

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1942

SYLLABUS

332. State Welfare Department.

The State Welfare Department may cooperate with the Works Progress Administration by providing a referral or certifying agency under the terms of the Nevada statutes and as long as the money appropriated is being used for the purposes set forth in the legislative Act.

STATEMENT OF FACTS

CARSON CITY, January 3, 1942.

In our opinion to you of October 27, 1941, we held that as long as State money was being used for the five purposes set forth in section 1, chapter 81 of the 1941 Statutes of Nevada, and as long as the Federal Government has not discontinued its employment relief, the Board of Examiners should continue to allow claims in the sum of \$3,000 per month payable to the proper Federal agency in charge of work and direct relief.

We further held that there was no statutory authority for transferring this sum of money appropriated to a Federal agency to either the State Board of Relief, Work Planning and Pension Control (chapter 138, 1935 Statutes of Nevada) or to the State Welfare Department (chapter 127, 1937 Statutes of Nevada).

Under date of December 16, 1941, William R. Lawson, Administrator of the Works Progress Administration, addressed a letter to you which in part, stated as follows:

The Emergency Relief Appropriation Act for the Fiscal Year 1942 states that the purpose of the Act is to provide work for needy employable persons on useful projects. The Act further provides that no relief worker shall be employed on WPA projects until after he has been certified as in need of employment by a local public certifying agency or by the Work Projects Administration where no such agency exists.

It is the policy of the Work Projects Administration that a local public welfare agency shall be responsible for referring to WPA the needy unemployed in the state who are eligible and capable of performing satisfactory work on the projects.

Policies which determine eligibility for referral to WPA shall be based upon a written

agreement signed by the head of the local public welfare agency and the Work Projects Administrator of the state. Before this agreement can become effective it shall be submitted to and approved by the Assistant Commissioner in charge of the Region.

The intent of the Federal Work Projects Administration regarding the responsibility for referrals cannot be carried out if the Administrator of the Work Projects Administration in Nevada also acts as the Director of the local public welfare agency. It is for this reason that I advised Mr. Noah Kearns when he was appointed Administrator, in September 1941, that he could assume no responsibility for the referral agency.

In order that the relationship between the State of Nevada and the Work Projects Administration can be brought in line with policies established by the Federal Administration and at the same time cause as little disturbance in the relief program in Nevada as possible, I recommend:

1. That immediate steps be taken by the State of Nevada to provide a local agency with administrative authority and funds to cooperate with the WPA in carrying out the provisions of the Emergency Relief Appropriation Act, Fiscal Year 1942.
2. That WPA receive no new referrals until such an agency is in operation.
3. That for a limited time the WPA operate the work program for those persons who now have active certifications with WPA.

#### INQUIRY

May the State Welfare Department cooperate with the Work Projects Administration by providing a referral or certifying agency, which agency is to be separate and apart from the Federal agency?

#### OPINION

Administrator Lawson's letter of December 16, 1941, is clearly a request from the Federal Government that the State Government cooperate with the Federal Emergency Relief Administration of Nevada, now officially designated Work Projects Administration, by providing a local public welfare agency responsible for referring to WPA the needy unemployed in the State who are eligible and capable of performing satisfactory work on WPA projects. Heretofore this referral agency has been directly in charge of the Federal Emergency Relief Administration of Nevada and has been paid for out of the moneys appropriated to the Federal Emergency Relief Administration of Nevada by sections 5 and 7, chapter 97 of the 1935 Statutes of Nevada; by section 2, chapter 103 of the 1939 Statutes of Nevada; and by section 2, chapter 81 of the 1941 Statutes of Nevada.

We believe that the State Welfare Act, supra, authorizes its board to assist the Federal Emergency Relief Administration of Nevada by setting up a referral agency for WPA. The title of this Act, in part, reads as follows:

An Act providing for the creation of a state welfare department; defining the powers and duties of such department; providing means of cooperation with the federal government and with the counties of Nevada in all matters concerning public assistance to needy individuals.

Likewise subdivision 4 of section 3 of the Act provides that the State board shall

assist and cooperate with other departments, agencies and institutions of the state and federal government, when so requested, by performing services in conformity with the purposes of this act.

Section 6 of the State Welfare Act appropriated \$16,200 for the biennium ending June 30, 1939. This appropriation was continued by chapter 138 of the 1939 Statutes of Nevada. \$13,600 was appropriated for the biennium ending June 30, 1943, by chapter 145 of the 1941 Statutes of Nevada.

Since the Federal agency, the WPA, has requested the establishment of a local referral agency separate and distinct from its own Federal agency, we believe that the State Welfare Board may create such an agency by virtue of the powers vested in it, and that it may use therefor moneys appropriated to it by the 1941 Legislature, chapter 145.

Subdivision 8, section 3 of chapter 138, 1935 Statutes of Nevada, heretofore noted in our opinion of October 27, 1941, likewise contains definite authority for aid and assistance to the Federal agencies. It reads:

To cooperate with and advise the federal emergency relief administration for Nevada and such other boards or offices of the federal government as are now or may hereafter be empowered to administer federal relief, either work or direct, in the State of Nevada.

