OPINION:

This conviction was authorized by virtue of the pro-

visions of Section 8439 of the Compiled Statutes which provides that every person who, in another state or county, steals the property of another or receives such property knowing it to have been stolen, and brings it into this state may be convicted and punished in the same manner as if such larceny or receiving of stolen property had been committed in this state.

Investigation disclosed that the property stolen was a horse. By reason of that fact, the sentence to be given is that sentence and punishment prescribed for the crime of larceny, of the same degree as grand larceny under the provisions of Section 8429. The punishment for such grand larceny under the provisions of Section 8431 of the Compiled Statutes is a term of imprisonment for not less than one year nor more than fourteen years. In the instant case, the court gave the prisoner a sentence of from one to two years. The one year portion of the sentence is proper as the minimum sentence that could be given for this crime but the maximum sentence attempted to be given by the court in this instance is a nullity. The court would not have the power or authority to alter the maximum sentence prescribed by law under the indeterminate sentence act. He may increase the minimum to one-half of the maximum but he could not decrease the maximum.

In the case of *In Re Erickson*, 44 Idaho 713, our Supreme Court said:

"The offense in the instant case having been committed after the enactment of the indeterminate sentence law, the district court was without authority to fix a maximum term of imprisonment, otherwise than according to the statute, and that portion of the judgment fixing any other or different term of imprisonment from that fixed by the statute was but mere surplusage."

It is, therefore, my opinion that the prisoner in this case is confronted with a sentence of from one to fourteen years.

*To Warden of State Penitentiary,*  
*March 25, 1929.*

W. D. GILLIS,  
Attorney General.

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#### Power of Courts to Re-sentence

##### 111. FACTS:

A defendant is charged with the commission of a crime which under the statutes amounts to a felony.

QUESTIONS:

1. May the court under the provisions of Section 9041 of the Compiled Statutes as amended by Chapter 97 of the 1929 Session Laws, having given a sentence to jail, later withdraw the commuted sentence and commit the defendant to the State Penitentiary?

2. As Chapter 97 above referred to does not specify the length of time of confinement, in jail, what would be the limitations on such sentences?

OPINION:

Replying to your first inquiry, Section 8079 of the Compiled Statutes makes it the duty of the court to pass sentence and determine and prescribe the punishment.

Section 8080 of the Compiled Statutes provides as follows:

"Whenever, in this code, the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case, must be determined by the court authorized to pass sentence within such limits as may be prescribed by this code."

Section 8083 of the Compiled Statutes divides crimes into "felonies and misdemeanors."

Section 8084 of the Compiled Statutes declares as follows:

"A felony is a crime which is punishable with death, or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the state prison is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison."

Section 8086 of the Compiled Statutes provides:

"Except in cases where a different punishment is prescribed by this code, every offense declared to be a misdemeanor, is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding \$300, or by both."

Section 9041 as amended by Chapter 97 of the 1929 Session Laws reads:

"Whenever any person shall have been convicted of any crime against the laws of this state except those of treason or murder, and the defendant has never before been convicted of a felony, the court may in its discretion, commute the sentence and confine the defendant in the county jail, or, if the

defendant is of proper age, in the State Industrial School, suspend the execution of judgment or withhold judgment on such terms and for such time as it may prescribe, and, in either event may put the defendant on probation in the charge of one of the probation officers of the Juvenile court of the county in which the court is sitting or other probation officer, or of any other proper person selected and designated for that purpose."

It will be noted that the above chapter does not contain an emergency clause and will, therefore, not be in effect until sixty days from March 7, 1929.

I am, however, basing this opinion upon the amended statute in view of the statement of your inquiry.

The word "commute" is defined:

"To exchange for one penalty or punishment another less severe. The substitution of a lesser for a greater penalty."

2 Words and Phrases, 1344.

We now come to the consideration of the concrete thing involved in your inquiry. The court in its discretion has commuted a felony sentence into a lesser or a misdemeanor sentence and has, we will say, rendered the following sentence, that the defendant be confined in the county jail for a period of six months or has given such sentence and paroled the defendant in the care of some person.

"May the court later revoke the parole or sentence and, in effect, re-sentence the defendant under the terms of penalty provided for the original felony charge?" Our Supreme Court has passed upon this in the case of *In re: Grove*, 43 Ida. 775. In that case the defendant pleaded guilty to the crime of grand larceny on January 30, 1923. The court adjudged him guilty and withheld the pronouncement of sentence and released said defendant on his own recognizance on September 17, 1926. Grove having been accused of the commission of other crimes was sentenced to the State Penitentiary for the crime under which he entered a plea of guilty in 1923. The Supreme Court declared:

"While the court, on a plea of guilty, may postpone the pronouncement of judgment for a reasonable time for a proper purpose, such as to enable it to examine the facts and circumstances with respect to the commission of the crime, and thereby determine the proper penalty to be imposed, it cannot indefinitely withhold the pronouncement of judgment, discharge the defendant, permit him to go his way, and three and one-half years afterward hale him into court and enter such judgment as might have been originally pronounced."

From the above authorities it is my opinion that the court having pronounced a lesser sentence might not later nullify that sentence and pronounce the sentence prescribed for the felony offence.

Replying to your second inquiry, it is my opinion that Section 9041 as amended by Chapter 97 of the 1929 Session Laws places no limitation on the length of time of the jail sentence which the court might pronounce except that probably the period of incarceration might not be greater than one-half the maximum sentence which might have been pronounced in felony cases where the indefinite sentence act prevailed. For example, assuming that the sentence the court might pronounce would be the indefinite sentence of from one to fourteen years in the Penitentiary, the court might in imposing sentence make it read: "from seven to fourteen years." Probably the man might not be sentenced to eight years in a county jail.

I am, just above, assuming a very unusual and probably a situation in the practical administration of justice which would not arise. Jail sentences ordinarily are not of long duration, at least not measured in terms of years.

To Mr. Cleve Groom,  
May 2, 1929.

W. D. GILLIS,  
Attorney General.

## SMALL CLAIMS COURT

### Jurisdiction of Small Claims Court

#### 112. QUESTION:

Does a justice of the peace in conducting a Small Claims Court have jurisdiction outside of his precinct for the service of papers?

#### OPINION:

Section 1 of Chapter 177 of the 1923 Session Laws provides as follows:

"That in every justice's court of this state there shall be created and organized by the justice of the peace thereof a department to be known as the 'Small Claims Department of the Justice's court,' which shall have jurisdiction, but not exclusive, in cases for the recovery of money only where the amount claimed does not exceed fifty dollars, and where the defendant resides within the precinct of such justice's court."

It is my opinion that the jurisdiction of the justice of

the peace does not extend outside the precinct in which he resides. There is no provision made for any service outside of the precinct as the defendant must reside *within the precinct* in order that the court have jurisdiction.

To Mr. S. H. McCullough,  
May 17, 1929.

W. D. GILLIS,  
Attorney General.

## TAXATION

### Status of Real Property for Purpose of Taxation Is of the Second Monday of January

#### 113. QUESTION:

During the month of May, a county has a sale of real property acquired through tax deeds and other sources, and the question has arisen as to who shall pay the taxes for 1930, and if the purchaser is to pay the taxes, whether he shall pay for the full year, or only the proportionate share of the year's taxes.

#### OPINION:

Assuming as a premise that the property was owned by the county on the second Monday of January, it is the opinion of this office that that date must be taken as the date to determine the taxability of said property.

Section 3097 C. S. as amended by Section 1, Chapter 201, Laws of 1929, provides that all real and personal property must be assessed at its full cash value, with reference to its value at 12 o'clock meridian, on the second Monday of January in the year in which such taxes are levied.

Section 3099 C. S. as amended by Section 1, Chapter 106, Laws of 1921, as amended by Chapter 201, Laws of 1929, exempts from taxation all property belonging to any county, etc., within the state.

Section 3134 C. S. as amended by Chapter 201, Laws of 1929 provides that the Assessor must assess all real and personal property in his county between the second Monday of January and the Fourth Monday of June of each year. It will be observed that none of the aforesaid provisions expressly provide that the status of the property on the second Monday of January must be taken as the basis of the assessment of the property for that year. However, this matter has been before the courts for construction and in the case of *Clearwater Timber Co. v. Nez Perce County*, 155 Fed. 633, an Idaho statute very similar to the

one above in its provisions, was construed. It read in part as follows:

"All taxable property shall be assessed in the county, city or district, in which it is situated on the second Monday in January, or if not within the State on that day, on the day of assessment; the assessor must between the second Monday in January and the first day in July in each year, ascertain the names of all taxable inhabitants and all property in his county subject to taxation and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was, at 12 o'clock M. of the second Monday in January next preceding, or on the day of assessment as aforesaid."

It will be observed from the language of this statute that there is a great similarity between it and the present law. The court, in the above case, placed a construction on that statute which we believe is applicable to the statute now in force, when it said:

"It is very clear from this language that the status of property within the State of Idaho, at 12 o'clock noon, on the second Monday in January, must be taken as the basis for the assessment of such property for that year.\* \* \*

"\* \* \* If this property was exempt from taxation upon the second Monday of January, 1905, it was exempt from taxation for the year 1905, and its subsequent transfer could not deprive it of this exemption."

From the above authority, it is the opinion of this office that the status of property on the second Monday of January must be taken as the basis of assessment, and since the property in question was owned by the county on that date, it will be exempt from taxation regardless of its subsequent sale by the county during the year.

To Mr. Chas. E. Harris,  
July 12, 1930.

W. D. GILLIS,  
Attorney General.

#### Assessment of Non-Operative Property of a Utility

##### 114. FACTS:

A power company has constructed several residences on its property where it operates a power plant. These cottages are occupied by their employees.

##### QUESTION:

Should said cottages be considered non-operating prop-

erty and assessed by the county assessor under Section 3185 Compiled Statutes?

●PINION:

Section 3185 of the Compiled Statutes reads as follows:

"All property belonging to any person owning, operating or constructing any railroad, telegraph, or electric current transmission lines, wholly or partly within this state, not included within the meaning of the term 'operating property,' as defined in this chapter; namely, property not reasonably necessary for the maintenance and successful operation of such railroad, telegraph, telephone or electric current transmission line, including vacant lots and tracts of land, and lots and tracts of land with the buildings thereon not used in the operation of such railroad, telegraph, telephone or electric current transmission line, also tenement and resident property, except section houses, also hotels and eating houses, situate more than 100 feet from the main track of any such railroad shall be assessed by the assessor of the county wherein the same is (are) situated."

It will be noted that the above section provides that all property belonging to any person owning, operating or constructing any railroad, telegraph, telephone or electric current transmission line, wholly or partly within this state, not included within the meaning of the term "operating property," shall be assessed by the assessor of the county wherein the same is situated. Particular attention is called to the fact that it specifically declares that tenement and resident property shall be assessed by the assessor of the county wherein the same is situated.

We shall properly at this time examine the statute in reference to the property defined as "operating property." Section 3106 of the Compiled Statutes defines the same, and reads as follows:

"The term 'operating property' as used in this chapter shall include all franchises, rights of way, roadbeds, tracks, terminals, rolling stock, equipment, power station, power sites, lands, reservoirs, generating plants and substations, all immovable or movable property owned, used or occupied by, or operated in connection with any railroad, or telegraph, telephone or electric current transmission line, wholly or partly within this state, and all station grounds and all super-structures upon the rights of way and station grounds, all other immovable or movable property used, operated or occupied by any person owning, operating or constructing any line or railroad or telegraph, telephone or electric current transmission lines, wholly



or partly within this state, and reasonably necessary to the maintenance and operation of such road or line, or in conducting its business, and shall include all title and interest in such property as owner, lessee or otherwise."

It will be noted that the use, operation and occupation of immovable or movable property by any person owning or operating any railroad or telegraph, telephone or electric current transmission lines, is limited to such use, operation and occupation as is reasonably necessary to the maintenance and operation of such utilities, or as is reasonably necessary in conducting their business. Within the language of this section, the resident houses in question are clearly immovable property used, operated and occupied by the Company, which owns and operates the electric current transmission lines involved, but are they reasonably necessary to the maintenance and operation of said lines?

The Supreme Court of this state in the case of Chicago, Milwaukee and St. Paul Railway Company vs. Kootenai County, 33 Ida. 234, quoted with approval from the case of Minneapolis St. P. & Sault Ste. Marie R. Co. v. Douglas County et al. (Wis.) 150 N. W. 422, where that court in defining the term "property of the railroad company" contained in a statute similar to ours, said:

"The word 'necessary' here does not mean 'inevitable' on the one hand, nor merely 'convenient' or 'profitable' on the other hand, but a stage of utility or materiality to the carrier's business less than the first but greater than the latter of these expressions."

The resident houses in question are undoubtedly convenient for the company in its ownership and operation of its electric plant, but in my opinion they must be more than convenient. Clearly, such resident houses are not necessary to the maintenance and operation of such lines, in the sense that they are inevitable or indispensable, because the transmission lines of the company could be maintained and operated without these resident houses for its employees. In my view the houses in question may not be said to be used, operated or occupied by the employees of that company "in conducting its business" in the sense contemplated by this statute. It is my conclusion that the language contemplates the use of such property as office buildings used by the company in transacting its business affairs in the maintenance and operation of its electric current transmission lines, but not this class of buildings. This is confirmed by the clear statement of the statute quoted

early in this opinion from Section 3185, that "tenement and resident property" is to be considered as non-operating property.

It is, therefore, my conclusion and opinion that the residences mentioned should be assessed by the county assessor of the county wherein such property is located.

*To Wm. H. Hardwick,*  
*August 17, 1929.*

W. D. GILLIS,  
Attorney General.

### Assessment of Franchise of Water Corporation

#### 115. QUESTION:

Is a franchise granted to a Water Corporation by a municipal corporation assessable for taxes for general state, county and municipal purposes?

#### OPINION:

Section 2 of Article XV of the Constitution provides as follows:

"The right to collect rates or compensation for the use of water, supplied to any county, city or town, or water district, or the inhabitants thereof, is a franchise, and can not be exercised except by authority of and in the manner prescribed by law."

In the case of Boise Artesian Hot and Cold Water Company vs. Boise City, 57 L. Ed. 1400; 230 U. S. 83, at page 1406 of the Law Edition, the Supreme Court said:

"The right which is acquired under an ordinance granting the right to a water company to lay and maintain its pipes in the street is a substantial property right. It has all of the attributes of property. It is assignable and will pass under a mortgage sale of the property and franchises of the company which owned it."

Section 5325 of the Idaho Compiled Statutes defines real property as follows:

- "Real property or real estate consists of:
1. Lands, possessory rights to land, ditch and water rights, and mining claims, both lode and placer.
  2. That which is affixed to land.
  3. That which is appurtenant to land."

Section 5326 of the Idaho Compiled Statutes defines personal property as follows:

"Every kind of property that is not real is personal."

A careful analysis of our exemption statutes shows no exemption allowed in respect to the franchise of a corporation. Our statute specifically provides that all property not exempted by statute shall be taxed.

In the case of *Spring Valley Water works vs. Schottler*, 62 Cal. 69, reads as follows, quoting from the syllabus on page 73:

"There can be no doubt of the power of a state to tax the franchise at its assessed value. There may be more difficulty in arriving at its value than that of a parcel of land or personal chattels, but still its value may be estimated, and such value may exceed the value of the tangible property of the corporation.

"In this state, the Constitution having declared that franchises are property, and that all property in the state not exempt from taxation shall be assessed in proportion to its value, to be ascertained as provided by law (Cont. Art. XIII, Sec. 1), it would seem to follow that the tax must be according to a valuation made by the officer appointed for that purpose. If the state can impose a tax on the franchise of a corporation in the nature of an excise or duty, it does not exclude the taxation by a valuation made by an assessor."

It will be observed that the Constitution of the State of California has declared franchises to be property. The Supreme Court of the United States in construing the provisions of our Constitution has held that a franchise is property. Our constitutional provisions may not be as plain as those of California, but, in view of the fact that the courts have given our Constitution this interpretation, there appears to be no question but that a franchise should be construed as an item of property in the State of Idaho.

Section 8 of Article VII of the Constitution of this state provides as follows:

"The power to tax corporations or corporate property, both real and personal, shall never be relinquished or suspended, and all corporations in this state or doing business therein, shall be subject to taxation for state, county, school, municipal, and other purposes, on real and personal property owned or used by them, and not by this constitution exempted from taxation within the territorial limits of the authority levying the tax."

I call attention to the case of *Fond Du Lac Water Company vs. City of Fond Du Lac*, 52 N. W. 439, wherein the Supreme Court of Wisconsin upheld the taxing of franchises; also the case of *South Nashville St. R. Co., vs. Morrow*, 11 S. W. 348, where a like holding was made.

It is, therefore, my opinion that the franchise of this Water Corporation is assessable for taxes for general, state and municipal purposes.

