It is held in *Howard v. Wright*, 38 Nev. 25, at 38, that a presumption of a right arises from the mere unexplained use of a way over the land of another for the statutory period (in this State, five years).

In conclusion, we are constrained to hold that, the Pitt Mill and Elevator Company having enjoyed the said right of way in an open, notorious, uninterrupted, adverse, and exclusive manner for a period of more than five years, the said company now has a good and legal title to said right of way by prescriptive easement, which title is just as valid under the law of this State as would be a title by grant.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney-General.

HON. S. C. DURKEE, State Highway Engineer, Carson City, Nevada.

SYLLABUS

148. General Election Ballots.

When two candidates file for a partisan nomination for an office on one party ticket and no candidate files for a partisan nomination for the same office on any other party ticket, to which office only one person can be elected, and where there is one independent candidate for the same office, the two party candidates must run in the primary election. The party candidate receiving the greater number of votes at such primary election becomes the nominee of this party and his name and the name of the independent candidate appear on the general election ballot.

INQUIRY

CARSON CITY, September 20, 1934.

Where only two candidates file for a partisan nomination for any office on one party ticket and no candidate or candidates file for a partisan nomination on any other party ticket for the same office to which only one person can be elected, and where there is also an independent candidate filed for the same office, do all three names appear on the general election ballot?

OPINION

Prior to the adoption of the State Primary Law, under the commonly called “Convention System” the respective political parties met in convention and nominated a candidate of each political party to represent the party as its nominee at the general election. Under this law, as many independent candidates might run in the general election as desired to do so, by complying with the law relative to independent candidates. To suppress the supposed evils of this law, the Legislature passed an Act entitled “An Act regulating the nomination of candidates for public office in the State of Nevada,” approved March 23, 1917, and commonly known as the “Primary Law.” It is to be noted that this law provides, as did the convention system which preceded it, for the nomination of candidates for public office--not the election thereof.

It was held in *State ex rel. Pittson v. Beemer*, 51 Nev. 192, that section 22 of the Primary Law, being section 2425 Nevada Compiled Laws 1929, as it existed prior to the 1933 amendment,

provided that where two candidates filed for the same office on one party ticket and no member of another party filed for the same office on any other party ticket, and there was no independent candidate, then the two candidates, members of the same political party, must run both at the primary and in the general election, the candidate receiving the highest number of votes at the general election being elected regardless of the outcome of the primary election. This decision exemplifies the rule that no candidate can be declared elected at a primary election, but can only be nominated thereat.

This decision construed section 22 of the Primary Law as amended in 1927 and as the same existed until again amended in 1933.

Section 22 of said Primary Law was amended by chapter 69, 1933 Statutes of Nevada, page 82, to read as follows:

> The party candidate who receives the highest vote at the primary shall be declared to be the nominee of his party for the November election. In the case of an office to which two or more candidates are to be elected at the November election, those party candidates equal in number to positions to be filled who receive the highest number of votes at the primary shall be declared the nominees of their party; provided, that if only one party shall have candidates for an office or offices for which there is no independent candidate, then the candidates of such party who received the highest number of votes at such primary (not to exceed in number twice the number to be elected to such office or offices at the general election) shall be declared the nominees of said office or offices; provided further, that where only two candidates have filed for a partisan nomination for any office on only one party ticket, and no candidates have filed for a partisan nomination on any other party ticket, for the same office, to which office only one person can be elected, the names of such candidates shall be omitted from all the primary election ballots, and such candidates' names shall be placed on the general election ballots. In the case of a nonpartisan office to which only one person can be elected at the November election, the two candidates receiving the highest number of votes shall be declared to be the nonpartisan nominees; provided, however, that where but two candidates have filed for a nonpartisan office, to which only one person can be elected, the names of such candidates shall be declared to be the nonpartisan nominees for such office. In the case of a nonpartisan office to which two or more persons may be elected at the November election, those candidates equal in number to twice the number of positions to be filled who receive the highest number of votes shall be declared to be the nonpartisan nominees for such office.

