The law certainly should be changed to cover the problem presented by your question. Both the Supreme Court and this office have recommended changes. However, until the law is amended we must abide by the Supreme Court's decision.

Very truly yours,

ALAN BIBLE, Attorney General

By: Homer Mooney, Deputy Attorney General

OPINION NO. 46-373. Elections—Death of Candidate After Primary Election—Party Committee Can Designate Candidate in Lieu of Dead Person for November Election.

Carson City, September 30, 1946

HONORABLE GROVER L. KRICK, *District Attorney, Douglas County, Minden, Nevada*.

DEAR MR. KRICK: This will acknowledge receipt of your letter of September 12, received in this office on September 13, 1946.

The facts of your letter disclose that at the time of the September primary there were two Republican candidates for State Senate. There were no Democratic candidates nor Independent candidates. Because of this fact the two Republican candidates were not required to run in the primary election. After the primary election one of the candidates for State Senate died.

You now ask—is there a vacancy on the Republican ticket which can be filled by the Republican party.

It is the opinion of this office that in such a situation as is presented by your facts that the law and public policy of the State permit the selection of a candidate to fill the vacancy caused by the death of one of the Republican candidates. The time has long since expired whereby an Independent could file his petition. Likewise no Democrat having filed prior to the September primary, such party now in my opinion has no standing in the matter.

We realize, of course, that the problem presented involves very substantial rights, particularly to the one remaining candidate now seeking the office of State Senator. Because of the importance of the problem, we think that it might be well if those vitally interested would seek a final decision from the Supreme Court of the State.

Our decision is based upon section 2425, Nevada Compiled Laws 1929, 1941 Supplement, read in connection with section 2429 Nevada Compiled Laws 1929. We likewise have the benefit of the Court expressions from the Supreme Court of our state in the cases of *Riter v. Douglas*, 32 Nevada, page 433; *Ex rel. McGill v. Oldfield*, 48 Nevada, page 264; and *Penrose v. Greathouse*, 48 Nevada, page 419.

Section 2425, Supplement, provides in part as follows: "*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 declare 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 form all the primary election ballots, and such candidates' names shall be placed on the general election ballots."

Am Jur. vol. 18, p. 179, defining the meaning of the term election, recites the following rule:

"An election may be broadly defined as the expression of a choice by voters of a body politic, or as otherwise expressed, it is the means by which a choice is made by the electors."

It appears from section 2425, supra, that the Legislature intended that a choice of persons in the candidates for office should be offered the electors whether or not there was a choice in a political party.

The first part of the section quoted provides for a situation wherein only one party has candidates for an office. In that event the candidates, not to exceed in number twice the number to be elected, who receive the highest number of votes at the primary election shall be declared the nominees for the office. Thus, if one party had three candidates for an office to which only one person could be elected the primary election would determine that two out of the three should be named at the primary as nominees, not of the party, but nominees for the office, thereby supplying the electors at the general election an opportunity to express a choice.

This intention is supported by the further provision in the section which authorizes the placing of the names of two candidates on the general election ballots when only two candidates on one party ticket have filed and no candidates have filed on any other party ticket.

The names of the two Republican candidates in the question presented were by statute omitted from the primary ballot, and the two names would have been placed on the general election ballot as nominees for the office.

After the holding of the primary election one of the candidates for the office died.

Is there then such a vacancy occurring after the holding of the primary as to come within the provisions of the statute for filling such vacancy?

Section 2429, N.C.L. 1929, provides in part as follows: "Vacancies occurring after the holding of any primary election shall be filled by the party committee of the county, district or state, as the case may be."

In the case of *State v. Irwin*, 5 Nevada 111, the court held that there was no technical or peculiar meaning in the word vacant; that it means empty, unoccupied, without an incumbent.

By operation of the statute the names of the two candidates of the same political party should be placed on the general election ballot, but due to the death of one there would be only the name of the one candidate placed on the ballot. As the statute contemplates that candidates of the same party, not to exceed in number twice the number to be elected to the office shall be declared the nominees of said office when there are no other candidates for the office, it follows that upon the death of one of the two candidates, there would be a candidacy in the Republican party that was unoccupied and therefore a vacancy after the holding of the primary election that could be filled as provided in section 2429, supra.