To Mr. R. D. Leonardson,  
July 1, 1929.

W. D. GILLIS,  
Attorney General.

**Funds Held By Guardians Under World War Veterans' Act of 1924 Not Taxable**

**116. QUESTION:**

Are funds received by a guardian for the benefit of their wards under the provisions of the World War Veterans' Act of 1924, and invested by such guardian in real estate, subject to taxation by the State of Idaho?

**OPINION:**

Section 22 of the World War Veterans' Act of June 7, 1924, as amended, provides in pertinent part as follows:

*"That the compensation, insurance, and maintenance and support allowance payable under Titles II, III and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Titles II, III, or IV; and shall be exempt from all taxation: \* \* \**

The italics above are mine.

In the case of U. S. v. Hall, 98 U. S. 345, the Supreme Court of the United States, in effect, held that when such money is paid to the guardian for the ward, the money is still under the control and the direction of the government and cannot be said to be delivered to the ward until he actually receives it.

In the case of Payne v. Jordan (Ga.) 138 S. E. 262, this question was submitted to the Supreme Court of the State of Georgia. The court in its opinion said:

*"An execution was levied upon certain property of the defendant in fi. fa., who interposed an affidavit of illegality. The case as thus made was submitted to the trial judge, to be determined by him without a jury, upon the following agreed facts:*

*"Defendant is the beneficiary under a policy in accordance with the provisions of the War Risk Insurance Act passed by Congress in the year 1917 (1914), and as such she receives checks monthly the proceeds of which she invested in a house and lot located in the city of Reynolds, in said county,*

the same being the property levied upon as above referred to. \* \* \* We agree that the only issue in said case is whether or not the property in question being purchased with said funds is subject to said execution.

"The court having rendered judgment sustaining the affidavit of illegality, and the motion of the plaintiff in fi. fa., for a new trial having been overruled, the plaintiff in fi. fa., excepted. Held: Under the provisions of section 28 of the Act of Congress, known as the War Risk Insurance Act, approved Sept. 2, 1914, and amended June 25, 1918, c. 104, sec. 2, 40 Stat. (U. S. Comp. Stat. 1918, sec. 514 n n n 1/4, p. 1739), as construed by the Supreme Court of this state in *Payne v. Jordan*, 152 Ga. 367, 110 S. E. 4, there was no error in the judgment complained of. Compare *Ober Co. v. Cochran*, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118, *Luthersville Banking Co. v. Hopkins*, 12 Ga. App. 488, 77 S. E. 589; 39 Cyc. 528-543; and the state exemption laws (Civil Code 1910, Sec. 3377, 3425.)"

In the matter of the succession of Geier, (La.) 99 So. 26, reference is made to Section 28 of the War Risk Insurance Act. In this case the Supreme Court of Louisiana laid down the following rule:

"The terms of the act are clear and unambiguous. Summarizing its provisions, there is a positive prohibition against all taxation on money paid out by the federal government under section 28, arts. 2, 3, and 4; and the insurance provision thereof is a contract between the United States, its agents, and the persons designated in the act as the beneficiaries of deceased service men. It is a bar to all state legislation which is in conflict with it."

In the case of *Tax Commission of Ohio v. Rife, et al*, (Ohio) 162 N. E. 390, the Supreme Court of Ohio used the following language:

"The administrator becomes a mere trustee or conduit for the government to make the payments to the persons entitled to the same under the provisions of the federal law. The intestate laws do not operate upon the decedent's property, but are referred to in order to determine who shall take the proceeds of the insurance. Congress had a right to adopt the course of descent prevailing in the state of the residence of the soldier, and the proceeds of the insurance therefor pass under the federal act, the intestate laws of Ohio being adopted as a standard or guide for ascertaining the next of kin to whom payment shall be made."

It is, therefore, my conclusion and opinion that funds received by guardians for the benefit of their wards under the provisions of the World War Veterans' Act of 1924,

although invested by the guardians in real estate, are not subject to taxation by the State of Idaho so long as said real estate or funds remain in the hands of the guardian.

*To Mr. Ralph R. Breshears,  
May 16, 1929.*

W. D. GILLIS,  
Attorney General.

### Redemptions From County Tax Deed

#### 117. FACTS:

The property was taxed and taxes have become delinquent and pursuant to the Statute the County Treasurer has noticed and sold, or delivered Tax Deed to the County. Thereafter the property was advertised to be sold at public sale under provisions of Section 3423 as amended by Chapter 180, Idaho Session Laws for 1925, and as amended by Chapter 159, Idaho Session Laws for 1927; and not sold. Thereafter, under Chapter 144, 1929 Session Laws, a party makes an offer and asks that the land be sold at private sale under the last named section. During the period of time that it is being advertised for sale under Chapter 144, 1929 Session Laws, the owner, or prior owner, of the land desires to redeem the same by payment of all taxes, penalties and costs.

#### QUESTIONS:

1. Has he the right to redeem and should the County Treasurer accept the payment of taxes, penalties and costs and restore to him title to his property as the same is provided for by the Law prior to the sale at public auction?
2. Is the redemptioner entitled to credit for any rent paid the County during the period that the County holds the tax deed?

#### OPINION:

Replying to your first inquiry, Chapter 140, Laws of 1929, definitely declares, and it is our opinion permits, the redemption of any delinquency entry mentioned in your letter up until the time a bid is made therefor at a public sale of such property. It is our further opinion that public sale would include sales under Chapter 144, Laws of 1929, as to the application of the right to redeem. In other words, until the property was absolutely alienated at the private sale, the property owner would have the right to redeem.

Replying to your second inquiry, it is my opinion that the redemptioner would not be entitled to receive a credit

for any rent paid to the county during the period that the county holds the tax deed and which money had gone into the general fund. The collection of rent is an incident to the holding of property, and the county might be the beneficiary of such rents during the period that it holds in effect the title, subject only to the right of redemption mentioned.

*To Mr. Chas. T. Cotant,  
October 17, 1929.*

W. D. GILLIS,  
Attorney General.

**County May Not Tax Property Standing in Its Name;  
County Officer Should Not Be Purchaser  
at Tax Sales**

118. QUESTIONS:

1. The county having taken a deed to real property for taxes, is it legal for it in the following year to again tax the same property while it stands in the name of the county and then sell it for the amount of taxes which were delinquent when the county received the deed and for the added taxes levied while the county was owner?

2. Is it legal for a county officer to purchase any property from the county which the county receives through delinquent taxes?

OPINION:

Replying to your first inquiry, this office in an opinion rendered January 24, 1928, in which I concur, held that the assessor is not authorized to make assessments on property owned by the county.

By virtue of Section 3099 of the Compiled Statutes as amended at various sessions of the Legislature, property owned by the county is not taxable. However, taxes accruing for those years following the year upon which the certificate was issued upon which the county deed was based are a lien against the property even after the county acquires its deed and any person wishing to redeem the property from the county must comply with Chapter 140 of the Laws of 1929 and pay the same before the redemption will be permitted. If the county offers the property for sale as authorized in Section 3423, as amended by Chapter 216, Laws of 1929, it must accept any bid for the property which covers all taxes lawfully accrued against it. It may, however, refuse to accept any bid for less than all the taxes

against the property. If, on the other hand, it does accept the bid, the title conveyed is free and clear from all taxes which have become a lien since the date of the tax sale certificate.

In conclusion, it may be said and it is my opinion that once the county acquires title to the property, from that time until the property is sold by the county it is off the assessment rolls as taxable property. However, this exception must be kept in mind at all times, that a redemptioner must pay "all taxes for the years subsequent to the expiration of the time of redemption \* \* \* extended in an amount equal to the percentage of state and county taxes for the subsequent year or years upon which valuation of said real estate would be assessed at the time application is made to redeem the same under this act, by the county assessor upon application of the county tax collector," as provided in Section 1 of Chapter 140 of the Laws of 1929.

Replying to your second inquiry, attention is called to Section 387 of the Compiled Statutes which reads as follows:

"State, county, district, precinct and city officers must not be purchasers at any sale nor vendors at any purchase made by them in their official capacity."

This section was apparently adopted from the political Code of California but there appears to have been no specific cases decided in reference to it in this state. The sheriff, his deputies, and the county commissioners are clearly covered by the prohibitions of this act. As to the other county officers, it cannot be said that the application is clear. Certainly the least that can be said is that such a practice would be contrary to public policy and should be frowned upon.

It is my opinion that as to the officers specially enumerated above, such a purchase would be made by them in violation of the law. The purchase of such property by the other officers mentioned would be made by them contrary to sound public policy.

*To Robert E. McFarland,  
May 22, 1929.*

W. D. GILLIS,  
Attorney General.



**Commissioner May, on Sales of Property for Delinquent Taxes, Accept a Lesser Sum From Bidders Than Total Amount of Taxes Against Property**

**119. QUESTION:**

In selling property to which a county has received title by reason of delinquent taxes, must the Board of County Commissioners reject all bids which are less than the amount of the principal, accrued interest and penalties of the taxes?

**OPINION:**

Chapter 216 of the Laws of 1929 defines the manner of sale of county property. It provides in part pertinent to this inquiry as follows:

"\* \* \* such board shall have authority to reject any bid which may be made for a less amount than the total amount of all delinquent taxes, penalties, and interest which may have accrued against any property so offered for sale, including the amount specified in the tax deed to the county. \* \* \*"

It will be noted that the discretionary form of statement is employed instead of a mandatory one. It is an accepted rule of statutory interpretation that when a legislature employs such form it grants to the governmental agency the right to use its discretion. In other words, the Board of County Commissioners may properly, if in its judgment and discretion it is for the best interest of the county so to do, accept the highest bid made even though it be a lesser amount than the total amount of the taxes against the property. It should be said, however, that the board is not obligated to accept such bid, but it is in its discretion and power to do so.

*To J. T. Evans,  
November 27, 1929.*

W. D. GILLIS,  
Attorney General.

**Telephone Lines Are Real Property For Purpose of Taxation**

**120. QUESTION:**

A telephone company of this county is delinquent in taxes and is assessed as a public utility. It has no realty other than telephone lines which run on the streets and alleys of the village and along highways and its easement across private property. It is the desire of your county to collect the taxes in the manner provided by law. Should

such property be classed as realty or personal property?

OPINION:

Section 3101, Compiled Statutes, as amended by Section 1, Chapter 74 of the Laws of 1925, defines real property. Section 3102, Compiled Statutes, defines personal property.

In Cooley on Taxation, Section 965, we find the following general statement:

"Poles, wires, conduits, etc., are generally taxable as real estate, although there is some conflict in the decisions and it has been held in at least one state that conduits laid under streets by telegraph and telephone companies are not taxable as 'real estate.'"

In the case of *Territory of New Mexico v. United States Trust Company*, 174 U. S. 545, 43 L. Ed. 1079, the Supreme Court of the United States, in referring to the taxation of the right of way granted to a railroad company for the construction of a railroad and telegraph line, held that an easement of the same should be as of real estate.

In the case of *Western Union Telegraph Company v. State (Tenn.)* 40 American Reports 99, the Supreme Court of Tennessee said:

"We treat the telegraph line as partaking of the nature of realty, in analogy to the now settled doctrine that railroads and rolling stock necessary to their use running alone on their tracks are so treated. We are aware that this is not strictly within the definitions of realty as found in the ancient common law, but those definitions were formed in a ruder age than this and must be accommodated to the advance of the age by sound analogies as demanded by the exigencies of our diversified development; \* \* \*"

In Volume 57 A. L. R. at page 869, we find the following statement:

"Upon the theory that a personal chattel does not become a fixture so as to become a part of the real estate, unless it be so affixed to the freehold as to be incapable of severance without physical injury to the freehold, it was held in *Newport Illuminating Co. v. Tax Assessors* (1895) 19 R. I. 632, 36 L. R. A. 266, 36 Atl. 426, that poles and wires of a lighting company were not subject to taxation as 'real estate,' since it could not be claimed that any physical injury would result to the freehold in question by their removal.

"Applying the view that the intention with which the article is annexed to the freehold affords

the cardinal test or criterion by which to determine its character as a fixture, and that, under this criterion, structures or improvements, if not permanent, would not be regarded as realty, the court in *Cortland v. New England Teleph. & Teleg. Co.* (1907) 103 Me. 240, 68 Atl. 1040, held that telephone conduits laid under a revocable license should not be regarded and taxed as realty."

In spite of the fact that Section 3102, Compiled Statutes, which I have not set out but which I refer to, might indicate that an easement is to be considered as personal property, our Supreme Court has held that it is an interest in real estate and is real property.

In the case of *Beasley v. Engstrom*, 31 Idaho 14, our Supreme Court in referring to the fact that an easement for the purpose of drainage across the land of another may be acquired by prescription, held:

"Such an easement is real property, under the laws of this state, \* \* \*"

From an examination of the various authorities and the text writers on this subject, it is apparent that there is a diversity of opinion as to whether or not this should be considered as real or personal property for the purpose of taxation. The courts are apparently divided on the question of whether or not the poles are sufficiently affixed to the land so that their removal would effect any damage.

However, in view of the fact that the majority of the courts seem to have held this to be real property, and that our own courts hold an easement to be real property, and as most telephone rights-of-way are merely easements, it is my conclusion and I am of the opinion that the better rule is to classify such property as real property. I further suggest that in seizing the same for the purpose of sale for non-payment of taxes, the Sheriff could include the personal property in his notice of sale of real property, while on the other hand his notice of sale of personal property under the statute would not necessarily convey title to the real property.

It is, therefore, my opinion that the said property should be treated as real property.

*To Mr. Chas. T. Cotant,  
January 27, 1930.*

W. D. GILLIS,  
Attorney General.

**Where a Lodge Permits Other Organizations to Use Its Building Without Profit to Itself it Does not Lose Its Right to Tax Exemption**

**121. QUESTION:**

A lodge located in this city owns a hall. They wish to permit its use by the Legion and Grange. Would the use of such organizations, if no rent be charged or lease executed, and only the actual costs of lights, water and janitor service be collected from the organizations, render the lodge liable to taxes under the provisions of Paragraph 3 of Section 3 of Chapter 201, Laws of 1929?

**OPINION:**

Paragraph 3 of Section 3 of Chapter 201 of the Laws of 1929 reads as follows:

"Property belonging to any fraternal, benevolent, or charitable corporation or society, The World War Veteran organization buildings and memorials of this state, used exclusively for the purposes for which such corporation or society is organized. Provided, That if any building or property belonging to any such corporation or society is leased by such owner or if such corporation or society uses such property for business purposes from which a revenue is derived then the same shall be assessed and taxed as any other property, and if any such property is leased in part or used in part by such corporation or society for commercial purposes the assessor shall determine the value of the entire building and assess such proportionate part of such building including the value of the real estate as is so leased or used for commercial purposes, and shall assess all merchandise kept for sale, and the trade fixtures used in connection with the sale of such merchandise."

It is apparent from an examination of the foregoing section that if the building in question is *leased* by the lodge or if it uses the building for business purposes from which revenue is derived, then the building shall be assessed and taxed as any other property. Under your statement of facts, the organizations mentioned are to receive no lease, and acquire no property interest thereby, and the use of the hall is to be only a permissive one revocable at will.

Turning then to the next question of whether or not the payment by the organizations to the lodge of the actual expenses of their use of the building could be termed as using such property for business purposes from which a revenue is derived.

"Revenue," as referred to in this statute, is defined in the case of *People vs. New York Cent. R. Co.*, 24 N. Y. 485, as follows:

"'Revenue is a return for capital invested or labor bestowed. In a general sense, it is the annual rents, profits, interests, or issues of any species of property, real or personal, belonging to an individual or the public. \* \* \* The revenue or income of a farm is the sum total which its owner received from it.'"

In the case of *Bates vs. Porter*, (Cal.) 15 Pac. 732, it was said:

"'Revenue' is defined by Worcester to mean: (1) Income or annual profit received from lands or other property; and (2) the income of a nation or state derived from the duties, taxes, and other sources for the payment of the national expenses. It is defined by Webster to be: (1) That which returns or comes back from an investment; the annual rents, profits, interest or issue of any species of property, real or personal; \* \* \*."

It will thus be apparent under the definition set out that the actual payment of the costs of using the hall would not be a revenue. As we have said, a permissive use would not be a lease.

It, therefore, follows, if the lodge in question permits other organizations the right to use its hall, granting no lease to them and deriving no profit or revenue from the use, that it may permit the use of its buildings in the manner described in your inquiry without loss of the exemption granted by Paragraph 3 of Section 3 of Chapter 201, Laws of 1929.

To Mr. C. A. Bottolfson,  
November 27, 1929.

W. D. GILLIS,  
Attorney General.

## TAX DEEDS

### Service of Notice by Registered Mail Is Insufficient

#### 122. QUESTIONS:

In what manner must service be made before a deed for taxes can be issued to the county? May registered mail be employed?