The question to be decided relates exclusively to the construction to be placed upon the first and second provisos of the second sentence of this section as amended. The Supreme Court, in *State v. Beemer*, supra, held that that portion of the section down to the first proviso in the second sentence deals only with the nomination, not election, of candidates at the primary election where both parties have candidates for nomination, and that the last two sentences of the section relate only to the nomination of nonpartisan candidates. These provisos, when read together, are probably somewhat ambiguous and, for this reason, extrinsic aids to construction may properly be applied.

In *National Mines Company v. District Court*, 34 Nev. 67, at 75, it is held:

> In construing any statute the language of which is not clear, it is well first to consider the law as it existed prior to the enactment.

The law as it existed prior to the 1933 amendment required candidates, as stated in *State v.*

Beemer, supra, to run in the primary and in the general election regardless of the outcome of the primary contest; and it must here be noted that this was only in cases where there were two candidates running on the same party ticket and no candidate of the opposite party and no independent candidate. This obviously entailed unnecessary expense both upon the candidates and upon the taxpayers. The question arises, what was the intention of the 1933 Legislature in amending the second proviso of section 22 of the Primary Law? (This is the only change made in the prior existing law.)

It is a cardinal rule of construction that the intention of the Legislature is to be obtained primarily from the language used in the statute. *State v. Hamilton*, 33 Nev. 418; 111 P. 1026; *Ex parte Rickey*, 31 Nev. 82, 100 P. 134. But, where such language is vague, ambiguous, or uncertain, the court may look not only to the language but to the object to be accomplished or the purpose to be subserved. *State ex rel. Bartlett v. Brodigan*, 37 Nev. 245, 141 P. 988.

The object to be accomplished and the purpose to be subserved by this amendment are clearly, in our opinion, to obviate the theretofore unnecessary expense entailed by law upon candidates and taxpayers when two members of the same party run for office without opposition from the opposite party or from an independent candidate, by providing that, in such case, the names of such party candidates be omitted from the primary ballot and placed on the ballot at the general election. The first proviso of the 1933 amendment, heretofore quoted verbatim in this opinion, should be construed as if it read, when applied to a case of this kind, as follows:

> provided, that if only one party shall have candidates for an office or offices for which there is an independent candidate, then the candidate of such party who receives the highest number of votes at such primary shall be declared the nominee of said party for such office.

This proviso as it actually reads is, so far as it relates to independent candidates, in the negative; but it is held that, in a proper case, "a statutory provision containing a negative may be read as an affirmative, for the sake of clarity." *Hedrick v. Pack*, 106 W. Va. 322, 145 S. E. 606.

The second proviso of this amendment, heretofore quoted verbatim, does not, in our opinion, stand out as an independent law, but relates back, refers to, belongs to, and is limited by the first proviso which immediately precedes it.

The rule in this regard is laid down by our Supreme Court in *State v. Beemer*, supra, at page 200, as follows:

> The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it, unless it clearly appears to have been intended for some other matter. It is to be construed in connection with the section of which if forms a part, and is substantially an exception. If it is a proviso to a particular section, it does not apply to others unless plainly intended. It should be construed with reference to the immediately (italics ours) preceding parts of the clause to which it is attached.

This is also held to be the law in In re McKay's Estate, 43 Nev. 114, 184 P. 305.
The most recent decision in this State on this point is *State ex rel. Miller v. Lani et al.* (Nev.), 27 P. (2d) 537, decided December 5, 1933, which holds the proviso contained in article XV, section 9, of the State Constitution to be limited by the operation of the section which immediately precedes it. In this connection, it is said at page 537:

> The portion of a proviso is usually and properly confined to the clause or distinct portion of the enactment which immediately (italics ours) precedes it, and does not

> extent to or qualify other sections, unless the legislative intent that it shall so operate is clearly disclosed.