As noted in our former opinion, there is no statutory authority for transferring the \$3,000 per month appropriated to the Federal Emergency Relief Administration of Nevada to the State Welfare Department. However, one of the purposes for which this \$3,000 per month was appropriated is

To provide for an agency to certify relief labor to the Works Progress Administration and other federal work programs employing relief labor.

It was unquestionably the clear and positive purpose of the Legislature that part of the \$3,000 appropriated each month should be used for providing a certifying agency, and we are of the opinion that as long as this purpose is being served, as well as the other purposes named in section 1, the money appropriated by the 1941 Legislature is being spent in conformity with

section 1 of the said Act.

In view of the fact that the Federal agency requests a State agency to perform the function of a referral agency as set forth in section 1, chapter 81 of the 1941 Statutes of Nevada, and in view of the additional fact that under both the Emergency Relief Appropriation Act of 1942 (Public Laws 143--77th Congress) and present WPA regulations, the Federal agency refuses to continue to provide a certifying agency, we believe that claims may be incurred by the State Welfare Department for the purpose of providing a certifying agency. Such claims, after the approval of the State Welfare Board, should be presented to the Federal Emergency Relief Administration administrator of Nevada, now officially designated the WPA administrator, for his approval, so that he in turn may present such claims to the Board of Examiners of the State of Nevada for their approval as a charge against the monthly appropriation of \$3,000 to the Federal Emergency Relief Administration for Nevada.

In line with Administrator William Lawson's letter of December 16, 1941, the monthly amount to be used for this purpose, as well as the general provisions for such use, may be set out in the written agreement to be signed by the head of the State Welfare Department and the WPA Administrator of Nevada and approved by the Assistant Commissioner in charge of the Region.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By ALAN BIBLE, Deputy Attorney-General.

HON. E. P. CARVILLE, Governor of Nevada, Carson City, Nevada.

## SYLLABUS

333. Motor Vehicles--Uniform Drivers' License Law of 1941--Cooperation Required Between Motor Vehicle Department and Drivers' License Administrator.

(1) There is no statutory law mandatorily requiring the Motor Vehicle Department of the State and its officers and assistants, including County Assessors, to assist the administrator of the so-called drivers' license law and his assistants in the enforcement of the Uniform Motor Vehicle Operators' and Chauffeurs' License Act, being chapter 190, 1941 Statutes of Nevada, pages 529-542, to the extent of seeing that at least one driver of every motor vehicle has the appropriate operators' or chauffeurs' license when such assistance is requested by said administrator or his assistants either of the Motor Vehicle Commissioner direct or indirectly of County Assessors; but it should not be necessary to have any such mandatory requirement in order to accomplish "cooperation" between these two agencies of State government. While there is no such statutory requirement for cooperation, it is simply in the interest of proper governmental functioning that all officers and departments of the State cooperate with each other to the end that the State government may properly function and the money of the taxpayers devoted to governmental purposes may be conserved and the functions of government carried on economically. State

officers and departments should, and I believe do, cooperate with each other to that end. Certainly, the Motor Vehicle Department, including County Assessors, should assist the administrator of said Drivers' License Act and his assistants when proper request be made of the head of said former department by or through said administrator in seeing that at least one driver of each motor vehicle has an operators' or chauffeurs' license, especially when doing so does not impose any considerable burden in time, inconvenience, or money upon the Motor Vehicle Department.

(2) There is not any authority expressly conferred by the Uniform Motor Vehicle Operators' and Chauffeurs' License Act upon the officials of the Motor Vehicle Department to require, in the sense of compelling, an applicant for registration of a motor vehicle to display a driver's license issued under said law to the registered owner of a vehicle, or to any other driver of such vehicle, for which such registration is applied; but no intelligent or fair-minded applicant would object to displaying such license to the County Assessor if he has one, or to obtain such a license, if he can conveniently do so, when he has no such license and is requested by the County Assessor to display such a license.

The County Assessor would not, however, have any right to refuse to issue a certificate of registration upon the sole ground that the driver failed or refused to display an operators' or chauffeurs' drivers license to him at the time of applying for such certificate of registration. In fact, the owner is the one who should apply for the certificate of registration of his motor vehicle, not necessarily the driver of it. Some other member of the family or a chauffeur might be the sole driver of the particular motor vehicle. It quite often occurs that the owner of the motor vehicle does not drive at all. Where the applicant for the certificate of registration is the driver, or at least one of the drivers, of the motor vehicle, and has his drivers license with him, it certainly could not work any great inconvenience upon either the applicant for the certificate of registration or upon the County Assessor to request the applicant to show the County Assessor his operators' or chauffeurs' license for the motor vehicle; and such applicant would undoubtedly show it to the County Assessor. Following this plan would assure that there was at least one properly licensed driver for each motor vehicle owned in the State. Proper cooperation is all that is required to accomplish it.