#### OPINION:

Section 3258, Compiled Statutes, as amended by Chapter 232 of the Laws of 1921, and by Chapter 33 of the Laws

of 1925, with reference to notice provides in pertinent part as follows:

"The tax collector shall serve or cause to be served written or printed or partly written or partly printed notice on the person or persons in actual possession or occupancy of such land or lot and also the person in whose name the same stands upon the records in the recorder's office, if, upon diligent inquiry he can be found in the state, at least three months and not more than five months before the expiration of the time of redemption, \* \* \*. If there is no person in the actual possession or occupancy of such land or lot and if the person in whose name it stands, upon diligent inquiry can not be found in the state, then the tax collector shall post in a conspicuous place upon said land or lot and in a substantial manner, a copy of said notice not more than five and not less than three months before such time of redemption shall expire, and shall publish a notice of all such delinquency entries in the official newspaper printed in such county and if no newspaper is printed in the county, then in the nearest newspaper that is published in this state to the said land or lots, which notice shall be inserted three times at intervals of not less than one week, the first insertion not more than five months and the last insertion not less than three months before the time of redemption expires, and a copy of such notice shall within said time, be mailed to the person in whose name the said land or lot stands on record, at his last known place of residence. \* \* \*"

Our Supreme Court in the case of *Johnson v. Welch*, reported in 48 Ida. at page 284, interpreted such section as amended by Chapter 232, and held that personal service of notice of delinquency must be made on the person in actual possession of land.

As Chapter 33, Laws of 1925, did not change the language of the statute as interpreted by our court in said case, the same rule would apply thereto, and it is my opinion that personal service must be made upon the person or persons in actual possession or occupancy of the land, and also upon the person in whose name the same stands upon the records in the office of the County Recorder, if such owner can be found in the state.

It is also my opinion that service by registered mail is entirely insufficient.

I am advised that the notice of delinquent taxes on the treasurer's affidavit is printed by the Statesman, Symms-York Company, and Strawn & Company of this city. There

may be other printers in the city who print the forms, but I am not advised as to who they are.

It is my opinion that it is the duty of the tax collector under the provisions of Section 3258 of the Compiled Statutes, as amended by Chapter 33, Laws of 1925, to secure or cause to be served the notice described in said section on the person or persons in actual possession or occupancy of the land and also the person in whose name the same stands upon the records in the recorder's office, if such record owner can be found within the state.

If there is no person in the actual possession or occupancy of the land and if the person in whose name it stands upon diligent inquiry cannot be found in the state then the tax collector shall post a copy of the notice upon the land.

Publication is necessary only in conjunction with posting and is not necessary where actual service has been made upon a person in possession and the record owner. Posting and publication are not necessary when there is no person in possession of the land and service has been made upon the record owner.

To Mr. C. W. Baird,  
August 27, 1930.

W. D. GILLIS,  
Attorney General.

### County Commissioners Are Empowered to Issue Tax Deeds

#### 123. QUESTIONS:

1. Chapter 161 of the Laws of 1923 having been repealed, does a county treasurer have authority to issue a tax deed upon redemption of property from sale for county taxes?

2. If not, how may the redemptioner secure his deed?

#### OPINION:

Chapter 161 of the Laws of 1923, among other things, provided in part pertinent to this inquiry:

"Upon payment of the amount required to be paid as herein provided the county treasurer must issue a tax deed to the redemptioner, and, upon the giving of such deed, any tax deed, or tax sale, or delinquency entry to the county shall become null and void and all right, title and interest acquired by the county under or by virtue of such tax deed, or tax sale, or delinquency entry, shall cease and terminate.

This was repealed by Section 3, Chapter 140 of the

Laws of 1929, and it follows that the right of the county treasurer to issue such deed was thereby taken from him. It is, therefore, apparent that unless some other statute delegates this authority, the right to issue the deed is denied the treasurer. No other statute or authority can be found authorizing this. It must next be conceded that it could not have been the intention of the legislature to take from all agencies of the county the authority to issue this necessary instrument.

The county commissioners have exclusive control over and the right to dispose of county property. (See Chapter 216 of the Laws of 1929.)

It, therefore, follows and it is my opinion that the county treasurer upon the redemption of property should issue a receipt for the same and give to the redemptioner a certificate showing such redemption. This might properly be addressed to the county commissioners. The redemptioner should then appear before the county commissioners and they, by proper resolution should authorize the issuance of a deed by them to the redemptioner. It is true that the statute does not in so many words specifically declare that they may do this. On the other hand, they are given the authority to carry out the provisions of the law, and the law, it is apparent, contemplates that the redemptioner shall be given a deed as redemptioner.

It is, therefore, my conclusion and opinion, in reply to your first inquiry, that the county treasurer does not have authority to issue a tax deed upon redemption of property from sale for county taxes. It is my further conclusion that he does have the right to issue a receipt and a certificate showing that actual redemption has been made.

Replying to your second inquiry, it is my conclusion and opinion that the county commissioners are empowered to issue the deed.

To E. V. Larson,  
November 22, 1929.

W. D. GILLIS,  
Attorney General.

## TAX EXEMPTIONS

### Widow's Allowance of Mortgage

#### 124. QUESTION:

Is a person having a farm worth \$6,000.00, full cash valuation, against which there is a mortgage of \$3,000.00, entitled to the \$1,000.00 exemption provided for by Sub-



division 4, Section 3099, Compiled Statutes, as amended by Section 1, Chapter 106, Laws of 1921, as further amended by Section 1, Chapter 145, Laws of 1927, and as further amended by Section 3, Chapter 201, Laws of 1929?

OPINION:

The above section, stated briefly, provides that widows may be allowed an exemption not to exceed the amount of \$1000 of full cash value to any one family, provided the following conditions exist:

1. That the total full cash value of property owned by such person or family does not exceed the sum of \$5000.
2. That said person does not have an income from property or assets, which property or assets, are equal to the sum of \$5000.
3. That such property owner or owners are citizens of this state.
4. That such exemption is claimed in the manner provided for in Section 3100, Compiled Statutes.

Such \$1000 exemption is subject to the following limitations:

(a) The total amount of all exemptions allowed to any one family, under subdivisions 4, 6 and 7 of said section, shall not exceed \$1000 of full cash value.

(b) No deductions shall be made in the assessment of the shares or capital stock of any corporation or association for exemption claimed under this section.

We now turn to the consideration of the question of whether or not the amount of mortgages can be deducted from the full cash valuation of a piece of real property.

It is my opinion that such a deduction may not be made. This property is required to be assessed at its full cash value. That question is not determined by the amount of mortgages against it, but rather by such elements as quality, topography of soil, state of improvement, fertility, location with respect to marketing points, etc. The statutes at no place make intimation that a mortgage against land is to be an element determinative of its value. It would require a technical and strange construction to so hold.

Cooley on Taxation, Volume 2, Fourth Edition, Section 672, has this to say in regard to construction of such statutes:

"An intention on the part of the legislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and

unmistakable terms, or must appear by necessary implication from the language used, for it is a well settled principle that when a special privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption, the exception the intention to make an exemption ought to be expressed in clear and unambiguous terms."

Furthermore, it will be noted that to permit the amount of mortgages against land to be deducted from the assessed value of the land would result in the land, to the extent of such mortgages, escaping taxation.

It is, therefore, my conclusion and opinion that a mortgage against farm land cannot be deducted from the assessed full cash value of such land in determining the cash value of the same, within the meaning of Subdivision 4, Section 3099, Compiled Statutes, as amended by Section 1, Chapter 106, Laws of 1921, as further amended by Section 1, Chapter 145, Laws of 1927, and as further amended by Section 3, Chapter 201, Laws of 1929.

*To Mr. A. B. Barclay,  
July 10, 1929.*

W. D. GILLIS,  
Attorney General.

## TAX LIEN

### Procedure for Foreclosure of Tax Lien

#### 125. QUESTIONS:

1. What is the procedure to be followed in order to foreclose a tax lien by the county where tax deed has been issued by the treasurer to the county for delinquent, unpaid taxes?
2. Who must be made parties defendant in such actions?
3. How is service to be made in such actions?
4. Must each tract of land be foreclosed separately or may all land acquired by the county by tax deed be joined in one foreclosure action?

5. Does the foreclosure of the tax lien by the county cancel special assessments against the property being foreclosed?

OPINION:

Section 3423 of the Idaho Compiled Statutes provides for the sale of property owned by the counties, said section being as follows:

"To sell at public auction at the courthouse door, after 30 days' previous notice given by publication in a newspaper of the county, or posted in five public places of the county, and convey to the highest bidder, for cash, any property, real or personal, belonging to the county, not necessary for its use, paying the proceeds into the county treasury for the use of the county."

This section was amended in the 1927 laws by the addition thereto of Sections 3423A, 3423B, and 3423C, said sections providing for the foreclosure of the tax lien after the land acquired by the county by tax deed has been offered for sale and not sold for want of bids, sections 3423A and 3423B, in particular apply to the questions herein submitted.

The foregoing sections of our statutes specifically provide that the statutes to be followed in the foreclosure of a tax lien are the same as in the foreclosure of a mortgage with the necessary substitutions to make the foreclosure conform to the facts of the tax lien as distinguished from the foreclosure of a mortgage lien.

In the foreclosure of a tax lien the only differences would be the allegation of the lien acquired by tax deed as distinguished from a lien of a mortgage as specified by the notes and mortgage.

It would be necessary to make all parties claiming any interest in the premises as lien holders or otherwise parties defendant and service would be made in the same manner as service in a mortgage foreclosure, that is, either personal service or service by publication.

With reference to the special improvement assessments, it is apparent that the case of *Hunt v. City of St. Maries*, decided by our Supreme Court and reported in 44 Idaho, 700, would control the question herein submitted.

It is necessary to quote at length from this case in order to completely cover the question with reference to special improvement assessments and the Court in this opinion states in part as follows:

"The vital question raised under the pleadings

in the lower court, and now here for determination, is whether or not the sale of the property for general taxes shuts off special improvement assessments and frees said property from any and all liability for the payment of the local improvement assessments, due or to become due.\* \* \*

"C. S. Sec. 5385, provides that:

"The term 'encumbrances' includes taxes, assessments, and all liens upon real property."

"A reasonable interpretation of the foregoing statutory provisions, upon which the validity and effect of the tax deed executed to appellant must depend, as well as others to which attention will be hereinafter directed, would seem to warrant the conclusion that by the deed of the county, appellant received title to the land conveyed free and clear of the special improvement assessments levied by the City of St. Maries and maturing prior to the assessment of the taxes on account of the delinquency of which the property was sold, but that whatever of such special improvement assessments attached to the property as liens after the assessment of the taxes on account of the delinquency of which the property was sold (viz., taxes for 1919), remained liens against the property and were and now are subject to be paid."

"From an examination of the following sections of the Compiled Statutes 1919, it is apparent that the legislature in the enactment of sec. 3263 and secs. 3942, 3944, 3999, 4007, 4013, 4014 and 4017, used the words 'special assessments,' 'special tax,' and 'taxes,' interchangeably. The above enumerated sections, with the exception of sec. 3263, have direct reference to taxes, special assessments, special taxes and special tax assessments levied by municipalities, and must be read and construed in pari materia, and when so construed in connection with sec. 3263 we are satisfied that it was not the legislative intent that the language used in sec. 3263 should be given literal effect; and we are likewise convinced that sec. 4007 should not receive a literal construction, said last section providing that whenever any expense or cost of work shall have been assessed on any land the amount of said expenses shall become a lien upon said lands, which shall take precedence of all other liens. If sec. 3263 were literally construed, any and all special assessments or taxes levied by a municipality would be discharged by the sale of the land for nonpayment of general taxes. It is clear, from a consideration of the foregoing sections, that excepted from the effect of a tax deed under the provisions of C. S., sec 3263, are liens for local improvement assessments which may have attached subsequently to the assessment for taxes on account of which the property is sold."

"The question is primarily one of statutory con-

struction and legislative intention, and, based upon a reasonable construction of relevant statutory provisions, it is thought that the expressed will of the legislature to require property which has received the benefit of improvements to bear a just proportion or share of the expenses thereof should, insofar as the statutes permit and require, be upheld and enforced. In matters of this kind the powers of the legislature are plenary, except as limited or restricted by the constitution, and it is the duty of courts to uphold and give effect, as far as possible, to its enactments. (*Ashenbach v. Kincaid*, 25 Ida. 768, 140 Pac. 529)."

It is therefore my opinion:

1. That the procedure necessary to foreclose a tax lien is the same as in the foreclosure of a mortgage with the exception that the allegations regarding the lien would be changed to set out the tax lien instead of the mortgage lien.

2. That the necessary parties defendant are the person holding a mortgage, who had been properly notified in accordance with statute, that the State would take a tax deed to the property and all parties having or claiming to have any interest in the property, who had been properly notified of the pendency of the delinquent tax, and that the county would take a tax deed to the property if said taxes were not paid.

3. That service would be made in the same manner as in a foreclosure action either by personal service of summons or by publication.

4. That each tract or tracts assessed in the name of the same person may be foreclosed in one action, but that separate actions must be maintained for the foreclosure of lands assessed in the name of different persons, that is, that a separate action must be maintained against each person appearing on the assessment rolls for which tax deed was issued to the county.

5. That the special improvement assessments maturing prior to the assessment of the taxes on account of the delinquency of which the property was sold can be foreclosed by the proceedings, but that all special assessments maturing subsequent to the date of the assessment of the taxes on account of the delinquency for which the property was sold, cannot be foreclosed by such proceedings.

*To Mr. D. K. McLean,  
January 22, 1930.*

W. D. GILLIS,  
Attorney General.

## TAX SALES

### County May Not Segregate Property Sold Into Lesser Areas

#### 126. FACTS:

Certain city property included in a special assessment in a paving district has been sold for taxes and deed taken by the county. It is offered for sale with no bidders. There are two lots included with the property above mentioned against which there are taxes and assessments due in the sum of \$10,000.00. The county has an opportunity to sell a portion of one of the lots, provided they can segregate. In effect, they wish to sell 11% of the total area of these two lots and receive for that portion about 11% of the total amount of the taxes.

#### QUESTION:

May the county do this?

#### OPINION:

Under the authorities in the case of *Hunt v. City of St. Maries*, 44 Idaho 700, the purchaser of property against which there are special assessments receives the same free and clear from all assessments which were due and payable at the time of said purchase, but the property is received subject to assessments that accrue after the date of purchase.

In this case the county secured the property clear of past due special assessments but burdened with the assessments to fall due in the future.

We now take up the question involved as to whether or not the county may dispose of a portion of these lots. Irrespective of how sold, it cannot alter or affect the bond obligations against the land covered by assessments to become due in the future. The lien of these bonds attached to the land whether it be subdivided or not. If the taxes are assessed against the lots of a legal subdivision (See 3129 of the Compiled Statutes) it is my opinion that the county does not have the authority to sell a portion of a city lot for the taxes against it.

Chapter 14 of the Session Laws of 1923, in my opinion, would not cover the present case as the question of a partial redemption is not involved in the instant case. Authority to sell a part of this property must be found, if the right exists, in Chapter 159 of the 1927 Session Laws.

The specific provision of this chapter applicable reads as follows:

"To sell or offer for sale at public auction at the courthouse door, after 30 days' previous notice given by publication in a newspaper of the county, \* \* \* any property, real or personal, belonging to the county, not necessary for its use, and such sale of real property may be made by the board of county commissioners, either for cash or upon such terms, as the board of county commissioners may determine, and the same must be sold to the highest bidder. \* \* \*"

I can find no authority under this Act to permit the county to offer the property for sale other than in the legal subdivisions existing at the time it secured the property through tax deed. In other words, there is no authority by statute for a smaller segregation than a city lot.

It is, therefore, the opinion of this office that the county does not have the authority to segregate or divide property into smaller areas than the legal subdivision of a lot.

*To Geraint Humphreys,*  
April 17, 1929.

W. D. GILLIS,  
Attorney General.

## TRANSFER TAX ACT

### Probate Court May Not Charge for Copies Forwarded State Auditor

#### 127. QUESTION:

May the Probate Judge charge 20c per folio or other fees for certified copies required to be mailed to the State Auditor of petitions for letters of administration, etc., as provided for by Section 22, Chapter 243, Laws of 1929?

#### OPINION:

Section 22, Chapter 243, Laws of 1929, provides among other things that:

"The court in which the following papers are filed or orders are made shall, upon the filing and making of the same, immediately forward to the state auditor certified copies thereof; petitions for letters testamentary or of administration; inventories and appraisements; all accounts, including the final account, of executors, administrators or trustees; decrees of distribution, either partial or final; appraisements made by inheritance tax appraisers; orders made by the court fixing valuation of property transferred under the provisions

of this Act; and orders made by the court fixing inheritance or transfer taxes."