The second proviso of section 22, under the rule of law above quoted, refers and belongs to the proviso immediately preceding it, which contains the words "for which there is no independent candidate." This being the case, the said second proviso should be construed as if it read as follows:

> provided further, that where only two candidates have filed for a partisan nomination for any office on only one party ticket, and no candidates have filed for a partisan nomination on any other party ticket for the same office and for which there is no independent candidate, to which office only one person can be elected, the names of such candidates shall be omitted from all primary election ballots, and such candidates' names shall be placed on the general election ballot.

In *State v. Brodigan*, 37 Nev. 245, at 249, it is held:

> Under the rules of statutory construction the court may consider prior existing law upon the subject under consideration and may consider the purpose of the changes sought to be effected, as the same may be deduced from a consideration of the whole subject matter.

Under this rule, when we consider the prior existing law upon the subject under consideration and the purpose of the changes sought to be effected, as the same are deducted from a consideration of the whole subject matter, we are forced to the conclusion that the sole and only purpose sought to be accomplished by the 1933 amendment, and, therefore, the only purpose which it does accomplish, is to provide that, where there are two candidates for the same office running on the same party ticket and where there is no candidate for the same office who is a member of the opposite political party and no independent candidate, then, in such case, and only in such case, shall the names of said candidates be omitted from the primary and placed on the general election ballot. Even if we concede, which we do not, that certain words are omitted from this amendment which the Legislature intended to be contained therein, even then it is held in *State v. Brodigan*, 37 Nev. 245, at 250, that:

> Where, from a reading of the entire act, certain words necessary to give it complete sense have manifestly been omitted, courts, under well-established rules of construction, are permitted to read the same into the act in order that the law may express the true legislative intent.
> In *Gibson v. Mason*, 5 Nev. 227, at 257, where it became necessary for the court to interpolate certain words into the statute, it is said:
>
> So also it is always the first great object of the courts in interpreting statutes, to place such construction upon them as will carry out the manifest purpose of the legislature, and this has been done in opposition to the very words of an act.

Again, in *Abel v. Eggers*, 36 Nev. 373, at 381, Point No. 7, it is held:

> In the interpretation of statutes, the courts so construe them as to carry out the manifest purpose of the legislature, and sometimes this has been done in opposition to the very words of an act.

It is our opinion that the interpretation we have placed upon this 1933 amendment, when the first and second provisos are read together with the entire 1933 amendment, is properly within the "letter" of the Act; but, regardless of the "letter," this interpretation is clearly within the "spirit"

thereof.

> In pursuance of the general object of giving effect to the intention of the legislature, the courts are not controlled by the literal meaning of the language of a statute. *People v. Stratton* (Ill.), 167 N. E. 31; also, 84 Conn. 234.
>
> But the spirit or intention of the law prevails over the letter thereof. *Ex Parte Prosole*, 32 Nev. 378, 108 P. 630.
>
> It is generally recognized that whatever is within the spirit of the statute is within the statute itself, although it is not within the letter thereof. *New York v. Davis*, 7 Fed.(2) 566; *Orono v. Bangor Ry. Co.*, 105 Me. 428; *State v. Long*, 43 Mont. 401, 117 P.104.

The first proviso of the Act, as we interpret it, provides that where two democrats and one independent file for the same county office, the democrat receiving the lesser number of votes in the primary is eliminated; the democrat receiving the greater number of votes in the primary runs against the independent in the general election. The second proviso, if read as an independent law (which cannot legally be done), without regard to the first proviso, would say that the two democrats and the independent all run in the general election. To construe the second proviso as independent of the first would, therefore, lead to an irreconcilable contradiction. When construed together, as we have done, there is no contradiction, with the result that effect may easily be given to both; and, since they are both in the same section of the law, that is exactly what must be done.