NOTE--We have revised this opinion (No. 333) as originally written for the sole purpose of shortening it and eliminating matters in the original opinion which were not essential to a determination of the law points involved in the inquiries made of this office. The matters eliminated have already served their purpose and do not concern the public. The revision does not, however, change the substance of this opinion on the law points involved.

#### STATEMENT

CARSON CITY, January 9, 1942.

The administrator under the Uniform Motor Vehicle Operators' and Chauffeurs' License Act (chapter 190, 1941 Statutes of Nevada, pages 529-542), through his assistant, in an effort to be certain that there was at least one properly licensed driver of each motor vehicle owned and

operated in this State, and for the purpose of assisting and inducing such motor vehicle owners to obtain such drivers' licenses, wrote a letter just prior to the time for the registration of motor vehicle in this State to the County Assessor of each of the counties of this State requesting or suggesting that it would be of assistance in accomplishing these purposes if the administrator of the Act would place in the county court house, or some convenient place nearby, an employee of his to issue drivers' licenses to those applying therefor, and to notify in a conspicuous manner the owners of said motor vehicles and applicants for certificates of registration of their motor vehicles and license plates therefor that they would be requested by their County Assessor to show their drivers' licenses to the Assessor and his employees when applying for registration of such motor vehicles and for registration license plates therefor prior to the issuance of such registration certificates and license plates for such motor vehicles. Said letter also requested said County Assessors, as ex officio members of the Motor Vehicle Department, to refuse to issue certificates of registration and license plates for such motor vehicles unless and until the applicant therefor showed the County Assessor his current operator's or chauffeur's license.

It will be noted that the assistant of said administrator, to be placed in each such county court house or some convenient place nearby for the purpose of issuing licenses to operators and chauffeurs of such motor vehicles when they did not have drivers' licenses, was to be an employee of and so placed by said administrator without expense to the Motor Vehicle Department or the County Assessors.

Said letters were written to the County Assessors, however, without prior notice to the Motor Vehicle Commissioner and without having first informed said commissioner of the plan so suggested to said County Assessors by said administrator, and without having first obtained the approval of said commissioner for said administrator and his assistants to writ such letters or make such requests for the cooperation of the County Assessors, and to have such County Assessors to cooperate in seeing that there is at least one driver's license for each motor vehicle owned and operated in this State, notwithstanding the fact that the law makes such County Assessors, ex officio a part of the Motor Vehicle Department and imposes upon them the duty of receiving applications for registration of motor vehicles and of issuing temporary certificates of registration thereof and the permanent license plates for such motor vehicles and of collecting the registration fees for them. The Motor Vehicle Commissioner assumed that the letter and request of said administrator was a demand, or in the nature of a demand, and required certain work to be done by the members (County Assessors) of the Motor Vehicle Department, and imposed certain duties upon said members (County Assessors) of the Motor Vehicle Department which would require considerable time and inconvenience, all without compensation therefor and without first having obtained the approval of the Motor Vehicle Commissioner, the head of the Motor Vehicle Department.

It is clear from the express language of said letters, however, that they were merely requests for such cooperation, and that such cooperation was requested not only for the purpose of seeing to it that there would be at least one driver's license for each motor vehicle owned and operated in this State, but also for the convenience of the owners or operators of such motor vehicles in securing drivers' licenses for their motor vehicles, especially for the convenience of those owners and operators who lived at considerable distance from their county seats or other

places where said Drivers License Division had established or would establish offices for the issuance of such drivers' and chauffeurs' licenses. It was not a demand at all for such cooperation, but simply a request; although the language of the letter, calling attention to chapter 202, 1931 Statutes of Nevada, section 23, subdivision (b), which makes it unlawful to use or permit the use of a motor vehicle in this State by a person who is not entitled to do so, coupled with the statement in said letter that the writer was informed that that law "makes it unlawful to issue plates (registration license plates) for a motor vehicle when the operator thereof is driving in violation of the law, namely, without a valid driver's license," might very easily be taken as giving the request the effect of a demand, inasmuch as the County Assessors would certainly not desire to participate in an act which would leave even an inference that they were committing an "unlawful" act in issuing license plates to an owner or operator who had no driver's license for the particular motor vehicle. That is the closest approach the letter makes to being a demand. The remainder of the letter, however, shows by its express language that it was not intended as a demand, but only as a request for such cooperation. In fact, it uses the word "request" in several places. The express language of the letter as a whole indicates clearly that it was intended as a mere request; and, in fact, the last sentence of the letter asks for the "reactions" of the County Assessors to the request.