It will now be noted that the above section does not require any person or distributee interested in the estate of a deceased person to procure such copies; neither does it require the State Auditor to procure such copies from the Probate Judge. On the other hand, the section makes it the *express duty of the court* in which said papers are filed to immediately, upon filing of the same, forward to the State Auditor certified copies thereof.

Section 25 of said Chapter 243, Laws of 1929, provides among other things, that the Probate Court *shall not be entitled to collect* any fees for any services under the provisions of that act, but that:

"\* \* \* ten per centum of the amount of all taxes collected by the county treasurer to be credited to the current expense fund of the county as herein provided for, shall be in lieu of fees or other charges."

From the foregoing, it is my opinion that the Probate Judge or Court is *not entitled* to charge 20c per folio or any other fee for certified copies required by the provisions of Section 22, Chapter 243, Laws of 1929, to be forwarded by him to the State Auditor.

To Mr. Alex Kasberg,  
July 5, 1930.

W. D. GILLIS,  
Attorney General.

#### Deductions To Be Made in Community Property Estate

##### 128. QUESTION:

Referring to Section 2, Subdivision 10, Chapter 243, Laws of 1929, what deductions therein mentioned are to be taken from the corpus of the property, or stated differently, from that portion that passes under the will or intestate laws in community property estates?

##### OPINION:

Subdivision 10 of Section 2 of Chapter 243, Laws of 1929, reads as follows:

"In determining the market value of the property transferred, the following deductions and no others shall be made from the appraised value thereof:

"(a) Debts of decedent owing at date of death;

"(b) Expenses of last illness and funeral, and including not more than \$500.00 for a memorial;



"(c) All state, county and municipal taxes which are liens against said property at the date of death;

"(d) The ordinary expenses of administration, including reasonable fees allowed executors and administrators, and reasonable fees of their attorneys;

"(e) The amount due or paid the government of the United States as a federal inheritance or estate tax; provided, however, that the amount of such tax allowable herein as a deduction shall be limited to a computation thereof (commencing at the primary rates) made by the probate court having jurisdiction of such matter upon the valuations he shall have fixed on that portion of such property only, the transfer of which is taxable under the provisions of this Act, by applying to such valuations the exemptions and rates of the federal inheritance or estate tax in force at the date of such transfer.

"(f) The amount due or paid any state or states of the United States (excepting Idaho) as a state inheritance, succession or transfer tax; provided, however, that the amount of such tax allowable herein as a deduction shall be limited to a computation thereof (commencing at the primary rates) made by the probate court having jurisdiction of such matter upon the valuations he shall have fixed on that portion of such property only, the transfer of which is taxable under the provisions of this Act, by applying to such valuations the exemptions and rates of such state inheritance, succession or transfer tax in force at the date of such transfer."

The Supreme Court of Louisiana, it being a community property state, has held that the community debts shall be deducted from the entire community property.

Succession of May, (La.) 45 So. 551;  
Inheritance Tax Law: Pinkerton and Millsaps,  
Secs. 182, 183, 184, 326, 327, 338, 339, 340;  
Blakemore and Bancroft, Sec. 351, p. 265;  
Gleason and Otis: Inheritance Taxation, 4th  
Ed. p. 46;  
In Re Sherwood's Estate, (Wn.) 211 Pac. 734;  
C. C. H. Inheritance Tax Service, Vol. 4, p.  
12235;

Our Supreme Court in the case of Swinehart vs. Turner,  
44 Ida. 461, said:

"On the death of either spouse, the community property being liable for the community debts, the administration of the estate draws to it the liquidation and settlement of the entire community estate for the purpose of satisfying the community debts which makes it necessary for the probate court to

assume jurisdiction over and administer both moieties of the community fund."

In *Ryan vs. Ferguson*, (Wash.) 28 Pac. 910, the Supreme Court of that state said:

"Neither one owns any specific part of this property before the dissolution of the community; and, upon its dissolution by the death of one member, no part of it can vest in the survivor except subject to the community debts. In administering upon the estate of the deceased member, community debts are proper charges against the same. The interest of the surviving member in the community property must be subjected to its just share of this indebtedness in some manner. If this whole property was not under the jurisdiction of the probate court, under the circumstances of this case, the interest of the survivor could not be made to respond to any part of these claims in the administration proceedings. \* \* \* Upon the death of either party the community ends upon the instant, but the relationship of the parties in the property as to its liability for the community debts is not altered."

There may be some question as to whether or not the deductions contained in Subdivision (e), which deal with the amount due or paid the government of the United States as a federal inheritance or estate tax, are properly deductible from the whole of the community estate, because of the situation that some of the courts appear to hold that the federal tax is an estate tax or a tax upon what the decedent leaves, or what the devisee, legatee or heir receives; that is, that a federal tax is imposed upon the estate transferred by death and not upon the succession resulting from death. Therefore, if the federal tax is paid only upon the estate succeeded to, it should not be deducted from the entire community estate, but only from the half thereof.

There are conflicting opinions from different courts throughout the land regarding these deductions of the federal tax. They are difficult to harmonize, but the one which in my opinion we should follow is the case of *In Re Miller's Estate*, (Cal.) 195 Pac. 413, there the court said:

"It is the settled law of this state that the inheritance tax is imposed upon the net clear market value of what the transferee receives, and that to ascertain this the value of what he does not receive, in contemplation of law, must be deducted from the value of what the decedent left. The application of this principle plainly requires the deduction of the federal estate tax."

It is, therefore, my conclusion and opinion that all of the said deduction set out in Subdivision 10 of Section 2 should be deducted from the whole of the community estate.

*To State Auditor,*  
*March 6, 1930.*

W. D. GILLIS,  
Attorney General.

**Orders Fixing Valuation of Inheritance Tax  
Need Not Be Recorded**

**129. QUESTION:**

Is it necessary, under Section 7755 C. S., as amended by the Session Laws of 1929, to record in the order book of the probate court, orders fixing valuation and inheritance tax under the inheritance tax law?

**OPINION:**

Section 7755 C. S. as amended by Section 17, Chapter 280 of the 1929 Laws, reads as follows:

"ORDERS TO BE ENTERED IN MINUTE BOOKS. All orders and decrees made by the probate court \* \* \* must be signed and filed and entered at length in the \* \* \* records of the court; \* \* \* each page of said record must be signed by the probate judge."

Sections 18 and 19 of Chapter 243, 1929 Laws, which chapter constitutes the present transfer and inheritance tax law of this state, provides for the making and entering orders fixing valuation of property transfer and inheritance taxes. Chapter 257, 1929 Laws, also provides for such orders.

The query arises; did the legislature intend by the use of the words "*all orders*" in Section 7755 C. S. as amended to require that orders fixing valuation and inheritance tax be entered at length in the records of the court.

Title 57 of the Compiled Statutes relates to the "proceedings in probate court." This title includes Chapter 273 to Chapter 291, both inclusive. Chapter 285, relating to orders, decrees, etc., embraces Section 7755. The words "*all orders*," as used in this Section clearly refers to orders in proceedings in probate, embraced within said title, as distinguished from orders in other proceedings. For example, the Probate Court makes orders in criminal and Civil cases, in proceedings in the correction of delinquent children, etc. Evidently the use of the words "*all orders*," as used in said section was not intended by the legislature

to refer to proceedings in such latter named instances, or under the inheritance tax laws.

It is, therefore, my opinion that Section 7755 Compiled Statutes, as amended, does not require the recording of orders fixing valuation of property and fixing inheritance tax under inheritance tax law.

*To Mr. John Jackson,  
March 1, 1930.*

W. D. GILLIS,  
Attorney General.

**Deposit in Idaho Bank of Utah Resident Not  
Subject to Transfer Tax**

**130. QUESTION:**

Is a deposit in an Idaho bank subject to a transfer and inheritance tax upon the owner's death, where the owner resided and had his domicile in the State of Utah?

**OPINION:**

This office has heretofore held, and upon the authority of the case of *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, that moneys of the character mentioned were taxable under our present inheritance tax act. However, since the above ruling, the Supreme Court of the United States has handed down the decision in the case of *The Farmers Loan & Trust Co. vs. State of Minnesota*, 280 U. S. 204, 50 Sup. Ct. Rep. 98, which expressly overrules the case of *Blackstone v. Miller*. This latter case was decided January 6, 1930.

In the *Blackstone* case there was involved a transfer tax upon a bank deposit of some three and one-half million dollars, which had been deposited in a bank in the State of New York. This deposit was owned by a non-resident decedent. The state of residence of said decedent imposed a transfer tax upon the transfer of said bank deposit. The State of New York also imposed a tax upon such transfer, thus bringing about a double tax upon this transfer. The Supreme Court upheld the imposition of the tax by the State of New York, and as I have said, it was upon that decision that this office made the ruling first above mentioned.

However, in view of the overruling of the case of *Blackstone v. Miller*, and upon the reasoning of the case of *The Farmers Loan & Trust Co. v. Minnesota*, it is now my opinion that I must now reverse myself and hold that the

transfer of said deposit is not subject to a transfer tax payable to the State of Idaho.

In support of this view, I quote you from the last above mentioned case:

"Blackstone v. Miller, supra, and certain approving opinions, lend support to the doctrine that ordinarily choses in action are subject to taxation both at the debtor's domicile and at the domicile of the creditor; that two States may tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the Fourteenth Amendment. The inevitable tendency of that view is to disturb good relations among the states and produce the kind of discontent expected to subside after establishment of the Union. The Federalist No. VII. The practical effect of it has been bad; perhaps two-thirds of the States have endeavored to avoid the evil by resort to reciprocal exemption laws. It has been stoutly assailed on principle. Having reconsidered the supporting arguments in the light of our more recent opinions, we are compelled to declare it untenable. Blackstone v. Miller no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled.

"Four different views concerning the situs for taxation of negotiable public obligations have been advanced. One fixes this at the domicile of the owner; another at the debtor's domicile; a third at the place where the instruments are found—physically present; and the fourth within the jurisdiction where the owner has caused them to become integral parts of a localized business. If each state can adopt any one of these and tax accordingly, obviously, the same bonds may be declared present for taxation in two, or three, or four places at the same moment. Such a startling possibility suggests a wrong premise."

To State Auditor,  
January 30, 1930.

W. D. GILLIS,  
Attorney General.

**Insurance Issued by Government to World War Veteran Is  
Exempt From Transfer Tax When Beneficiary Dies  
and Insurance Is Paid to Estate**

**131. QUESTION:**

A person who served in the World War has a policy of insurance issued by the Government and which is made tax exempt as to beneficiary named. That beneficiary dies and it therefore is paid to his estate. Does the tax exemp-

tion apply or does the right to receive the money make the estate liable for the inheritance tax?

OPINION:

There are two cases from the Surrogate, an inferior court of the State of New York, which hold that the proceeds of insurance payable to the insured's estate are not exempt from taxation under Section 22 of World War Veterans Act (38 U. S. C. A. Sec. 454). They are:

Re Schaeffer's Estate, 224 N. Y. S. 305.

Re Dean's Estate, 225 N. Y. S. 543.

The first case was decided in September 1927 and the last in November 1927. They are the only cases this office can find which hold that this section does not exempt such proceeds.

Since 1927 several well considered decisions have been rendered by the courts of this country and to them I will refer later.

Section 22 is a part of Chapter 320 which was enacted June 7, 1924, (43 Stat. 613), and is a part of the chapter cited as the "World War Veterans' Act, 1924." Section 1 of that act found in 43 Stat. 607, and in 38 U. S. C. A. Section 421, authorizes the act to be cited as "World War Veterans' Act, 1924." Section 22 above referred to provides for exemption from taxation of compensation insurance, etc. It reads as follows:

"The compensation, insurance, and maintenance and support allowance payable under Parts II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Parts II, III, or IV; and shall be exempt from all taxation: Such compensation, insurance, and maintenance and support allowance shall be subject to any claims which the United States may have, under Parts II, III, IV and V, against the person on whose account the compensation, insurance or maintenance and support allowance is payable.

"The provisions of this section shall not be construed to prohibit the assignment by any person to whom converted insurance shall be payable under Part III of this chapter of his interest in such insurance to any other member of the permitted class of beneficiaries."

Section 303 of the same act relating to payment of insurance to the estate of deceased's beneficiary, 43 Stat. 1310, and found as Section 514 of 38 U. S. C. A. is as follows:

"If no person within the permitted class be des-

ignated as beneficiary for yearly renewable term insurance by the insured either in his lifetime or by his last will and testament or if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment under any existing award: PROVIDED, That all awards of yearly renewable term insurance which were in course of payment on March 4, 1925, shall continue until the death of the person receiving such payments, or until he forfeits same under the provisions of this chapter. When any person to whom such insurance was awarded prior to such date dies or forfeits his rights to such insurance then there shall be paid to the estate of the insured the present value of the remaining unpaid monthly installments of the insurance so awarded to such person: PROVIDED FURTHER, That no award of yearly renewable term insurance made to the estate of a last surviving beneficiary prior to March 4, 1925, shall be affected by the foregoing provisions. In cases when the estate of an insured would escheat under the laws of the place of his residence the insurance shall not be paid to the estate but shall escheat to the United States and be credited to the military and naval insurance appropriation. This section shall be deemed to be in effect as of October 6, 1917."

The Louisiana and Ohio cases hereinafter cited construe Section 28 of the War Risk Insurance Act, but this section was reenacted in the World War Veterans' Act, 43 Statutes at Large 607, 613, heretofore referred to. (Watkins v. Hall, W. Va. 147 S. E. 876.)

The following cases from the states of Louisiana, Ohio, West Virginia and Washington hold that proceeds of War Risk Insurance payable to the insured's estate on the death of the beneficiary is not subject to state inheritance tax.

The first case was decided in 1924, that of Succession of Geier, (La.), 99 So. 26. This construed Section 28 of the War Risk Insurance Act, referred to, which was as follows:

"Allotments and family allowances, compensation, and insurance payable under Articles II, III and IV respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under articles II, III, or IV; and shall be exempt from all taxation."

It will be observed that this section, so far as exemption from taxation of the proceeds of War Risk Insurance is concerned, is substantially the same as Section 22 of the World War Veterans' Act of 1924.

In this case one Geier died leaving War Risk Insurance, his mother being named as the beneficiary. The mother died before the insured, and as no other beneficiary had been substituted, the insurance at the death of the insured became payable to the deceased's surviving father and brothers and sisters. The court held that the beneficiaries did not take as heirs, saying:

"\* \* \* They come within the permitted class of beneficiaries, because they are the heirs at law or next of kin of the deceased service man, but they are designated in the act as beneficiaries, and they take as such under the contract of insurance to the same extent and in the same manner as the beneficiary named in the policy of insurance would take in the event such beneficiary survived the insured."

As to the exemption provided for by said Section 28, the court said:

"The terms of the act are clear and unambiguous. Summarizing its provisions, there is a positive prohibition against all taxation on money paid out by the federal government under section 28, arts. 2, 3, and 4; and the insurance provision thereof is a contract between the United States, its agents, and the persons designated in the act as the beneficiaries of deceased service men. It is a bar to all state legislation which is in conflict with it."

The case of *Ohio v. Rife* (Ohio) 162 N. E. 398, also construed Section 28 of the War Risk Insurance Act.

Here, one Earl Stewart was awarded a policy contract, as provided by the acts of Congress in the sum of \$10,000. He paid the premiums until he was killed in action on a battlefield in France. His mother, Hannah Rife, was named beneficiary in said policy. The United States paid to her the monthly installments until she died and after her death an administrator was appointed by the probate court and the United States, through the Bureau of War Risk Insurance, paid to the administrator the remaining value of the policy. The court held that Stewart's aunts and uncles were designated as being within the permitted class and payment to them provided for; and that said act provided that the permitted class of beneficiaries should be determined by the intestate laws of the state of which the insured was a resident.



The Ohio Inheritance Tax law imposed a tax upon succession to any property passing by will or the intestate laws from any person who was a resident of the state at the time of his death. In this respect the Ohio law was substantially the same as Section 3371, Compiled Statutes of Idaho, of the old Inheritance Tax Statute, and Section 2 of Chapter 243 of the 1929 Laws of Idaho, a part of the new Transfer and Inheritance Tax Act.

The court held that the proceeds of such policy were exempt from all taxation and that there was no succession to property within the meaning of the Ohio Transfer Tax Statute but—

“\* \* \* that the property passed direct from the United States and that the government adopted the method of paying through an administrator to relieve the Bureau of War Risk Insurance of the expense of ascertaining in each case who the persons were within the permitted class.”