It is held that:

> The rule of construction according to the spirit of the law is especially applicable where adherence to the letter would result in absurdity or contradiction. *United States v. Katz*, 271 U. S. 354, 70 L. Ed. 984; *McGraph v. Koelin*, 66 Cal. App. 41, 225 P.34.

In *Nye County v. Schmidt*, 39 Nev. 456, 157 P. 1073, the rule is emphatically set forth that legislative Acts shall be construed so as to make all parts thereof harmonious, if a reasonable construction can accomplish this result; and we are of the opinion that, when the first and second provisos are considered together and with the rest of the 1933 amendment, as we have done in this opinion, the whole thereof is harmonious and there is no contradiction. Where two candidates file for a partisan nomination on one party ticket and no candidate files for a party nomination for the same office on any other party ticket and there is one independent candidate for the same office, to hold that the Legislature intended, by the enactment of the second proviso of the 1933 amendment, that the three candidates go on the general election ballot would, in our opinion, offend the entire elimination theory of the Primary Law. It is not to be presumed that the Legislature intended, by the 1933 amendment, to so completely revise the Primary Law as to open the door to possible absurdities--such was not the intention of the Legislature. The Legislature, having in mind the fact that there can be no such thing as an election at the primaries in this State, and being aware of the unreasonableness of the law requiring two partisan candidates without opposition from another party or an independent to run in both the primary and general election, did provide in the 1933 amendment an exception to the rule of elimination in the primaries, this exception being that, where there are two party candidates and no candidates of the opposite party and no independent candidate, then the party candidates' names are omitted from the primary election ballot and they must run in the general election.

For the foregoing reasons, we are constrained to answer your inquiry, and we do hold, as follows:

When two candidates file for a partisan nomination for an office on one party ticket and no candidate files for a partisan nomination for the same office on any other party ticket, to which

office only one person can be elected, and where there is one independent candidate for the same office, the three names do not appear on the general election ballot, but the law is that the two party candidates run in the primary election and the party candidate receiving the greater number of votes at such primary election becomes the nominee of his party and, therefore, does run against the independent candidate in the general election; the party candidate who received the lesser number of votes at the primary election was legally and lawfully eliminated thereat.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By JULIAN THRUSTON, Deputy Attorney General.

HON. F. E. WADSWORTH, District Attorney, Pioche, Nevada.

SYLLABUS

149. Railroad Transportation--Public Service Commission.

1. Members of the Public Service Commission, or its inspectors, in strict pursuance of official duty for the purpose of making train-service inspection in Nevada relative to cost thereof, fixing of rates therefor, and ascertaining the quantity and quality of such service, may enter and ride upon trains without payment of transportation charges therefor.

2. The furnishing of such free transportation does not subject the railroad companies nor their agents, servants, or employees, or the public officer duly authorized thereto, to prosecution for violation of the State law prohibiting free transportation of state officers.

INQUIRY

CARSON CITY, November 23, 1934.

1. May a member of the Public Service Commission of Nevada, or its duly appointed and qualified inspector, enter and ride upon trains of railroads operating in and through the State of Nevada, for the purpose of making train-service inspection within Nevada relative to the cost thereof and the fixing of rates therefor and ascertaining the quantity and quality of such train service, without payment of transportation charges to such railroads for the transportation of such member or such inspector while making such inspection?

2. Would the furnishing of such free transportation subject the railroad companies or their agents, servants, or employees to prosecution for violation of the State law prohibiting free transportation of State officers?

INQUIRY

CARSON CITY, November 23, 1934.

1. May a member of the Public Service Commission of Nevada, or its duly appointed and qualified inspector, enter and ride upon trains of railroads operating in and through the State of Nevada, for the purpose of making train-service inspection within Nevada relative to the cost thereof and the fixing of rates therefor and ascertaining the quantity and quality of such train service, without payment of transportation charges to such railroads for the transportation of such member or such inspector while making such inspection?