It was expressly stated in said letter that "this procedure will not only assist us greatly in licensing at least one operator for each vehicle, but will also permit the applicant to complete, at one time, all legal requirements for the operation of a motor vehicle," and the view was expressed that such procedure would not "entail any great amount of work" for such assessors, as most of the owners and operators of such motor vehicles had already obtained their drivers' licenses. The belief was also expressed that said assessors would thereby be doing their people a favor in requesting them to comply with the drivers' license law, as the law makes it a misdemeanor with heavy penalties for a person to drive a motor vehicle in this State without a valid driver's license, "or to permit another person to drive (such) a vehicle owned by him" without a driver's license. Said assessors were expressly assured that it was not the intention of the administrator or Drivers License Division to attempt to tell them how they should operate their offices, or "to assume judicial status in interpreting the law"; but that the administrator and his assistant who wrote the letter were "merely using every means available in obtaining universal licensing." The view was also expressed that such a law as ours "has been directly responsible for a very material reduction in accidents."

Their final conclusion was expressed in that letter in this language:

This request to you, therefore, is in the interest of the well being and the lives of your constituents. We merely point out the law which enables you to determine, insofar as possible, that a vehicle is not being put to unlawful use before plates are issued.

The letter was merely a request for the cooperation of the assessors in assisting their people in securing drivers' licenses, as shown by the following quotation from the letter:

We are, therefore, soliciting your cooperation in rendering this service to your people.

The letter closes with this expression of appreciation in advance:

We shall greatly appreciate your cooperation, and thank you for a statement of your reactions to this request.

So far there seems to be nothing unusual or improper in such a mere request for cooperation; provided, of course, that such owners and operators are sufficiently impressed by proper notice of the fact that they will be requested by the assessors for their drivers' licenses to actually induce them to obtain their drivers' licenses before applying to the assessors for registration certificates and license plates for the current year, and to such an extent that they will have their drivers' licenses with them to exhibit to such assessors at the time they first apply for such registration certificates and license plates, so that they can immediately exhibit their licenses to their assessors and thereby save unnecessary time and avoid unnecessary discussion and trouble. If such owners and applicants have their drivers' licenses with them, it would not require any considerable time for them to exhibit such licenses to their said assessors. It would not, therefore, involve any considerable delay or trouble or even burden to such assessors. If they are not so impressed and do not, therefore, have their drivers' licenses with them at the time they first apply at the desk of the assessor for their registration certificates and license plates, and are, therefore, required to step out of line and go to some other place and obtain their drivers' licenses and again get in line to make their application to the assessor, then considerable time and delay, trouble, burden and expense would result to the assessor and to the Motor Vehicle Department of which he is a part. It is not unusual for one officer or department of government to ask for the assistance of another or others and for small accommodations of this kind.

In fact, all the moneys obtained as fees not only for operators' and chauffeurs' licenses but also for the registration of such motor vehicles by the Motor Vehicle Department itself and for the issuance of carrier licenses by the Public Service Commission to trucks and busses, except the statutory deductions for administrative purposes, go into the highway fund for the maintenance of the highways of the State and for cooperation with the Federal Government in the construction of highways in certain instances. The State Highway Engineer, who is also made by law the administrator of the Drivers License Division in the Highway Department, is made by law the head of the Highway Department of the State and has supervision under the law, subject to the approval of the State Highway Board, of the moneys constituting said highway fund and derived by cooperation with the various other above-mentioned departments of State. In other words, the law itself not only contemplates but expressly provides for the cooperation of these various departments of State in the collection of the moneys constituting said State Highway Fund. In fact, the Highway Department itself was at that very time cooperating with and assisting the Motor Vehicle Department in collecting the old license plates as they were discarded and new ones for the current year substituted in their place. This was done at the request of the Motor Vehicle Commissioner to the effect that the highway trucks, in passing through county seats where these old discarded license plates were retained by the assessors and placed in receptacles, pick up these old discarded license plates and bring them into Carson City in making trips to the Highway Department Headquarters in this city. There was nothing improper in this cooperation on the part of the Highway Department and the assistance thereby



rendered to the Motor Vehicle Department in getting these old discarded license plates back to the Motor Vehicle Department in order that the metal in them might be used in the manufacture of new license plates, since there was a scarcity of such metal due to national defense activities, and since the highway trucks were making the trips to Carson City anyway. It did, however, involve some work and some time and inconvenience. But, in view of the fact that the money received by the assessors as ex officio members of the Motor Vehicle Department as fees for the new license plates goes into the State Highway Fund, except the above-mentioned administrative expenses, the Highway Department was cooperating with and assisting the Motor Vehicle Department in the collection of these old discarded license plates as above indicated. In fact, the County Assessors and all the other members of the entire Motor Vehicle Department, as well as many of the other State departments and their employees, as above indicated, were cooperating with each other and with the Highway Department in collecting the moneys which constitute the State Highway Fund.

It was somewhat natural, therefore, for said administrator and his assistants to assume that there was nothing improper in requesting as distinguished from demanding, the cooperation of the County Assessors as was done in said letter. In fact, all the State offices and departments are assumed, and in fact, do, cooperate with each other in many ways in accomplishing efficient State administration and proper governmental functioning. Such cooperation among the various State offices and departments is absolutely essential to good government and to the economic use of the money paid by the taxpayers of this State for the functions of State government. There is not anything either unusual or improper in the mere requesting of such cooperation as distinguished from demanding such cooperation.