Referring to the Ohio Transfer Tax Statute, the court said:

“The succession provided for in Section 5332, General Code, is a right given by the intestate laws of Ohio. The United States had the right to designate those that came within the permitted class of beneficiaries. It did so in entering into this contract of insurance. The succession, if it were such, was not a series of persons conformable to the laws of Ohio. It was expressly provided in the War Risk Insurance Act that, in case of reversion, the money or property should revert to the United States. If the succession was to be according to the laws of Ohio, the reversion would have been to the state of Ohio.

“The law of the United States is a part of, and is read into, this contract of insurance. Among other things, it provides that the insurance ‘shall be exempt from all taxation.’”

Continuing further the court said:

“The tax commission of Ohio bases its entire claim on the language that the insurance shall be exempt from taxation, claiming that taxing the right of succession is not a tax on the insurance.

“This insurance was provided for and awarded when the nation was at war. It was a protective measure for the government, as well as for the insured, and the use of the language, ‘shall be exempt from all taxation,’ in view of the fact that the government designated the permitted class and that the laws of Ohio are subject to the laws of the United States on this question, leaves no doubt that the act meant what it said when it provided

that such insurance 'shall be exempt from all taxation.'"

The court in this case cited the Geier, Louisiana case, *supra*, as an authority. This case was decided in 1928.

The following cases from West Virginia and Washington construe Section 22 of the World War Veterans' Act, 1924, which, as pointed out, is in substance the same as Section 28 of the War Risk Insurance Act construed in the last two mentioned cases.

The case of *Watkins v. Hall* (W. Va.) 147 S. E. 876, held that the computed value of War Risk policy turned over to the estate of a deceased soldier for distribution was not subject to the state inheritance tax. The facts of this case were:

One Talbott holding a \$10,000 policy of War Risk Insurance died intestate, unmarried and without issue, leaving surviving him a mother, three sisters, and five brothers. The monthly installments provided for under the policy were paid to the mother until her death. After that time the government paid to the administrator of the deceased's estate the remaining installments. The court quoted from the language of the *Rife* case of Ohio and cited the *Geier* case of Louisiana to sustain its position and said:

"\* \* \* The administrator becomes a mere trustee or conduit for the government to make the payments to the persons entitled to the same under the provisions of the federal law. The intestate laws do not operate upon the decedent's property, but are referred to in order to determine who shall take the proceeds of the insurance. This position we believe to be a sound one. That Congress had a right to adopt the course of descent prevailing in the state of the residence of the soldier, there can be no question. The proceeds of the insurance, therefore, passed under the federal act. In other words, the intestate laws of the state of the residence of the soldier was simply adopted as a means for ascertaining the next of kin to whom payment should be made. Such a construction is supported by the further fact that in case of an escheat the same shall be to the United States rather than the state.

"It being apparent that the brothers and sisters take as beneficiaries under the contract of insurance, that the intestate laws of this state have been set in motion for the purpose of carrying out certain provisions of a war measure in regard thereto, and that the terms of said war measure expressly exempts from all taxation insurance payable thereunder, the decree of the lower court will be affirmed."

This case was decided in April, 1929.

One of the best considered cases is that of *In Re Cross' Estate*, (Wash.) 278 Pac. 414, decided in June, 1929. There it was held that the proceeds of War Risk Insurance, payable to insured's estate upon death of beneficiary is not subject to state inheritance tax. This case also combined the case of *Cross v. State*. These cases were before the court in 1928 and the decision is found in 269 Pac. 339. In the first case it was held that the proceeds of War Risk Insurance were not exempt from the State Inheritance Tax Act, but this decision was overruled later on rehearing. The facts were: One LeRoy W. Cross was killed in the World War, dying intestate and single. He left surviving him a father, mother, brothers and sisters and at the time of his death was carrying a \$10,000 policy of War Risk Insurance. His mother was designated as his beneficiary. After his death and while his mother was receiving monthly installments under the policy the father died leaving his estate to his wife. Thereafter the mother died leaving her estate to her sons and daughters.

The court points out that Section 303 of the World War Veterans' Act of 1924, as amended in 1925, quoted above, designates certain beneficiaries under the War Risk Insurance policy, and holds that such persons take as beneficiaries and not as heirs under the intestate laws of the state, saying:

"\* \* \* we believe the whole intent and purpose of these acts is to exhaust the proceeds of this insurance for the benefit of those within the designated class, and that so long as there are such persons they must take, not as heirs at law, but as beneficiaries under the war risk insurance policy. It seems to us that any other reasoning would be contrary to the text and import of the entire act. If it be said that the proceeds of a policy shall be distributed to the heirs at law of the named beneficiaries when there exist persons 'within the permitted class,' then the act does not 'give to every \* \* \* enlisted man \* \* \* greater protection for themselves and their dependents.' It would also seem inconsistent for us to say that, although the act permits the insured to select the beneficiary, 'but only within the classes \* \* \* provided,' still by the death of the designated beneficiary some person or persons outside of 'the permitted class,' probably a total stranger, shall receive the residue. We do not believe that is the intention of the act, and we do not believe that it so provides. Benefits under such a policy of insurance as we have here first accrue to the designated beneficiary, who has but

a lifetime interest, subject to certain limitations, and then to all of the beneficiaries in the order of their priority 'within the permitted class.' All of these last mentioned beneficiaries have an inchoate or prospective benefit, and, if finally they do realize from the insurance, it must be as beneficiaries and not as heirs at law. The payment of the residue into the estate of the insured is only procedural, and is nevertheless to be distributed only to persons 'within the permitted class.'"

And adds, that while there is undoubtedly a diversity of opinion, it feels that the weight of authority and better reasoned cases support the court's view.

In conclusion the court says:

"We now hold that the proceeds of the War Risk Insurance of LeRoy W. Cross should be distributed out of the estate of said insured to such persons, within the permitted class of beneficiaries now prescribed by the War Risk Insurance Act, as would, under the laws of this State, be entitled to the insured's personal property in case of intestacy, and that those so taking do so as beneficiaries under said policy, and not as heirs at law, and that the proceeds so distributed are free from our state inheritance tax.\* \* \*"

From the foregoing it is my opinion that the proceeds of War Risk Insurance held by a World War Veteran, after his death, and the death of his beneficiary named in the insurance policy, should be distributed to the designated class of beneficiaries named under the act and that such distribution of such proceeds is not a passing of property from a decedent under the intestate laws of this state and are therefore not taxable under the transfer tax statute of this state; but, that on the contrary, the person or persons in such permitted or designated class, takes merely as a beneficiary under the policy and such proceeds are therefore exempt from the inheritance tax imposed by this state, under the provisions of Section 22 of the World War Veterans' Act as amended.

*To State Auditor  
December 17, 1929.*

W. D. GILLIS,  
Attorney General.

## TEACHERS

### Grounds for Discharge of Teachers

#### 132. QUESTION:

May a teacher be discharged by the Board of Trustees because of having taken bankruptcy?

#### OPINION:

Chapter 215, Section 102, of the Laws of 1921, provides the grounds for revocation of a teacher's certificate. It reads:

"The County Superintendent shall have power to revoke any county certificate for neglect of duty, for incompetency to instruct and govern a school, for immorality or for any cause which would have been sufficient ground for refusing to issue the same, had the cause existed or been known at the time of its issue; Provided, that no certificate shall be revoked or annulled without a personal hearing, unless the holder thereof shall, after thirty days notice, neglect or refuse to appear before the Superintendent for that purpose; Provided, further, that said teacher shall have the right to appeal to the State Board of Education, whose decision shall be final; Provided further, that it shall be the right of any citizen to bring to the attention of the State Board of Education any case in which the County Superintendent shall neglect or refuse to revoke a certificate when cognizant of the facts in the case, and it shall be the duty of the State Board of Education, thru its executive officer, to investigate the charges, and if proved true in accordance with the reasons set forth in this section, then the State Board of Education is empowered to revoke the certificate in question."

Bankruptcy, it will be noted, is not included as a ground.

The bankruptcy act was enacted for the purpose of enabling one whose liabilities exceed his assets to file a petition setting forth that fact together with the statement of all assets and liabilities and have the matter determined by a Federal Court. It is strictly a legal proceeding provided for by an act of Congress and is not ground for a rescission of contract, and it follows that a teacher may not be discharged on that ground.

*To Mr. Arnold A. Tomchols,  
February 24, 1930.*

W. D. GILLIS,  
Attorney General.

### Qualification to Teach Under Act of 1927

#### 133. QUESTIONS:

1. May students who have finished a one-year normal course and are issued certificates to teach prior to September 1, 1929, but who have not taught by virtue of such certificate or by virtue of any prior certificate for a period of eighteen months or more in the public schools of this state prior to September 1, 1928, be permitted to teach in the public schools of the State of Idaho during the school year of 1929-30?

2. May teachers who do not have two years' normal school work and have not taught in the public schools of this state for a period of eighteen months, (two school years), prior to September 1, 1928, by virtue of a certificate to teach, be permitted to teach during the year 1929-30 in view of the provisions of Chapter 97 of the Session Laws of 1921, as amended by Chapter 59 of the 1927 Session Laws?

#### OPINION:

In view of the importance of this question, by reason of the considerable number of teachers it may affect, this office has given intensive attention to this problem. Two assistants and myself have very exhaustively examined all of the statutory and decision law of this state which might affect it, and have also carefully considered and analyzed an opinion rendered some seven years ago by a former attorney general.

This office is unanimous in the conclusions set out here. The former opinion can be distinguished in that it was the interpretation of a law now repealed and of a statute while somewhat similar in terms yet lacking the plain and unambiguous language found in the section hereafter considered.

The act interpreted by the former attorney general was repealed by Chapter 149 of the Laws of 1923. It did not contain the plain mandatory declarations of the present law, nor the specific, definite language of this final expression of the legislature we are now to examine. The construction given to the act considered in 1922 was doubtless justified, but it is not applicable in the instant case.

#### POWER OF BOARD IN REFERENCE TO CERTIFICATES DEFINED BY LAW

Section 2 of Article IX of the Constitution of Idaho provides:

"The general supervision of state educational institutions and public school system of the State of Idaho, shall be vested in a state board of education, the membership, powers and duties of which shall be prescribed by law.\* \* \*"

Subdivision 10 of Section 803 of the Compiled Statutes in reference to the powers and duties of the State Board of Educators provides that the board shall:

"\* \* \* Have entire supervision and control of certification of teachers in accordance with law.  
\* \* \*"

Section 76 of Chapter 215 of the Laws of 1921 in reference to the certification of teachers reads in part as follows:

"The granting and renewing of all teachers' certificates shall be governed by the provisions of this act and every person employed as a teacher in the public schools of the State of Idaho must be the holder of a valid state, county, or state normal school certificate. *No person shall be entitled to, or shall receive any compensation for the time he or she teaches in any public school without a certificate valid under the laws of the State of Idaho and in force for such time in the county where such school is taught.*"

The above section has in no respect been amended or modified since its adoption in 1921.

Section 79 of the same chapter describes the kinds of certificates.

Section 1100 of the Compiled Statutes provides that the Board of Trustees of the Albion State Normal School may issue:

"Such certificates and diplomas as may from time to time be deemed suitable."

It is my opinion that the word "suitable" must be interpreted to mean that the board is controlled by the provisions of the act of 1921 as later amended and hereafter referred to, and that it may grant certificates of legal sufficiency in the hands of the holder no greater than is provided by law.

By Section 1086 of the Compiled Statutes, a section like the above, applies to the Lewiston State Normal School, it too stating that the board may:

"\* \* \* issue such certificates and diplomas as may from time to time be deemed suitable."

It is my opinion that the same interpretation must be given this section as to the one above referred to.

A like provision is found in Section 1116 of the Com-

piled Statutes, which applies to the then "Idaho Technical Institute."

Section 99 of Chapter 215 of the Laws of 1921 gives no aid or comfort. The type or class of certificate held cannot control unless it be supported by the qualifications or teaching experience hereinafter enumerated.

From the foregoing sections, it is apparent that the granting and renewing of all teachers' certificates and the right to teach in the schools of Idaho are governed by law with no powers in any agency to vary the educational requirements or period of teaching experience required by statute.

We now turn to the statute to be interpreted. It is Section 97 of Chapter 215 of the Laws of 1921, as amended by Chapter 149 of the Laws of 1923, and as further amended by Chapter 59 of the Laws of 1927. It reads as follows:

Every applicant for a third grade certificate shall be examined in such subjects as the State Board of Education may determine and in addition to passing such examination such applicant shall have attended a professional school for teachers for at least nine weeks, and shall have received such passing grades in such subjects as may be required by the State Board of Education. Any person who has had one year or more training in a school of at least equal requirements to the Idaho State Normal School may become an applicant for a third grade certificate without the requirement of the nine weeks' attendance at such professional school. No person shall become an applicant for a third grade certificate after September first, 1927, who has not satisfactorily completed one year of normal school work in one of the Idaho State Normal schools, or a school of equal standing; *and from and after September first, 1929, no person shall teach in any of the elementary schools of the State of Idaho who has not had at least two years of like training in such normal school work, provided, that none of the requirements specified in this Act shall apply to any person who has taught in the public schools of the State of Idaho for a period of eighteen months or more prior to September first, 1928.* No person shall be eligible for more than one third grade certificate and all third grade certificates issued shall be valid for one year only."

I call particular attention to the italicized portion and its plain declarations. It stands by itself unaffected by what goes before.



### QUALIFICATIONS REQUIRED AFTER SEPTEMBER, 1927

For that reason, I do not give consideration here to the qualifications required for applications for third grade certificates prior to September 1, 1927. In tracing the increasing demands as to qualifications, it is pertinent to our inquiry that we give consideration to that which relates to the application for third grade certificates after the last mentioned date. At this point, the requirements take a radical turn because after this date, the statutes say:

"No person shall become an applicant for a third grade certificate who has not satisfactorily completed one year of normal school work in one of the Idaho state normal schools or a school of equal standing; \* \* \*."

In other words, while prior to September 1, 1927, a person could become an applicant who successfully passed the examination given, and who in addition thereto, had nine weeks' training in a professional school for teachers, after September 1, 1927, an applicant for a third grade certificate would not possess qualifications sufficient to entitle him to take the examinations unless he had at least one year's work in an Idaho State Normal School or a school of equal standing—an increase from nine weeks to nine months.

### QUALIFICATIONS REQUIRED AFTER SEPTEMBER 1, 1929.

After September 1, 1929, comes another radical turn for the statute declares even the above qualifications are not sufficient to permit one to teach in the elementary schools in that after that date it is necessary that a person before being eligible to teach, must have *two years'* work in an Idaho State Normal School or a school of equal standing, *or have taught at least eighteen months prior to September 1, 1928.* This provision in the year 1927 served notice upon everyone who desired to become an applicant to teach after September 1, 1929, that unless they had eighteen months' actual teaching experience *prior to September 1, 1928,* that they would not be eligible to teach; or, in lieu thereof, that they must take two years of normal school work.

It is my opinion that there can be no question or doubt, giving the English language its ordinary interpretation, but that the legislature intended the above.

## CONCLUSIONS

In conclusion, it is my opinion that a student who has finished a one-year normal course and has been issued a certificate to teach prior to September 1, 1929, but who had not taught by virtue of such certificate or by virtue of any prior certificate for a period of eighteen months or more in the public schools of this state prior to September 1, 1928, may not be permitted to teach in the elementary schools of Idaho during the school year 1929-30.

As to your second inquiry, it is my opinion that any teacher now teaching in the public schools of this state who does not have two years' normal school work, or who had not taught in the public schools of this state for a period of eighteen months prior to September 1, 1928, may not be permitted to teach in the elementary schools of this state for the school year 1929-30.

In view of the fact that certificates may not be granted to those who do not have the qualifications above defined and the further statutory restriction that without a certificate a teacher may not draw compensation for his services, a teacher not possessing the qualifications above described would not be eligible to receive public moneys for his services.

*To State Supt. of Pub. Ins.*  
*May 14, 1929.*

W. D. GILLIS,  
Attorney General.

## TEACHERS' CERTIFICATES

**Life Certificates to Aliens: Must Be Naturalized  
Within Seven Years**

## 134. QUESTIONS:

1. Is an alien entitled to a life certificate as a teacher upon declaration of intention to become a citizen of the United States, all other requirements of the school laws having been complied with?

2. If entitled to such certificate upon declaration of intention to become a citizen, is such person entitled to receive the regular form of certificate without defacement in any manner or is such person only entitled to receive a certificate stating on its face that such person is not a citizen and that such certificate is invalid after a certain date (period of time allowed for complete naturalization,

Sec. 77, Ch. 215, Laws of 1921) unless accompanied by final naturalization papers?

3. Section 77, Chapter 215, Laws of 1929, provides that "... when such certificate ... shall have been issued to any person who shall not within seven years become a citizen, such certificate shall be automatically revoked ...". At what date does this seven year period begin to run: (a) date of entrance into United States; (b) date of declaration of intention to become a citizen; (c) date of the issuance of the certificate?