In the case of *Stewart v. Polley*, 137 N.W. 565; 143 A.L.4. 999, under a statute that used the words "after a nomination as a party candidate has been made," it was clear that the main purpose of the Legislature in enacting the primary law was to take the making of all nominations out of the hands of conventions and political central committees, and require that the people themselves, by their direct vote, should name party nominees; and that the only vacancies contemplated by the Legislature to be filled by conventions or central committees were such as might occur after the people themselves had made nominations, and vacancies therein had occurred by death, resignation or otherwise. It was decided on the basis of the clause "after a nomination as party candidate had been made." In the case of *Curyea v. Wells*, 138 N.W. 165, the court distinguished this case upon a statute that did not contain such a limitation, but used the word "occurred" (the same as the Nevada statute) and held that the word must be given its ordinary meaning and that if after a primary there was a vacancy it had occurred within the meaning of the statute.

Riter v. Douglass, 32 Nevada on page 433, the court held that a primary election is not an election of officers within the constitutional test; indicating that if so construed it would be unconstitutional.

Chapter 43, Statutes of 1913, section 22 (sec. 2425 N.C.L. 1929) provided that in case there is but one person to be elected to a nonpartisan office, any candidate who receives at the primary election to such office a majority of the total votes cast for all candidates for such office shall be the only candidate for such office at the general election.

The Supreme Court, construing this section in the case of *Ex rel. McGill v. Oldfield*, 48 Nevada, on page 264, held that the intention of equivalent to an election to such office, under the conditions prescribed.

This case was decided October 1924, and on March 21, 1925 the Legislature amended this section to read in case of a nonpartisan office to which only one person can be elected, the two

candidates receiving the highest number of votes shall be the nominees; also when but two candidates have filed for an office to which only one can be elected, the names of such candidates shall be omitted from the primary ballot and shall be the nonpartisan nominees for such office.

The plain purpose of the Legislature in enacting the statute was to remove any intention to make a nomination at a primary election equivalent to an election to office, and to provide an opportunity for each political party to name its candidate.

Very truly yours,

ALAN BIBLE, Attorney General

OPINION NO. 46-374. Nevada Hospital for Mental Diseases—State Not Responsible for Personal Loss By Fire—Board May Provide Living Quarters for Superintendent Outside Hospital—Insurance Paid to State and Placed in General Fund.

Carson City, October 2, 1946

DR. S.J. TILLIM, *Superintendent Nevada Hospital for Mental Diseases, P.O. Box 2460, Reno, Nevada.*

DEAR MR. TILLIM: This will acknowledge receipt of your letter dated September 27, 1946, received in this office September 30, 1946, requesting an opinion on the following questions:

1. Whether any responsibility for the hospital exists in the event of personal loss for employees of the hospital who are given subsistence and quarters as part of their remuneration, and in any event, whether compensation for loss by fire is permissive if the loss by fire is partly or in whole reimbursed by insurance for the State.

2. Where the statute provide that living quarters, household provisions, supplies and other facilities and accommodations as are available at the hospital shall constitute part of the remuneration, the board wishes to know if it would be proper to consider compensation in lieu of such extra services when, by reason of fire, the facilities intended were destroyed, specifically whether the hospital board may make reasonable allowance for essential extra costs to the Superintendent in maintaining a level of household commensurate with his position. It also wishes to know whether acquisition of proper housing accommodations, such as an apartment or house would be proper expense against the general support operations of the hospital.

3. The substance of this question is—Will the money received by the State from the insurance on the building destroyed by fire be credited to the hospital fund for repairs and equipment and can it be applied toward the cost of installing certain fire-escapes, which the board considers necessary, and for other purposes of construction rather than the rebuilding of the Superintendent's house.

The answer to your first question must be in the negative as we cannot find authority in law or equity that places responsibility upon the State to pay for the loss of personal property of State officials or employees.

In answer to your second question we are of the opinion that the authority of the hospital board must be restrained within the limitations of the statute, insofar as the facilities and accommodations are reasonably available.

Section 6, chapter 154, Statutes of 1945, relating to the employment of a superintendent for the Mental Hospital reads in part deemed relevant as follows:

> The superintendent shall live at the hospital in quarters to be furnished, shall devote his full time to his position, and not engage in private practice, and shall receive as an annual compensation therefor the sum of five thousand ($5,000) dollars per year, and in addition thereto shall be entitled to living quarters and household provisions and supplies and such other facilities and accommodations as are available at the hospital.

The unqualified provisions of the statute are that the Superintendent shall live at the hospital in quarters to be furnished, he shall devote his full time to his position and not engage in private