The objection to the plan as carried out and as outlined in the first portion of this opinion is not the fact that a mere request, as distinguished from a demand, was made for such cooperation, but the method of making this request, that is to say, addressing the request to County Assessors, who are ex officio members of the Motor Vehicle Department, instead of to the Motor Vehicle Commissioner, the head of the Motor Vehicle Department of this State. That method of procedure was certainly objectionable. The head of every office or department is entitled to know, at first hand, exactly what his employees are doing and exactly what requests are being made of them, insofar as the performance of the duties of the particular office or department is concerned. All requests for cooperation and information should be addressed to the head of the particular office or department. Taking the office of the Attorney-General as an example, the interpretation and construction of certain laws have been assigned to the Chief Deputy Attorney-General, while the interpretation and construction of other laws have been assigned to the other Deputy Attorney-General in this office; and the interpretation and construction of other laws, as well as the general supervision of those assigned to these deputies, are assumed by the Attorney-General himself, the head of the office. This assignment and division of official duties in this office is in the interest of economy and a more efficient method of performing the innumerable duties of the office for the benefit of the public. The other State offices and departments do not know which of the deputies has been assigned to the particular law they desire interpreted and construed in official opinions requested by them. This is known only to the Attorney-General and his deputies. It is in the interest of economy and efficiency, therefore, that every request for legal advice or the official opinion of this office be addressed to

the Attorney-General himself, in order that he may refer the question involved to the deputy who has been assigned to the handling of the particular law, or handle it himself in accordance with said assignments. The same situation, to some extent at least, exists in every other State office and department. Only the head of that office or department knows the officer or employee in it who is best qualified to handle the particular matter referred to it. He alone can assign and distribute the work of the office so as to accomplish the best results for the State and the persons concerned. All requests for information and cooperation should, therefore, be addressed to him, not to some other officer or employee in the particular office or department.

The fact remains, however, that the letter was a mere request, as hereinbefore shown; and there seems to have been no intention of ignoring the Motor Vehicle Commissioner in addressing said letter and request for cooperation to the County Assessors instead of to him. The fact remains that the County Assessors are elective officers, not mere employees of the Motor Vehicle Department. Their salaries are paid by the counties, except the deductible portion of the fee for registration of motor vehicles to pay the administrative expenses of such County Assessors in issuing temporary certificates of registration and registration license plates and in collecting the statutory fee therefor. The fact remains that the assessors themselves and their employees actually do the work involved. Such additional work for them as would be involved in complying with the request of said Administrator of the Drivers License Division of the Highway Department would have to be done by said County Assessors and their employees. It was but natural, therefore, that said administrator's request for this cooperation be addressed to the County Assessors, and that it would not occur to said administrator to address that request to the Motor Vehicle Commissioner, the head of that department. In other words, it is evident that there was no studied intention to ignore the Motor Vehicle Commissioner in this matter.

The fact remains that said chapter 202, 1931 Statutes of Nevada, section 23, subdivision (b), requires the Motor Vehicle Department to "rescind and cancel the registration" of motor vehicles when they are put to unlawful use, as shown by the following language quoted from said section 23(b):

The department shall rescind and cancel the registration of a vehicle whenever the person to whom the registration card or registration number plates therefor have been issued shall make or permit to be made any unlawful use of the same or permit the use thereof by a person not entitled thereto.

It certainly is unlawful to operate a motor vehicle without a driver's license, and has been so ever since the enactment and approval of the law requiring such driver's licenses. It is certainly easier and in the interest of economy, even to the Motor Vehicle Department itself, to see that there is at least one driver's license for each motor vehicle owned and operated in this State before issuing the certificate of registration and furnishing license plates for it then it would be for the department to "rescind and cancel" such registration and call in the certificate and license plates for such motor vehicle after it has been ascertained that the owner and operator thereof has no driver's license and is, therefore, operating it unlawfully in this State. The provisions of the above-quoted section 23(b) would probably require a hearing by the Motor Vehicle Department itself and a trip by the owner or operator of any such motor vehicle operated

without a driver's license from his home to the office of the department, and the expenses incident to such a trip and such a hearing. All of this time, trouble, and expense would be avoided by compliance with the procedure requested of the County Assessors in said letter. The procedure requested, therefore, is actually easier and less expensive than the procedure necessitated by compliance with the language above quoted from said section 23(b).