OPINION:

Replying to your first question, Section 77 of Chapter 215 of the Laws of 1921 relates to certificates granted aliens and reads as follows:

"No person shall be granted a certificate or employed as a teacher in any public school, who is not a citizen of the United States or who has not declared his intention to become such: PROVIDED, That when such certificate to teach in the public schools in the State shall have been issued to any person who shall not within seven years become a citizen, such certificate shall be automatically revoked, and such person shall be ineligible to receive a certificate until he becomes a fully naturalized citizen."

It will be noted that it declares a prohibition against the issuance of a certificate to a person "who has not declared his intention to become" a citizen of the United State. It implies that a certificate may be granted to a person who has declared his intention but the proviso declares that there shall be an automatic revocation of a certificate so issued if the person or alien to whom it was issued "shall not within seven years become a citizen."

An alien is required to declare his intention to become a citizen of the United States at least two years prior to his admission as a citizen (8 U. S. C. A. Sec. 373). Such alien having so declared his intention must then file his petition for naturalization not less than two nor more than seven years after such declaration. It must appear to the court admitting an alien to citizenship that he has, immediately preceding the date of his application for citizenship, resided continuously within the United States five years at least and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United

States, and well disposed to the good order and happiness of the same. (8 U. S. C. A. 382.)

In view of these requirements of the federal statutes, it is apparent that, after an alien has declared his intention to become a citizen of the United States and has been granted a certificate to teach in the schools of this state, it is impossible to determine at the time of granting or issuance of such certificate whether or not such alien will within seven years become a citizen of the United States, or whether he will ever become such citizen. It is, therefore, apparent that Section 77 of Chapter 215, Laws of 1921, contemplates that if such alien does not, within seven years after the issuance of such certificate, become a citizen of the United States, such certificate shall be automatically revoked, and after such revocation, the person would be ineligible to receive a certificate until he became a fully naturalized citizen.

It is, therefore, my opinion that an alien is not entitled to a life certificate as a teacher upon declaration of his intention to become a citizen of the United States, even though all other requirements of the school laws have been complied with.

Turning now to your second inquiry, the foregoing opinion on No. 1 disposes of this question.

Replying to your third inquiry, the seven-year period referred to in Section 77 of Chapter 215, Laws of 1921, apparently has reference to the date of granting the certificate provided for in said section, and, therefore, said period would begin to run from the date of the issuance of said certificate. If at any time during the seven-year period it is ascertained that such person cannot within the seven-year period become a citizen of the United States, at the time of such discovery the certificate might be revoked, but if such fact be not ascertained until the end of the seven-year period, the certificate would be automatically revoked at the end of that period. It would seem that Section 77 of said chapter contemplates that it is necessary that an alien to whom a certificate has been issued become a citizen of the United States within seven years after the issuance of such certificate.

It is, therefore, my conclusion and opinion as to your third inquiry that the seven-year period provided for begins to run upon the issuance of the certificate and not at

the date of entrance into the United States or date of declaration of intention to become a citizen.

*To Mr. Thomas A. Madden,  
November 15, 1929.*

W. D. GILLIS,  
Attorney General.

## VACANCIES

### **When Highway Commissioner Is Appointed to Fill Vacancy, He Holds Office Only Until Next Election**

#### 135. QUESTION:

Where one of the Commissioners of a highway District fails to qualify and the other Commissioners appoint a successor, will this successor hold for the full term of the person whose place he fills, or shall the office be filled at the next general election?

#### OPINION:

Filling of vacancies is dealt with in Section 1500 C. S., as amended by Chapter 31, Laws of 1927, which provides that each vacancy occurring in the office of the Highway Commissioner, other than by expiration of the term, shall be filled by the Highway Board. I assume from this that the tenure of the appointee is governed by the general law since it is not specifically stated as to what his tenure shall be.

Sections 466 and 467 C. S., provide that appointments made under this chapter shall be until the next election, at which the vacancy shall be filled. There seems to be no other provision relating to any officer, either state, precinct or county, except members of the Supreme Court and the Judiciary where the appointee is run past the next general election.

Therefore, it is the opinion of this office that a Highway Commissioner does not come within this exception and, for that reason, at the next general election there should be also an election to fill this vacancy for the unexpired term of the appointee's predecessor.

*To Mr. Harry Baker,  
November 2, 1929.*

W. D. GILLIS,  
Attorney General.

### Should Be Confirmed at Special Session

#### 136. QUESTION:

Under the Constitution, should your executive appointment to fill the vacancy existing in the office of the Lieutenant Governor, arising by reason of the death of the Honorable W. B. Kinne, be sent to the Senate for confirmation at the Extraordinary Session of the Legislature called by Your Excellency to convene on February 24, 1930 or should this appointment to fill said vacancy be transmitted to the Senate for action thereon at the next regular session to convene in January, 1931?

#### OPINION:

An opinion rendered by this office on October 17, 1929, to Your Excellency held that a vacancy existed in the office of Lieutenant-Governor.

Section 6 or Article IV of the Constitution of Idaho provides the method for filling said vacancy, and reads in part as follows:

"If during the recess of the senate, a vacancy occurs in any state or district office, the governor shall appoint some fit person to discharge the duties thereof until the next meeting of the senate, when he shall nominate some person to fill such office."

The Constitution clearly contemplates joint action by the Governor and the Senate in the matter of such appointments when possible and as soon as possible, and the provision providing for the appointment of a person to occupy the office until confirmation by the Senate requires the construction that the Senate should be permitted to act when next in session.

It, therefore, appears that the only question that confronts us at this time is whether or not the convention of the Senate at the Special Session will amount to a "next meeting" of the Senate.

Section 8 of Article III of the Constitution provides as follows:

"The sessions of the legislature shall, after the first session thereof, be held biennially, at the capital of the state, commencing on the first Monday after the first day of January, and every second year thereafter unless a different day shall have been appointed by law, and at other times when convened by the governor."

Section 9 of Article IV of the Constitution provides for

the calling of sessions of the legislature on extraordinary sessions.

In the case of *State vs. Olson*, (N. D.) 176 N. W. 528, the question of whether or not a special session of the legislature was in reality a session of the legislature was presented to the court. In this case the court said:

"Can there be any question that the legislature which met in special session in 1919 was a legislative assembly? Can it be doubted that such session was not a session of the legislative assembly? Is there any room for construction or argument that, under the Constitution, the same members of the House and Senate might one day be sitting in regular session bound by the constitutional provisions, requiring a two-thirds vote in order to enact an emergency measure, and that acts not so passed should not become effective until July 1st, and that several days later, after adjournment and reconvenement by the Governor, this same legislature, composed of exactly the same members, sitting in special session, would have the power to enact statutory enactments irrespective of the constitutional provisions, and in disregard of the legislative power reserved to the people in the initiative and referendum?"

"In *People v. Rice*, 135 N. Y. 473, 31 N. E. 921, 923, 16 L. R. A. 836, the point was made that an extraordinary session was not, such a session as was contemplated by the Constitution. It was held that an extraordinary session is nevertheless a session of the legislature; that the Governor, by the terms of the Constitution, has the power to convene the Legislature on extraordinary occasions, and that when convened the legislature was in session."

The Supreme Court of the State of Florida, in the matter of *In Re Advisory Opinion to the Governor*, 59 So. 782, was called upon to answer a question similar to the one in the instant case. A request was made by the Governor for an opinion as to whether appointments by him of a Supreme Court Judge, State Attorney and Judge of the Criminal Court should be submitted for confirmation at a Special Session of the Legislature. That court, with provisions of its Constitution quite similar to our own, held that the appointments should be submitted to the Senate for confirmation. It likewise held that such confirmation was not legislative business.

It is, therefore, my opinion that it is your executive duty to transmit to the Senate for its action thereon at the Extraordinary Session convened by your proclamation for

February 24, 1930, your appointment of the Honorable O. E. Hailey as Lieutenant-Governor of the State of Idaho, such appointment having been made by you since the adjournment of the last session of the Legislature.

It is my further opinion that the convening of the Legislature by your proclamation at such Extraordinary Session will amount to the next meeting of the Senate, as provided in Section 6 of Article IV of the Constitution, above referred to.

*To Honorable H. C. Baldrige,  
Governor of Idaho,  
February 21, 1930.*

W. D. GILLIS,  
Attorney General.

## WAREHOUSE RECEIPT

**A Clause Permitting Shipment of Grain From State May Not Be Incorporated in a Negotiable Warehouse Receipt**

### 137. QUESTION:

May the following clause be incorporated in a negotiable warehouse receipt for use in this state?

"The owner hereby expressly consents and agrees, and the right is hereby given the Union Wholesale & Merc. Co., in case of congestion at its elevator at Craigmont, Idaho, to ship any or all bulk grain to the Pacific Coast Terminals for storage."

### OPINION:

Upon an examination of the statutes of this state relating to uniform warehouse receipts, it is the opinion of this office that such statutes do not contemplate the shipment of grain stored in a warehouse in this state and for which a warehouse receipt has been issued, to points outside of this state for storage.

*To Union Warehouse &  
Mercantile Co.,  
July 3, 1930.*

W. D. GILLIS,  
Attorney General.



## “THE COW”

By

JUDGE JEREMIAH NETERER

The inspiration for the writing of the following history of the faithful friend of man, the cow, was the decision in the Oleomargarine case. The plaintiffs in their attack upon the constitutionality of the Act had given a long history of the butter substitute, dwelling on the fact that it was invented during the Franco-Prussian War and lauding its usefulness to man. Judge Jeremiah Neterer of the United States District Court for the Western District of Washington, who wrote the decision in the case of Best Foods Inc., vs Welch et al, doubtless feeling that the long and honorable history of the cow should be told, wrote the following into that decision. My excuse for placing it here is that it is worthy of having wider circulation than the toms of a law library will permit.

“\* \* \* In view of the statement of the history of the invention, manufacture and introduction of oleomargarine, and the contention that the cow and factory are competitors, a brief statement of the origin and development of the cow follows:

“The earliest written records, nearly four centuries before Christ, in the Vedic Hymns written in Sanscrit and preserved in India, it is said, give us our first authentic information of the cow. The Aryans on the plains of Central Asia, to whom the common ancestors of all the ‘white races’ can be traced, are said to be the first to use cow’s milk as a life sustaining substance. The domesticated cows of the Aryans are the ancestors of our cows, whence she was taken through Asia, Africa, Europe (Sweden and Denmark, ‘ko’ and Germany, ‘kuh’) and finally a few into the new world by Columbus on the second voyage in 1493 to the island of Santo Domingo, and to Mexico in 1525, and Florida in 1538. The first shipment to New England was made in 1624 by Governor Winslow.

“The Hindus, Greeks, Egyptians, Romans all revealed great consideration for their cows. The Grecian urn, immortalized by Keats, depicted a familiar scene: ‘To what green altar, O mysterious priest, Lead’st thou that heifer lowing at the skies, and all her silken flanks with garlands drest?’ In Egypt the cow was sacred to Isis; in Uganda in the heart of Africa, the tribal cow is thought holy and the milk cared for with elaborate ceremonies. The Greek poet Hesiod in his work on agricultural ‘Works and Days,’ offered advice and admonishes care of the Grecian herds. Jacob and his brethren said to Pharoah: ‘Thy servants hath been about cattle from our youth even until now both we and our fathers.’ The cow was worshipped in Babylonia and in Tyre. The Jews thought milk most valuable, and described the blessings of the land of promise as a land ‘flowing with milk and honey.’ Caesar, in war with the Gauls, observed that the people on the shores of Lake Geneva did not farm, but ‘lived by keeping cows.’

“In India veneration for the cow has continued in many parts as part of their religion, and in some native states the law pro-

hibits the killing of cows, and some Tibetan tribes treat their dairies as holy temples.

"Thus development of the cow has been a continuous, progressive change; the unfolding as natural and inevitable under the tender care of an intelligent keeper as the 'unfolding of a flower.' Cows have developed from a milk production sufficient only to sustain their offspring to 33,364.7 pounds of milk (official test for one year) by De Kol Plus Segis Dixie containing 1,349.31 pounds of butterfat, and 37,381.4 pounds of milk containing 1,158.95 pounds of butterfat by Segis Preterje Prospect.

"Milk, it is said, contains all of the vitamins essential to life and growth. 'The \* \* \* white race \* \* \* cannot survive without dairy products.' (Herbert Hoover, now President of the United States, quoted in 'The Path of the Gopatis.')

The large ranges have given way to the settler and the home builder. Commercial cattle have disappeared from the open plains. The small farmer and the dairyman have and are appropriating the open spaces. The Handbook of Dairy Statistics, Bureau of Animal Industry, U. S. Department of Agriculture, Washington, D. C. 1928, states that Idaho in 1924 produced on farms 78,505,003 gallons of milk and 3,661,728 pounds of *farm butter* from 151,722 cows. From comparison of per capita consumption based on the national agricultural report, they consumed approximately \$10,500,000 worth of forage at the farm, and the total value of the milk produced by comparison with the same report, was approximately \$19,000,000."

## DOCKET 1929-1930

### UNITED STATES SUPREME COURT

- 34 *Matter of Estate of Samual Marx Rothchild, deceased, and Anne Falk Rothchild, deceased.* Inheritance tax case. Writ of Certiorari denied. Pending distribution.
- 270 *C. A. Jungst, et al vs. H. C. Baldrige, Governor, et al.* Appealed from U. S. Statutory Court, District of Idaho, Southern Division. Constitutionality of Ch. 148, Laws of 1929, (Butcher Act) Pending on appeal.
- 288 *New World Life Insurance Co. v. W. D. Gillis, Attorney General and Vermont Loan and Trust Company vs. W. D. Gillis, Attorney General.* Appealed from U. S. Statutory Court, District of Idaho, Southern Division. Taxation of Capital Stock in competition with Banks. Pending on appeal.

### UNITED STATES CIRCUIT COURT OF APPEALS

- 412 *P. H. Detweiler et al v. John S. Welch, et al.* Appealed from Federal Court, Idaho Southern Division. Re: Constitutionality of Idaho Potato Grading Act. Pending.

### UNITED STATES DISTRICT COURT

- 277 *Best Foods, Inc. vs. John S. Welch, as Commissioner of Agriculture, et al.* Before U. S. Statutory Court, District of Idaho, Southern Division. Restrain collection of tax on oleomargarine. Decision for defendants.
- 279 *Otto Zurcher, et al, vs. John S. Welch, et al.* Before U. S. Statutory Court, District of Idaho, Southern Division. Restrain collection of tax on oleomargarine. Decision for defendants.
- 280 *Davidson Grocery Company vs. John S. Welch, Commissioner of Agriculture, et al.* Before U. S. Statutory Court, District of Idaho, Southern Division. Restrain collection of tax on oleomargarine. Decision for defendants.
- 281 *Falk Mercantile Company vs. John S. Welch, Commissioner of Agriculture, et al.* Before U. S. Statutory Court, District of Idaho, Southern Division. Restrain collection of tax on oleomargarine. Decision for defendant.
- 230 *Ernest Sauve vs. W. H. Abbott, et al.* Eastern Division, Distribution of water. Decree entered.
- 239 *Insurance Finance Corporation vs. Phoenix Securities Corporation.* Eastern Division. Possession of assets of Idaho Fire Insurance Company held by Director of Insurance. Pending.
- 332 *The Oregon Mortgage Company v. W. D. Gillis, Attorney General.* Southern Division. Taxation of Capital stock. Action dismissed without prejudice.
- 341 *In the matter of Kootenai Motor Company.* Bankrupt. Claim for gasoline tax. Pending.

- 357 *Alton and Southern R. R. Co., et al. vs. United States of America.* Rate case. Pending.
- 384 *Geo. N. Carter, Commissioner of Reclamation vs. Blaine County Investment Company, et al.* Southern Division. Little Lost River Suit. Pending.
- 288 *National Savings and Loan Association vs. W. D. Gillis, Attorney General of Idaho.* Taxation of Foreign Bldg. and Loan Ass'ns. Decision for plaintiffs.
- 288 (a) *Vermont Loan and Trust Company vs. W. D. Gillis, Attorney General of Idaho.* Taxation of Foreign Corporations. Injunction denied. Appealed.
- 288 (b) *Vermont Loan and Trust Company vs. W. D. Gillis, Attorney General of Idaho.* Taxation of Foreign Corporations. Injunction denied. Appealed.
- 412 *P. H. Detweiler, et al v. John S. Welch, et al:* Proceedings to determine Constitutionality of Chapter 115 of the 1929 Session Laws (Potato Grading Act). Decision for plaintiffs. Appealed.

### HEARINGS BEFORE FEDERAL BOARDS AND COMMISSIONS

#### INTERNATIONAL JOINT COMMISSION

- 300 *Re: Application of West Kootenai Power and Light Co.* Restraining condemnation of lands for power site. Pending.

