

As to whether Mr. Harriman or Mr. Chester is the legally qualified Trustee of said school district, we call your attention to Opinion 42 of this office, dated July 14, 1931, in which it was held that, since the recall election was illegal, Mr. Harriman is still the legally qualified School Trustee of said school district; and this is still the opinion of this office, based upon the facts before us at the time said opinion was given.

Answering your above-mentioned question directly, it is the opinion of this office that the salary of the school teachers of said school district for the services rendered by them prior to September 27, 1932, cannot legally be paid, as the school law of this State definitely provides that no salary of a school teacher can be paid unless the school teacher was legally employed and *had a legal certificate to teach school in this State which was in force and effect at the very time the services were rendered.* Nevada Compiled Laws 1929, section 5684.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General.*

HON. E. E. WINTERS, *District Attorney, Fallon, Nevada.*

---

SYLLABUS

**OPINION NO. 1932-94. Elections—Absent Voters.**

1. When an elector who has been duly registered and who, by reason of illness, expects to be confined in bed on election day, voted by absent ballot and died before election day, his or her ballot should not be deposited in the ballot box for counting.
2. If a duly qualified elector becomes ill less than three days prior to the date of election and is therefore unable to appear at the polls on election day, he nevertheless, under the law, has no right to cast his ballot at his home in the presence of two members of the election board.

INQUIRY

CARSON CITY, November 23, 1932.

1. If an elector who has been duly registered and who, by reason of illness, expects to be confined in bed on election day voted by absent voter's ballot and dies prior to the day of the election and the election board has notice of his or her death, can his or her ballot be deposited in the ballot box for counting?
2. If a duly qualified elector becomes ill less than three days prior to the date of an election and is unable to appear in person at the polls on election day and makes request for permission to vote his ballot at his home, can he cast his ballot in the presence of two members of the election board, said members being of opposite political faith?

OPINION

In answering the above queries, submitted under date of November 15, and after the general election of this year, we do so because the opinion is desired for future reference.

1

Section 2561, Nevada Compiled Laws 1929, the same being section 10 of the Absent Voters Law, reads as follows:

On the day of election, at the close of the regular balloting, the inspector of election who received the absent voters' ballots from the county clerk shall, in the

presence of a majority of the election officers, proceed to deposit the ballots in the ballot-box in the following manner:

The name of the voter, as shown in the carrier envelope, is to be called and checked as if the voter were voting in person. If found entitled to cast his vote, the envelope is then, but not until then, opened, the number torn off, and if the number on said envelope agree with the number of the ballot taken from said envelope, the ballot shall then be deposited in the regular ballot-box, without examining or unfolding it, and the clerk of election shall mark opposite the name of the voter the word "voted."

and discloses that a further check on the absent voter's right to vote is to be had by the election board by whom the absent voter's ballot has been received from the County Clerk before such ballot is deposited in the ballot box, the same check that is had where an elector presents himself in person and requests a ballot for the purpose of voting.

While it is provided in section 4 of the law, *i.e.*, section 2555, Nevada Compiled Laws 1929, that the County Clerk shall determine that the person applying for an absent voter's ballot is entitled to vote and to cast his ballot at a particular place, still section 2561 above quoted makes it mandatory upon the election board to check the records and further determine that such person is eligible to vote, and this is and must be done at a particular time, *i.e.*, at the close of the regular balloting on the day of election. This requirement of the law clearly negatives the proposition that the right and eligibility of the voter to vote is to be determined as of the time he marked the absent voter's ballot. Under the statute, such right and eligibility to vote is to be further determined *at the time* the envelope containing the absent voter's ballot is, by the inspector of election receiving the ballot from the County Clerk, about to be opened and the ballot therein contained deposited in the ballot box. Then and there the voter's name is called and checked as if the voter were voting in person. Thus, the right and eligibility is further determined at that particular time. When such absent voter's name is called and checked and it is known to the election board that such person is dead, then, most assuredly, such person is not then eligible to vote. There is no person then in being capable of exercising the elective franchise evidenced by such ballot.

The theory and the principle of the Election Law is that the body of the electors shall evidence the will of the electorate on the day of the election and on that day only. The Absent Voters Law simply provides a means for those entitled to vote by absent voter's ballot to record their will in advance of the day of election, but this is as far as such law goes. It does not provide that the will of such electors shall be registered and become effective for any purpose until the day of election; and it is on that day, and that day only, and at the close of that day, that the absent voter in fact casts his ballot. We think it most clear that such absent voter shall then and there be in being or, at least, be presumed to be living by the election board at the time his ballot is deposited in the ballot box and thereby becomes the active agent of the voter's will. If such absent voter be then and there dead, it follows that he could not vote in person; so, likewise, his ballot after his death cannot be the active agent of a will no longer in existence.