It is a fact, however, that the procedure so requested of said County Assessors would not result in every operator and chauffeur of a motor vehicle having a driver's license to operate it, for the very simple reason that there are often several persons who operate one motor vehicle, such as the owner, his wife, his sons and daughters permitted by law to operate such motor vehicles, and sometimes employees of the owner. It is usually the owner himself who applies for the registration of the motor vehicle, and obtains the certificate of registration and registration license plates for it. Sometimes the owner himself does not operate his motor vehicle and does not, therefore, have a driver's license permitting him to do so. For the foregoing reasons, and many others, the plan of cooperation requested of the County Assessors does not accomplish the full purpose of seeing to it that each driver of a motor vehicle has a driver's license therefor. It does have the advantage, however, when complied with, of resulting in one driver's license for every motor vehicle owned and operated in this State for which a registration certificate is issued and registration license plates furnished. In other words, it accomplishes that purpose and is easier and less expensive than the procedure specified in said section 23(b) for rescinding and canceling the registration of such vehicles, although there is actually nothing in the law which makes it unlawful for the County Assessors to register motor vehicles and issue registration license plates therefor before ascertaining that the applicant therefor has a driver's license for the particular motor vehicle.

It must not be assumed from this statement that there is friction or the lack of a spirit of cooperation between the Commissioner of Motor Vehicles and the Administrator of the Drivers License Division in the Highway Department. Both of these officers are performing their duties well and efficiently. They are both conscientious and both ambitious to see that their departments properly function. They are both doing a conscientious job in the performance of their duties. They are both earnest, sincere, energetic, and capable. Each is doing a wonderfully fine job in his particular office or department. In fact, the failure to make said request of the Motor Vehicle Commissioner was, no doubt, due to the fact that said Administrator of the Drivers License Division and his assistant were so anxious to have their cooperation, and so energetic in trying to accomplish this cooperation promptly that they overlooked the fact that the County Assessors are ex officio members of the Motor Vehicle Department, and that the request for cooperation should have been addressed to the head of that Department, the Motor Vehicle Commissioner. The objection to the procedure adopted was also based upon the earnest and sincere desire of the Motor Vehicle Commissioner to be informed directly of all work requested of every branch of his department.

There are, of course, differences of opinion among State officers and employees, just as there are differences of opinion among the people generally. Such differences of opinion are wholesome and in the interest of good government, when accompanied by toleration and consideration for the opinions of others, and when each is willing to yield to reason.

## INQUIRIES

Arising out of the above-mentioned situation and conditions relating thereto as revealed by the foregoing statement, this office has been asked for its official opinion on the following inquiries as to the law of this State, which inquiries we here quote:

1. Whether or not there is any obligation imposed upon the Motor Vehicle Department of the office of Secretary of State by either the motor vehicle registration law or the new uniform drivers' licensing law, or any other law, to aid or assist in the enforcement of the drivers' licensing law; and
2. Whether or not, under the provisions of the motor vehicle registration law there is any authority conferred upon the officials of the Motor Vehicle Department to either require an applicant for registration of a vehicle (new or renewal) to display a driver's license issued under the new law to the registered owner of the vehicle for which registration is applied, or to any one else; or, if such license be not displayed to refuse the registration applied for until such time as the required driver's license is presented, or displayed, to the officers of the department.

## OPINION

We believe the discussion of these problems in our lengthy statement avoids the necessity of lengthy opinions in answer to these questions. The length of the foregoing statement is due to the fact that we have attempted to present all the facts involved as relied upon by both parties to this difference of opinion so far as we know them. Such honest differences of opinion are not only helpful in governmental administration, but a friendly, honest, sincere and tolerant discussion of differences of opinion practically always avoid bitter controversies and permanent unfriendliness.

Officers and heads of departments should always realize that there is no such thing as one officer or department being superior to another. Each is somewhat supreme in the performance of the duties conferred upon him or it by law. This supremacy is, however, limited to the matters which are by law or lawful regulation placed solely within the realm of his particular office or department. In the interrelations of the various offices and departments with each other, however, they are all equal, and each should be treated with equal consideration, courtesy, and respect insofar as his official duties are concerned. Our laws quite expressly designate the rights, powers and duties of each officer and department. So long as each keeps within the realm of such rights, powers and duties, he is the equal of any other officer or department doing so.

With the foregoing comment which we hope will be helpful, the following is our official opinion on each of the above quoted inquires, numbered in the same order as the inquiries are numbered above:

1. It is our unqualified opinion in answer to Inquiry No. 1 that there is not any obligation

expressly imposed by law upon the Motor Vehicle Department of the Office of Secretary of State by either of the laws mentioned in said Inquiry No. 1, or any other law, mandatorily requiring the Motor Vehicle Department, or any of the officers, employees, or members thereof, to aid or assist in any way whatever in the enforcement of the drivers' license law. The only obligation of that department, or any of its officers, employees, or members, to aid or assist in such enforcement, is the moral obligation which all officers and departments assume to cooperate with and assist all other officers and departments, especially when requested to do so. There is some element of obligation to cooperate with and assist other officers and departments inherent in the official oath of office which all officers take when they enter upon the duties of their offices and wear that they will support, protect and defend the Constitution and *government* of the State of Nevada, and bear true faith, allegiance and loyalty to the same. Certainly, no one expects that each office and department is set up, operated, and maintained as a wholly separate and distinct entity or unit in government, or as a complete and independent kingdom within itself. No office or department is a sovereign--one that should operate without any regard at all to the well-being of the other offices and departments. There is necessarily an element of coordination and correlation among the various State offices and departments. None of them is absolutely independent of any other. This coordination and correlation actually makes State government. No government, either National, State, county, or city, or any other government for that matter, can exist without such coordination, correlation, and dependence, one upon the other. This correlation, coordination, and a spirit of cooperation among the various State offices and departments is essential. There is, therefore, a moral obligation not only on the part of the Motor Vehicle Department and all the officers and employees thereof to aid and assist the Drivers License Division, but also a similar moral obligation upon the officers and employees of every other office and department, including those of said Drivers License Division, to aid and assist, and to cooperate with, all the others. Such aid and assistance is not only desirable but also exceedingly necessary for good government, be that government National, State, county, city or any other government.