#### INTERSTATE COMMERCE COMMISSION

- 174 *Public Utilities Commission vs. Union Pacific Railroad Co. et al.* Clarkston-Homestead railroad. Relief denied.
- 213 *State ex rel. Public Utilities Commission vs. Oregon Short Line et al.* Rate case on oils, gas, etc. Action dismissed.
- 369 *Public Utilities Commission vs. Oregon Short Line R. R. Co.* Rate case on bricks. Pending.
- 367 *Public Utilities Commission vs. Oregon Short Line R. R. Co.* Rate case on Peas and Beans. Pending.
- 368 *Public Utilities Commission vs. Oregon Short Line R. R. Co.* Rate case on Onions. Pending.
- 240 *Public Utilities Commission of Idaho v. Oregon Short Line R. R. Co.* Rate case on deciduous fruits. Pending.
- 401 *Public Utilities Commission vs. Oregon Short Line R. R. Co.* Rates on Petroleum products. Pending.
- 402 *Oregon - Washington Railroad & Navigation Co. vs. United States of America and Public Utilities Commission of Idaho, Intervenor.* Re: Construction of 185 miles railroad through Central Oregon. Pending.
- 403 *California Growers' and Shippers Protective League vs. The Atchison, Topeka & Santa Fe Railway Co. et al, and Public Utilities Commission of Idaho, Intervenor.* Rate case. Deciduous Fruits. Pending.
- 404 *Public Utilities Commission, the Statesman Printing Company, Capital News Publishing Company vs. Oregon Short Line R. R. Co.* Rate case on printed matter. Pending.

## LAND OFFICE, BLACKFOOT, IDAHO

- 228 *Never Sweat Mining Co. vs. State of Idaho*. Contest of Mining Claim. Decision affirmed.
- 255 *Application of Josephine R. Jarvis for Mineral Patent*. Protest on part of State of Idaho. Pending.

## HEARINGS BEFORE STATE BOARDS

## BEFORE STATE COOPERATIVE BOARD OF FORESTRY

- 363 (1) Proceedings before State Cooperative Board of Forestry to establish reforestation district in Latah County.
- 363 (2) Proceedings before State Cooperative Board of Forestry to establish reforestation district in Clearwater County.
- 363 (3) Proceedings before State Cooperative Board of Forestry to establish reforestation district in Clearwater County.

## COMMISSIONER OF RECLAMATION

- 390 Matter of application of water on Charles F. Zilkey lands. Transfer of water right. Pending.

## DEPARTMENT OF LAW ENFORCEMENT

- 365 Matter of revocation of medical license of W. H. Marshal. Revocation of license. Dismissed.

## INDUSTRIAL ACCIDENT BOARD

Workmen's Compensation Hearings  
(Closed)

*State, Claimant v. Kaniksu Boom & Navigation Company, Employer, et al. Re: A. J. Buchanan, deceased*. Claim by state Auditor. Findings of fact, rulings of law and award denying state's claim.

*State, Claimant v. Bunker Hill & Sullivan Mining & Concentrating Company, Employer—Re: John H. Stewart, deceased*. Claim by State Auditor. Award in favor of State. Appeal to District Court by employer.

*State, Claimant, v. Boise Payette Lumber Company, employer, et al—Re: Andrew McPherson, deceased*. Claim by State Auditor. Award in favor of state. \$1,000.00 paid to State October 22, 1929.

*State, Claimant v. Panhandle Lumber Company, Employer, et al.—Re: A. J. Hatch, deceased*. Claim by State Auditor. Award in favor of State. \$1,000.00 paid to State March 10, 1930.

*State, Claimant v. Bunker Hill & Sullivan Mining & Concentrating Company, Employer.—Re: Charles W. Griffith, deceased*. Claim by State Auditor. Award in favor of State. \$1,000 paid to State June 14, 1929.

*State, Claimant v. Winton Lumber Company, Employer, et al.—Re: Wendell Lantz, deceased*. Claim by State Auditor. Award in favor of State. \$1,000.00 paid to State August 16, 1930.

*State, Claimant v. Winton Lumber Company, Employer, et al.—Re: Albert McCluskey, deceased*. Claim by State Auditor. Award in favor of State. \$1,000.00 paid to State July 3, 1930.

INDUSTRIAL ACCIDENT BOARD  
Workmen's Compensation Hearings  
(Pending)

*State, Claimant, v. Kaniks Cedar Company, Employer, et al*  
*Re: Charles Wood, deceased. Claim by State Auditor.*

*State, Claimant v. Tamarack & Custer Consolidated Mining Company, Employer, et al—Re: Peter Johnson, deceased. Claim by State Auditor.*

*State, Claimant v. Clearwater Timber Company, Employer, et al.*  
*Re: George Lowe, Deceased. Claim by State Auditor.*

*State, Claimant v. Clearwater Timber Company, Employer, et al,*  
*Re: Isaac Niemi, deceased. Claim by State Auditor.*

*State, Claimant v. Clearwater Timber Company, Employer et al.*  
*Re: John Philipson, deceased. Claim by State Auditor.*

*State, Claimant v. Clearwater Timber Company, Employer, et al.*  
*Re: Charles Paulson, deceased. Claim by State Auditor.*

*State, Claimant v. Edward Rutledge Timber Company, Employer,*  
*et al. Re: Frank Domain, deceased. Claim by State Auditor.*

*State, Claimant v. Humbird Lumber Company, Employer, et al*  
*Re: William Gray, deceased. Claim by State Auditor.*

*State, Claimant v. Edward Rutledge Timber Company, Employer,*  
*et al. Re: Ed. Brigham, deceased. Claim by State Auditor.*

*State, Claimant v. Clearwater Timber Company, Employer, et al.*  
*Re: John Archer, deceased. Claim by State Auditor. Award in favor of State. Appealed to District Court.*

CASES IN JUSTICE'S COURT

380 *State ex rel. E. G. Gallet vs. Catherine M. Johnson, executrix of estate of Richard H. Johnson, deceased. Ada County. Inheritance and transfer tax. Pending.*

CASES IN PROBATE COURT

329 *State of Idaho vs. J. W. Nesbitt. Custer County. Attachment suit. Pending.*

379 *Matter of Estate of Edward Little, deceased. Shoshone County. Claim for moneys escheated to state. Pending.*

396 *Matter of estate of Jeanette Baldeck, deceased. Nezperce County. Inheritance tax Case. Pending.*

405 *State v. Itha Johnson, Guardian Myrtle O. Woodfin, incompetent. Latah County. Maintenance charges for keeping in Insane Asylum. Pending.*

338 *State ex rel. E. G. Gallet v. John L. Naylor and George N. Lamphere. Suit to collect Inheritance Tax. Appealed to Supreme Court.*

SUPREME COURT OF IDAHO

(Original Proceedings)

295 *State ex rel. Capital Investment Company v. Fred E. Lukens, Secretary of State. Original Action for Writ of Mandate. Pending.*

- 297 *Boise-Kuna Irrigation District et al v. Clinton H. Hartson, District Judge.* Original Action. Writ of Prohibition for distribution of water. Pending.
- 388 *Payette County v. H. C. Baldrige, Governor, et al, as State Board of Equalization.* Original Action for alternative writ of mandate to compel assessment. Pending.
- 244 *Herbert Corey v. Clinton H. Hartson, District Judge.* Original Action. Writ of Prohibition (Eugenics). Dismissed by Plaintiff.
- 282 *Ira B. Lane v. Fred E. Lukens, Secretary of State.* Original Action. Writ of Mandate (Four year term.) Granted.
- 343 *State of Idaho and Wood Livestock Co. v. Ralph W. Adair, District Judge.* Original Action Writ of Certiorari. Denied.
- 352 *Minidoka County et al. v. E. M. Hoover, Commissioner of Public Investments.* Original Action. Writ of Mandate. Compel Commissioner to submit claim for delinquent taxes to board of examiners. Granted and made permanent.
- 353 *Minidoka County et al v. E. M. Hoover, Commissioner of Public Investments.* Original Action. Writ of Mandate to compel Commissioner to submit claim for delinquent taxes to board of examiners. Granted and made permanent.
- 358 *Boise Street Car Company v. Roy D. Leonardson, Assessor.* Original Action. Petition for Writ of Mandate to compel assessor to accept motor vehicle license. Denied.
- 361 *John Logan v. Geo. N. Carter et al. and Blaine County Investment Company, et al.* Original Action. Mandamus. Motion to Quash sustained.
- 397 *W. C. Pond v. Byron Defenbach, Treasurer State of Idaho.* Mandamus. Pending.
- 419 *State v. Troutman.* Appealed from Eugenics Board and from District Court. Pending.

## SUPREME COURT OF IDAHO

(Civil Appeals Closed)

- 184 *Cassia County, et al. vs. C. A. Bauer, Appellant.* Appeal from District Court Cassia County. Tax lien case. Judgment for Respondents affirmed.
- 283 *James W. Williams et al. Appellants vs. H. C. Baldrige, Governor, et al, as State Board of Equalization, Respondents.* Appeal from District Court, Ada County. Enjoin allowance of tax exemption on puniping plants. Judgment affirmed.
- 285 *Lora G. Chapman, et al, Respondents vs. Ada County and John Jackson, Probate Judge.* Appellants. Constitutionality of Chap. 91, 1927 Session Laws. Probate Court Fees. Affirmed.
- 399 *State ex rel. Gallet vs. Bunkerhill & Sullivan Mining Co. Respondents. Re: death of John Stewart.* Appeal from Industrial Accident Board. Collection of \$1000. due State of Idaho. Judgment affirmed in part; Reversed in part.
- 400 *State ex rel. E. G. Gallet, Appellant vs. Clearwater Timber Co., et al, Respondents. Re: Death of Myron Pierce.* Appeal from Industrial Accident Board. Collection of \$1000. due State of Idaho. Judgment affirmed.

- 117 *J. E. Arkoosh, et al. Appellant vs. Big Wood Canal Company, et al. Respondents.* Appeal from District Court, Blaine County. Water suit. Affirmed in part; Reversed in part. Remanded.
- 131 *State ex rel. E. G. Gallet vs. John T. Salisbury, et al.* Appeal from District Court, Ada County. Collection on Bond. Default in Fish and Game licenses. Settled out of court.
- 191 *State ex rel. I. H. Nash, appellant vs. Emma L. Reed, County Treasurer, Respondent.* Appeal from District Court, Blaine County. Judgment reversed.
- 222 *Federal Land Bank, Spokane, Appellant, vs. Robert T. Stewart, County Treasurer, et al. Respondents.* Appeal from District Court, Lemhi County. Remove personal property tax lien from realty. Reversed and remanded.
- 296 *Preston A. Blair Company vs. J. D. Jensen, Sheriff.* Appeal from District Court, Bingham County. Assessment of automobiles. Judgment for plaintiffs.
- 305 *Grangeville Highway District vs. J. F. Ailshie, et al.* Appeal from District Court, Idaho County.
- 349 *Utah Mortgage Loan Corp. v. W. D. Gillis, Attorney General Appellant.* Taxation of Capital Stock in competition with banks. Judgment for plaintiffs affirmed.
- 346 *Spokane and Eastern Trust Company v. W. D. Gillis, Attorney General, Appellant.* Taxation of Capital Stock in competition with banks. Judgment for plaintiffs affirmed.
- 347 *Union Central Life Insurance Company v. W. D. Gillis, Attorney General, Appellant.* Taxation of Capital Stock in competition with banks. Judgment for plaintiffs affirmed.
- 347 *Chicago Livestock Loan Company v. Ada County and Roy D. Leonardson. W. D. Gillis, Intervenor and Appellant.* Judgment for plaintiffs affirmed.
- 257 *Carl L. DeLong et al v. John S. Welch, Commissioner of Agriculture, et al, appellants.* Appeal from Order of District Judge denying change of venue. No defense. Dismissed.

## SUPREME COURT OF IDAHO

(Civil Appeals Pending)

- 245 Application of Blackfoot City Bank for Transfer of Water Right. Appeal from decision of Commissioner of Reclamation. Protest by State against transfer. Pending.
- 264 *James Turnbull, et al, vs. Consolidated School District No. 31, Blaine County et al.* Appeal from District Court, Blaine County. Restraining disbursement of fire insurance money. Pending.
- 338 *State ex rel. E. G. Gallet v. John L. Naylor, and George N. Lamphere.* Appeal from Probate Court, Latah County. Inheritance tax case. Pending.
- 351 *P. D. Pacc, Sheriff v. I. W. Barlow, Appellant.* Appeal from District Court, Cassia County. Habeas Corpus Proceedings. Pending.
- 286 *Harry T. West, W. B. Savage et al. v. Department of Agriculture et al, Twin Falls County.* Restraining provisions of Chapter 115 of the 1929 Session Laws (Potato Grading Act.) Judgment for defendants. Appealed to Supreme Court. Pending.



## SUPREME COURT OF IDAHO

(Criminal Appeals Pending)

- 252 *State v. Ray Green*. District Court, Bannock County. Sale of Intoxicating Liquors. pending.
- 265 *State v. Steinberg and Kimball*. Original Action in District Court. Violation of potato Regulation Act. Pending in District Court.
- 274 *State v. Cleo Bush*. District Court, Twin Falls County. Assault with Deadly Weapon. Pending.
- 293 *State v. O. Steinberg*. District Court, Lemhi County. Issuing check without sufficient funds. Pending.
- 331 *State v. Al Brown, Osmund Vallem and Mary Vallem*. District Court, Minidoka County. Burglary, second degree. Pending.
- 342 *State v. Emmett Terry*. District Court, Gooding County. Perjury. Pending.
- 369 *State v. J. B. Bernhardt*. District Court, Bannock County. Pending.
- 362 *State v. John C. McClurg*. District Court, Gem County. Murder, First Degree. Pending.
- 364 *State v. Roy Elmer*. District Court, Twin Falls County. Pending.
- 372 *State v. Chris Carlson*. District Court, Custer County. Grazing sheep on cattle range. Pending.
- 373 *State v. George Hiramatsu, Sr.* District Court, Franklin County. Pending.
- 378 *State v. Chester G. Ward*. District Court, Benewah County. Assault with Deadly Weapon. Pending.
- 391 *State v. Jones Frank*. District Court, Nez Perce County. Pending.

## SUPREME COURT OF IDAHO

(Criminal Cases Closed)

- 243 *State of Idaho v. John McPherson*. District Court, Lemhi County. Grand larceny. Affirmed.
- 179 *State v. Stephen Dowell*. District Court, Ada County. Rape. Affirmed.
- 193 *State v. Wesley Vail*. District Court, Canyon County. Rape. Affirmed.
- 196 *State v. E. E. Seaverns*. District Court, Bonner County. Selling intoxicating liquors. Affirmed.
- 197 *State v. J. M. Jensen and Abbott*. District Court, Ada County. Obtaining money under false pretenses. Affirmed.
- 203 *State v. John Autheman*. District Court, Bannock County. Murder, Second Degree. Affirmed.
- 214 *State v. Buck Van Eaton*. District Court, Twin Falls County. Possession of Intoxicating Liquors. Appeal dismissed.
- 215 *State v. Walter Van Eaton*. District Court, Twin Falls County. Possession of Intoxicating Liquors. Appeal dismissed.
- 216 *State v. Floyd Hagan*. District Court, Ada County. Receiving Stolen Property. Affirmed.

- 218 *State v. Harry Knutson*. District Court, Lewis County. Furnishing liquor to minor. Reversed and remanded.
- 224 *State v. Elery Thomas*. Appeal from District Court, Twin Falls County. Rape. Affirmed.
- 225 *State v. Fong Wee*. District Court, Ada County. Practicing Medicine without License. Reversed.
- 229 *State v. Parley Clark*. District Court, Cassia County. Embezzlement. Affirmed.
- 231 *State v. Alexander Bull*. District Court, Minidoka County. Burglary. Affirmed.
- 233 *State v. Edwin T. Alvord*. District Court, Madison County. Furnishing liquor to minor. Affirmed.
- 234 *State v. Edwin T. Alvord*. District Court, Madison County. Rape. Affirmed.
- 236 *State v. Joe Petrogallio*. District Court, Latah County. Intoxicating liquor. Appeal dismissed.
- 237 *State v. Charles H. Gee*. District Court, Ada County. Involuntary Manslaughter. Affirmed.
- 242 *State v. John Bradley*. District Court, Twin Falls County. Intoxicating Liquor. Appeal dismissed.
- 247 *State v. G. W. Farris*. District Court, Canyon County. Transporting Intoxicating Liquors. Affirmed.
- 248 *State v. Roland Parker*. District Court, Bonner County. Sale of Intoxicating Liquors. Appeal Dismissed.
- 249 *State v. John Drew, William Hammond and Earl Manion*. District Court, Bingham County. Burglary First Degree. Reversed and remanded.
- 251 *State v. Malcolm Bentley*. District Court, Bingham County. Grand Larceny. Reversed and Remanded.
- 250 *State v. Benjamin McKeehan*. District Court, Latah County. Sale of Intoxicating Liquors. Reversed.
- 253 *State v. Elmer Stone*. District Court, Bonner County. Liquor Charge. Appeal dismissed.
- 256 *State v. Ward Otis Tharp*. District Court, Twin Falls County. Murder. Affirmed.
- 260 *State v. A. B. Meyer, alias Sam Stevens*. District Court, Bannock County. Obtaining Money under false pretenses. Affirmed.
- 262 *State v. S. H. Smith*. District Court, Kootenai County. Embezzlement. Affirmed.
- 266 *State v. Ross Moseley*. District Court, Twin Falls County. Selling intoxicating liquors. Affirmed.
- 267 *State v. N. E. Montgomery*. District Court, Cassia County. Receiving stolen property. Affirmed.
- 271 *State v. Jack McAllister*. District Court, Clark County. Petit larceny. Affirmed.
- 268 *State v. Turner*. District Court, Twin Falls County. Possession of Intoxicating Liquor. Dismissed.
- 287 *State v. Ira Rogers*. District Court, Bonner County. Rape. Affirmed.
- 298 *State v. E. F. Brace*. District Court, Owyhee County. Trespass on Cattle Range. Affirmed.