We conclude that your query is correctly answered in the negative. We therefore concur in your opinion upon this question contained in your letter submitting the queries.

The elector mentioned in this query is not within the terms of the Absent Voter Law, inasmuch as it appears that the elector's ability to appear at the polling place did not become hampered until within three days prior to the day of election. Such elector, even though he applied to the County Clerk for a ballot for the purpose of voting it under the provisions of this law, could not be furnished such ballot by the Clerk without a manifest evasion of the law. Sections 2554 and 2559, Nevada Compiled Laws 1929. We think the provisions of these sections of the statute are mandatory and do not provide discretionary powers upon the County Clerk. No provision for meeting the situation disclosed in the query being contained in the Absent Voter

Law, we must look elsewhere for authority for the election board to provide a voting place for the elector in question elsewhere than at the fixed and established voting place of and for said elector. An examination of the Direct Primary Law and the law governing general elections fails to disclose any right or power in the election board to permit the voting of or the casting of ballots of any elector elsewhere than at the duly and regularly established voting places, save and except the voting of absent voters' ballots under the provisions of that law which is not applicable to the instant question.

It might be said that the Direct Primary Law is to be liberally construed because section 1 of that law, *i.e.*, section 2404, Nevada Compiled Laws 1929, provides for a liberal construction of the law; but we think such provision pertains to the construction of the Primary Law for the purpose of effectuating the participating of minority groups and parties in the election for the nomination of their respective candidates and not to permit of some action on the part of the election board tending to invade the purity of elections and the secrecy of the ballot. Further, section 15 of the Direct Primary Law, *i.e.*, section 2418, Nevada Compiled Laws 1929, provides, among other things, that the qualifications and regulations of voters at primary elections shall be subject to the same test and governed by the same provisions and rules and regulations as are now prescribed by law for other elections, meaning the General Election Law. As stated above, an examination of the General Election Law fails to disclose any provision granting any right or power in the election board to permit the voting of or the casting of ballots elsewhere than at the established voting places. On the other hand, this law contains many provisions and interdictions clearly evidencing the legislative will that the voting shall be done at the regularly established voting places and that the election board and the members thereof shall conduct the election in strict accord therewith and in strict accord with other provisions tending to effectuate the purity of elections and secrecy of the ballot; and it is provided in such law, *i.e.*, in section 67 thereof (section 2505, Nevada Compiled Laws 1929), that "No person shall remove any ballot from any polling place before the closing of the polls." This provision of the law is mandatory. To provide the elector mentioned in the query a means and a mode of voting at his residence would undoubtedly violate this provision of the law, if not other provisions, save and except that such elector could vote at his residence under the provisions of the Absent Voters Law if he came within its provisions, but the elector here does not come within the terms of such law.

We think that the Legislature in the enactment of the Absent Voter Law evidenced an intention to provide facilities for electors who fall sick prior to election day so far as it was possible for it so to do and maintain the purity of elections and secrecy of the ballot; and, while it is no doubt a great disappointment for electors to be deprived of their vote by an illness occurring so near to the day of election that they were unable to secure an absent voter's ballot and thereby exercise their right of franchise, still, in view of the right of the body of the electorate to have the safeguards provided by law for the purity of elections maintained by those in charge of the conduct of elections, it follows that a manifest evasion of the law, even though it affords an elector an opportunity to vote and no intent to perpetrate a fraud is had, would tend at least to invade the purity of the election. Further, should the members of the election board accede to the request of such elector in one instance, it would have to do so in all like situations and thereby the door to abuses which the election law was enacted to prevent would be opened.

Entertaining the views above set forth, we are constrained to answer your query in the negative. The right to vote conferred by sections 1 and 6 of article II, Constitution of Nevada, is a mere political privilege and not an inherent, unqualified personal or political right. *Riter v. Douglass*, 32 Nev. 400; *In Re Walker River Irr. District*, 44 Nev. 321.

The Legislature has the power to adopt such provisions as may be deemed necessary to preserve order at elections and guard against fraud, undue influence or oppression and to preserve the purity of the ballot. *State v. Findlay*, 20 Nev. 198.

Respectfully submitted,

GRAY MASHBURN, *Attorney-General*.

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

HON. HOWARD E. BROWNE, *District Attorney, Lander County, Austin, Nevada*.