When we come to answer specifically this question, as asked, in the light of the statutory requirement or obligation of the Motor Vehicle Department and its officers, members, and assistants to aid and assist in the enforcement of the drivers license law, the fact is that there is no such statutory law mandatorily requiring such aid or assistance.

2. Answering Inquiry No. 2, it is our unqualified opinion that, under the provisions of the motor vehicle registration law, there is not any authority at all expressly conferred upon the officials of the Motor Vehicle Department to either require, in the sense of to compel, an applicant for registration of a motor vehicle, either a new registration or a renewal of registration, to display a driver's license issued under the new law to the registered owner of a vehicle for which such registration is applied. Certainly, neither the motor vehicle registration law nor the so-called drivers license law mandatorily requires or compels any applicant for registration of a motor vehicle to exhibit and driver's license, either his own driver's license or the driver's license of anybody else. We doubt very much, however, whether any applicant would object to showing his driver's license to the assessor, or to any other officer who requests him to do so. Certainly, no intelligent and fair-minded applicant would object to doing so. It is inconceivable how any reasonable applicant could satisfy even himself that he had any justification at all in refusing to exhibit his driver's license. It is a well-known fact that motor vehicle drivers invariably carry their drivers' licenses with them. One of the purposes of having drivers' licenses

is that the little paper constituting that license is to be carried by the driver, and on his person, as a protection to him in the event of an accident or any question should be made of his right to drive a motor vehicle. Certainly, any driver of a motor vehicle, who has a driver's license, could not possibly have the slightest reasonable objection to exhibiting it to the County Assessor or to any other officer, not only at the time he makes his application for the registration of his motor vehicle, but also at any other time. Answering this portion of the question specifically and in the form in which it is asked, our opinion is that the applicant could not be compelled by this law to exhibit his driver's license to the County Assessor when he applies for the registration of his vehicle.

This Inquiry No. 2 is properly divided at the semicolon immediately following the word "else" and the two portions of it as so divided answered separately. We shall now answer that portion thereof following said semicolon as follows:

It is our unqualified opinion that, if such license be not displayed, neither the County Assessor nor any other officer, member or employee of the Motor Vehicle Department would have any right to refuse the registration of the motor vehicle so applied for pending such time as his driver's license, or a driver's license for some other person having the right to drive the particular motor vehicle, is so presented or displayed, solely upon the ground of the applicant's refusal to so display his driver's license. Certainly, the law does not require or compel the applicant to so display his driver's license as a condition precedent to the registration of the motor vehicle. In fact, the applicant might not be a driver of the particular automobile or have any right to drive it, or to a license to drive it. Some other member of the family, or even some person entirely outside of the family, might be the sole driver for the particular motor vehicle, or at least one of the drivers of it. In fact, there are usually several driver's licenses issued for the driving of a particular motor vehicle. The license involved is not an owner's license, but a driver's license. The applicant might not have or need any driver's license therefor. It would certainly not work any great hardship or difficulty, however, upon the applicant to either show the assessor his driver's license or explain to him that some other member of the family or person had a driver's license for that particular motor vehicle.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

HONORABLE MALCOLM McEACHIN, Motor Vehicle Commissioner, Carson City, Nevada.

B-74. Water Law--Transfer of Applications for Permits to Appropriate Water.

Applications for permits to appropriate water in this State may be assigned by the person making such application to other persons. Such assignments must be in writing and filed for record in the office of the State Engineer.

CARSON CITY, January 13, 1942.

MR. ALFRED MERRITT SMITH, State Engineer, Carson City, Nevada.

Re Nos. 10188, 10202, 10092.

DEAR SIR: Reference is hereby made to your letter of December 23 and also the letter enclosed therewith from W. C. Henderson, Director of Fish and Wildlife Service of the Department of the Interior, relating to the above-numbered applications for permits to appropriate waters. It is noted you desire advice as to whether you can transfer the applications for permits heretofore made in the name of Henry A. Wallace as Secretary of Agriculture, to the Fish and Wildlife Service of United States Department of the Interior without first being authorized to do so by direct communication from the Secretary of Agriculture.