- 310 *State v. William Haskins*. District Court, Bannock County. Rape. Affirmed.
- 328 *State v. Benjamin McKeehan*, District Court, Latah County. Rape. Affirmed.
- 344 *State v. Walker Holder*. District Court, Latah County. Persistent Violator of Prohibition law. Affirmed.
- 268 *State v. Frank Turner*. Twin Falls County, District Court. Possession of Intoxicating Liquor. Dismissed.
- 303 *State v. Lester A. Repass*. Twin Falls County, District Court. Possession of Intoxicating Liquor. Dismissed on motion.
- 330 *State v. Viola Love*. Appealed from District Court, Twin Falls County. Forgery. Affirmed.

## DISTRICT COURTS OF IDAHO

(Cases Closed)

- 149 *State ex rel. A. H. Conner, v. Western Mutual Benefit Association*. District Court Washington County. Dismissed.
- 220 *Nels P. Larson v. John Welch, Commissioner of Agriculture, and Hartford Accident and Indemnity Company*. Ada County. Action for Damages. Dismissed for want of prosecution.
- 258 *Frank E. Smith, County Auditor v. City of Weiser, et al.* Washington County. Quiet Title Suit. Decision for Plaintiff.
- 263 *Matter of Estate of Joseph H. Murray, deceased*, Nez Perce County. Escheat matter. Decision for heirs.
- 269 *J. A. Trivers v. A. L. Chapman, Robert L. Bailey, et al.* Default on contract for highway. Recovery on Bond. Benewah County. Dismissed. Settlement.
- 273 *Gooding County v. H. C. Baldrige, et al, as State Board of Equalization*. District Court, Ada County. Writ to compel assessment of pumping plants. Dismissed. New Action No. 283.
- 275 *R. D. Baker v. Fred Dill and Catherine Dill*. Cassia County. Foreclosure. No appearance by State.
- 289 *Vida L. Christ, Executrix v. Fred Ayotte, et al.* Kootenai County. Quiet Title Suit. Demurrer of State overruled.
- 292 *William S. Forrester et al. v. State of Idaho*. Twin Falls County. Quiet Title. No Appearance by state.
- 306 *State ex rel. Wood. v. Harry Moyses, et ux.* Ada County. Condemnation for highway. Judgment for state.
- 307 *State ex rel. J. D. Wood v. Guy E. Smith, et al.* Ada County. Condemnation. Judgment for state.
- 308 *State ex rel. J. D. Wood v. Perry M. Scott, et ux.* Ada County. Condemnation. Judgment for State.
- 309 *State ex rel. J. D. Wood v. Edward B. Smith, et ux.* Ada County. Condemnation. Judgment for state.
- 321 *Clair Glass v. Unknown Heirs, etc., of H. P. Glass, deceased*. Boundary County. Inheritance Tax. No defense by state.
- 322 *People's West Coast Hydroelectric Corporation, v. R. E. Buttram and Jane Doe Buttram and State of Idaho*. Blaine County. Dismissed. Settled.

- 354 *John A. Garner et al. v. G. Clyde Baldwin, Water Master*. Fremont County. Water decree. Granted.
- 393 *State ex rel. Gallet Re: Peter John Levin, deceased, v. Winton Lumber Company*. Shoshone County. \$1000. due State. Judgment reversed. Appeal from Industrial Accident Board.
- 394 *Charles W. Griffith v. Bunker Hill & Sullivan Mining Co.* Valley County. Appeal from Industrial Accident Board. Judgment for State.
- 374 *Worth S. Lee v. Jennie Nash, Charles S. Geerhart, et al.* Elmore County. Quiet Title. Inheritance tax. Disclaimer by State.
- 360 *State ex rel. C. K. Macey v. Albert Johnson, Administrator*. Latah County. Claim for maintenance of Insane Ward. Dismissed.
- 278 *In the Matter of the Estate of Daniel Hutchinson, deceased*. Judgment for State. Money received.
- 355 *In the Matter of the Estate of Richard H. Johnson, deceased*. Transfer tax. Dismissed. See new action No. 380.
- 299 *First Church of Christ Scientist, in Boston, Mass., v. State of Idaho, Benjamin Norris, et al.* Latah County. Transfer tax matter. Disclaimer by State.
- 257 *Carl L. DeLong et al v. John S. Welch, Commissioner of Agriculture et al.* Twin Falls County. Recover damages. Dismissed.
- 284 *State ex rel. E. G. Gallet v. Carl L. DeLong et al.* Ada County. Judgment for Inspection Fees. Dismissed. Plaintiff admitted to bankruptcy.

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- 180 *State of Iowa v. Mary E. Goodloe, Treasurer of Canyon County*. Canyon County. Tax question. Pending.
- 235 *Charles W. King v. Idaho Fire Insurance Co.* Ada County. Disposition of assets of Idaho Fire Ins. Co. in possession of Director of Insurance. Pending.
- 276 *State of Idaho and Wood Livestock Co. v. A. A. Ziegler*. Custer County. Restraining diversion of water. Pending.
- 290 *F. H. Gifford v. Geo. N. Carter, Commissioner of Reclamation*. Camas County. Water decree. Pending.
- 291 *D. H. Williams, Trustee v. City of Weiser, et al.* Washington County. Quiet Title Suit. No defense by State.
- 294 *James Nelson et ux v. Thomas Larsen, Martha E. Rekdal et al.* Latah County. Inheritance tax. Pending.
- 301 *Hattie Rosa Lee Graves et al v. Alice Barns, et al.* Latah County. Inheritance Tax. Pending.
- 302 *State ex rel. J. D. Wood v. John W. Hurlbert and Mary L. Hurlbert, et al.* Ada County. Condemnation proceedings. Pending.
- 304 *Elta M. Arnold v. State of Idaho, Charles O. Workman et al.* Cassia County. Quiet Title Suit. Pending.
- 311 *John Hendrickson v. Peter Erikson et al.* Latah County. Quiet Title Suit. Transfer tax. Pending.

- 312 *State ex rel. E. M. Hoover v. County of Gem et al.* Gem County. Pending. Action for cancellation of tax lien.
- 313 *State ex rel. E. M. Hoover v. Blaine County.* Blaine County. Action for cancellation of tax lien. Pending.
- 314 *State ex rel. E. M. Hoover v. Blaine County et al.* Blaine County. Action for cancellation of tax lien. Pending.
- 316 *State of Idaho v. Custer County et al.* Custer County. Action for cancellation of tax lien. Pending.
- 317 *State ex rel. E. M. Hoover v. County of Bonner et al.* Bonner County. Action for cancellation of tax lien. Pending.
- 318 *Twin Falls North Side Investment Co. v. Henry O. Kissinger et al.* Elmore County. Foreclosure of mortgage. Pending.
- 320 *State ex rel. E. M. Hoover v. County of Idaho et al.* Idaho County. Action for cancellation of tax lien. Pending.
- 324 *State ex rel. E. M. Hoover v. County of Twin Falls.* Twin Falls County. Action for cancellation of tax lien. Pending.
- 323 *State ex rel. E. M. Hoover v. County of Bonneville.* Bonneville County. Action for cancellation of tax lien. Pending.
- 325 *State ex rel. E. M. Hoover v. Minidoka County et al.* Minidoka County. Action for cancellation of tax lien. Pending.
- 326 *State ex rel. E. M. Hoover v. Blaine County et al.* Blaine County. Action for cancellation of tax lien. Pending.
- 327 *State for use and benefit of W. E. Oster et al v. Intermountain Nursery Company et al.* Recovery on bond of nurseryman for falsely labeling and delivering fruit trees.
- 333 *D. L. McClung, et al v. Twin Falls North Side Canal Co.* Jerome County. Rights on water contract. Pending.
- 334 *State ex rel. E. M. Hoover v. Power County et al.* Power County. Action for cancellation of tax lien. Pending.
- 335 *State ex rel. E. M. Hoover v. County of Lincoln et al.* Lincoln County. Action for cancellation of tax lien. Pending.
- 336 *State ex rel. Hoover v. County of Bingham et al.* Bingham County. Action for cancellation of tax lien. Pending.
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- 340 *State ex rel. E. G. Gallet v. Kootenai Motor Company, a corporation.* Ada County. Collection of gasoline tax. Pending (Defendant admitted to involuntary bankruptcy.)
- 348 *State ex rel. J. D. Wood v. Eugene Looney et ux.* Adams County. Condemnation proceedings. Pending.
- 349 *State ex rel. J. D. Wood v. J. H. Abshire et ux.* Adams County. Condemnation proceedings. Pending.
- 356 *Mrs. Charles R. Hilding et al v. Lewiston Highway District et al.* Nez Perce County. Condemnation proceedings. Pending.
- 366 *State ex rel. C. K. Macey v. H. Melgard, Administrator.* Latah County. Claim for confinement at Insane Asylum at Orofino. Pending.
- 371 *Independent Schgol District, Class A. v. Fred E. Luken, Commissioner of Law Enforcement,* Cassia County. Restraining. collection of gasoline tax. Pending.

- 375 *State ex rel. W. D. Gillis, Attorney General v. Idaho Improvement Company*. Custer County. Mandamus. Pending.
- 376 *City of Burley, Cassia County et al. v. Fred E. Lukens, Commissioner of Law Enforcement*. Cassia County. Restraining collection of gasoline tax. Pending.
- 377 *Columbia Trust Company et al. v. Blaine County Investment Company*. Butte County. Restraining collection of gasoline tax. Pending.
- 381 *Fred G. Miller et ux v. W. A. Whitted et al.* Latah County. Quiet Title suit. Pending.
- 382 *Agnes L. Weed et al v. State of Idaho et al.* Latah County. Inheritance tax.: Quiet title suit. Pending.
- 383 *Emma Neal, a widow, v. Harley Pefley et al.* Ada County. Transfer tax case. Pending.
- 385 *P. H. Whitaker et al v. H. C. Baldridge, Governor, et al.* Cassia County. Restraining Department of Highways changing highway. Pending.
- 386 *Norman G. Wells v. George N. Carter et al.* Lemhi County. Little Lost River suit. Pending.
- 387 *State ex rel. E. G. Gallet v. National Surety Company*. Ada County. Forestry matter; collection on bond.
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- 339 *Boise Street Car Company v. Roy D. Leonardson*. Mandamus. Pending.
- 406 *E. M. Hoover Comr. Public Investments ex rel State v. Village of Ashton*. Fremont County. Non-payment of village warrants. Pending.
- 407 *E. M. Hoover, Commissioner Department Public Investments ex rel. State v. Village of Ashton and O. W. Edwards*. Fremont County. Non-payment of village warrants. Pending.
- 408 *State ex rel. E. M. Hoover, Commissioner Public Investments, v. Village of Ashton and George Kent*. Fremont County. Non-payment of Village warrants. Pending.
- 409 *State ex rel. E. M. Hoover, Commissioner, Public Investments, v. Village of Ashton and W. A. Lansberry*. Fremont County. Non-payment of Village warrants. Pending.
- 410 *E. M. Hoover, Commissioner Public Investments ex rel State. v. Village of Ashton and R. Marquardt*. Fremont County. Non-payment of village warrants. Pending.
- 411 *E. M. Hoover, Commissioner Public Investments ex rel State. v. Village of Ashton and the Utah Power and Light Co.* Fremont County. Non-payment of Village warrants. Pending.

- 414 *In the matter of death of O. C. Anderson. Claimants, N. P. Anderson and Maria Anderson, v. Lynch Cannon Engineering Company and Hartford Accident & Indemnity Company.* Claim under Workmen's Compensation Act. Pending.
- 415 *Oregon Short Line R. R. Co. v. Franklin Co. et al.* Tax Suit. Pending.
- 416 *People of Idaho, ex rel W. D. Gillis, v. Wm. Smith et al. Re: Unsatisfactory Telephone Service.* Bannock County. Pending.
- 417 *Twin Falls Canal Co. v. J. D. Wood ex rel. State* Injunction enjoining Dept. Pub. Wks., from constructing bridge over Low Line Canal. Pending.

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- 4069 *State v. Fischer, et al.*, Camas County, Service incomplete.
- 1283 *State v. Wilson, et al.*, Cassia County, Proceedings withheld at request of Department of Public Investments.
- 4885 *State v. Hill, et al.*, Cassia County, Service incomplete.
- 4624 *State v. Taggart, et al*, Custer County, Judgment taken, sale pending.
- 4373 *State v. Brown, et al.*, Custer County, Service incomplete.
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- 4254 *State v. Osborn, et al.*, Gooding County, Service incomplete.
- 2699 *State v. Ricks, et al.*, Madison County, Pending on demurrer.
- 4649 *State v. Murray, et al.*, Oneida County, Withheld at the request of the Department of Public Investments.
- 999 *State v. Brunzell, et al.*, Owyhee County, Default entered, Ready for trial.
- 2196 *State v. Bowen, et al.*, Power County, Service incomplete.
- 2678 *State v. Bowen, et al.*, Power County, Service incomplete.
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- 3650 *State v. Mikesell, et al.*, Teton County, Further proceedings withheld at request of Department of Public Investments.
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AND CLOSED WITHOUT SUIT

Dec. 1, 1928 to Dec. 1, 1930

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- 944 *Colburn.* Closed without action.
- 1416 *Pritchard.* Withdrawn by Department of Public Investments.
- 1867 *Morgan.* Closed by payment of interest.
- 1867 *Morgan.* Withdrawn by Department of Public Investments.
- 2193 *Nate.* Closed by partial payment of loan; extension granted.
- 2371 *Rader & Droege.* Loan placed in good standing.
- 2501 *Rogers.* Closed by payment of interest.

- 2566 *Banks*. Withdrawn by Department of Public Investments.  
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Dec. 1, 1928 to Dec. 1, 1930.

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- 295 *State v. Van Gilse, et al.*, Ada County, Judgment taken, property sold.  
 3048 *State v. Hebard, et al.*, Ada County, Judgment taken, property sold.  
 3732 *State v. Jarrett, et al.*, Ada County, Judgment taken, property sold.



- 3283 *State v. Wilson (E. D. Wallace, et al.,)* Adams County, Judgment taken, property sold.
- 4277 *State v. Peebles*, Adams County, Judgment taken, property sold.
- 3590 *State v. Bosworth, et al.*, Bannock County, Interest paid. Action dismissed.
- 4928 *State v. Christiansen, et ux.*, Bannock County, Loan placed in good standing. Action dismissed.
- 3173 *State v. Ringel, et ux.*, Bear Lake County, Judgment taken, property sold.
- 3992 *State v. Spencer*, Bear Lake County, Closed by payment of interest. Action dismissed.
- 4208 *State v. Wolf, et al.*, Bear Lake County, Interest and delinquent taxes paid. Action dismissed.
- 4152 *State v. Driscoll*, Benewah County, Judgment taken, property sold.
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- 2566 *State v. Banks, et al.*, Canyon County, Action dismissed. New action filed.
- 2566 *State v. Banks, et al.*, Canyon County, Judgment taken, property sold.

- 426 *State v. Critchfield, Admr. of estate of Joseph Palmer, deceased, et al.*, Cassia County, Judgment taken, property sold.
- 729 *State v. Workman, et al.*, Cassia County, Judgment taken, property sold for \$3,000.00 leaving a deficiency of \$3,195.16.
- 1283 *The Equitable Trust Co. v. Wilson, et al.*, Cassia County, Judgment rendered in favor of plaintiff in accordance with stipulation.
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