We think your inquiry is answered by section 7951 Nevada Compiled Laws 1929, the same being section 66 of our water code, in that such section provides that an "application for permit, or any permit to appropriate water, may be assigned subject to the conditions of the permit, but no such assignment shall be binding except between the parties thereto, unless filed for record in the office of the State Engineer." We think the proper procedure in the instant matter is for the Secretary of Agriculture to assign its applications to the Fish and Wildlife Service and preferably the assignment should be made to the head of that department.

Trusting this will answer your inquiry, I am

Yours very truly,

W. T. MATHEWS, Deputy Attorney-General.

B-75. Motor Vehicle Registration Law--Motor Vehicles Owned by the Defense Plant Corporation in Construction of the Basic Magnesium Plant in Clark County.

Facts submitted to Motor Vehicle Commissioner not sufficient to show that the motor vehicles were the property of an instrumentality of the Federal Government and used and operated by such instrumentality. Presumption is that such vehicles are subject to the registration and licensing laws of this State and such presumption must be indulged in until the contrary is shown by competent evidence.

CARSON CITY, January 13, 1942.

HONORABLE MALCOLM McEACHIN, Motor Vehicle Commissioner, Carson City, Nevada.

DEAR MR. McEACHIN: Reference is hereby made to your letter of July 9 and the enclosures annexed thereto concerning the question of the registration of the motor vehicles owned by the Defense Plan Corporation of Washington, D.C., and, as we understand, operated in connection with the construction of the Basic Magnesium plant in Clark County.

From the letter of Brobeck, Phleger & Harrison, Attorneys of San Francisco, accompanying your letter, we understand it is claimed that the Defense Plant Corporation owns the motor vehicles in question. We further gather from such letter that the Defense Plant Corporation is claimed to be an instrumentality of the Federal Government and, for that reason, claims exemption from the registration and licensing provisions of our laws as applied to its motor vehicles.

Were this the only question involved in this matter, perhaps solution of it would be comparatively easy. However, the question of whether the Defense Plant Corporation is actually involved in this particular matter is completely shrouded in doubt. We are advised that the Basic Magnesium, Inc., is not only under contract with the so-called Defense Plant Corporation to manage and operate the plant when completed, but that such Basic Magnesium, Inc., is engaged in the construction of the plant. We are further advised that the Basic Magnesium, Inc., is an independent contractor and is not such an instrumentality of the Federal Government as exempts it from the operation of the revenue and licensing laws of this State. We do not believe that your office has been furnished with sufficient proof as to the identity and ownership of the motor vehicles in question and neither do we believe that your office has been furnished with sufficient proof that the Defense Plant Corporation is actually operating such vehicles. Most certainly this office has not been able to secure proper and necessary information as to the status of either one of the corporations and only vague statements concerning contract terms have been forthcoming for our consideration.

We are inclined to the view that no showing has been made to your department sufficient to warrant the holding at this time that the motor vehicles in question are immune from our registration and licensing laws and we think the presumption must be indulged in that such vehicles are subject to those laws and until such time as it is competently shown that the vehicles are property of such corporations as are instrumentalities of the Federal Government and operated by such instrumentalities, the foregoing presumption must continue to be indulged in.

Yours very truly,

GRAY MASHBURN, Attorney-General.

W. T. MATHEWS, Deputy Attorney-General.

#### SYLLABUS

334. Fish and Game Law.

The amendment to section 66 of the Fish and Game Law contained in chapter 112, 1941 Statutes, does not authorize the hunting and killing of fawn deer.

#### INQUIRY



CARSON CITY, January 14, 1942.

Can fawn deer be hunted and killed under section 66 of the fish and game law, as amended by chapter 112 of the 1941 Statutes, providing for the hunting and killing of doe deer pursuant to certain regulations?

#### OPINION

Prior to the amendment of section 66 of the fish and game law, the same being section 3100 Nevada Compiled Laws 1929, as amended by chapter 112 of the 1941 Statutes, it was unlawful to kill doe deer at any time. See Attorney-General's Opinion No. 257 to the State Fish and Game Commission, dated May 26, 1938. Ever since the enactment of said section 66 of the fish and game law, it has been unlawful to kill any male deer excepting male deer with branched horns.

The above query presents the question of whether the 1941 amendment to said section 66 now permits the killing of fawn deer. The fish and game law contains no definition of the term "fawn." It becomes necessary then to ascertain the common and ordinary meaning of the term "fawn," as it is the rule of statutory construction that words used in a statute are to be construed in their common and ordinary meaning, unless a different meaning is provided in the statute. Webster's International Dictionary defines the word fawn to mean, "A young deer; a buck or doe of the first year." We understand that the members of the State Fish and Game Commission have agreed that the foregoing definition of a fawn is the correct definition thereof. Did the Legislature in the enactment of the 1941 amendment intend that fawn deer could be hunted and killed when the Legislature, in the enactment of the amendment, used the term "doe"?

The amendment to said section 66 was incorporated in such section as a proviso, thus causing said section 66 to now read as follows:

It shall be unlawful to hunt deer at any time during the year other than during such thirty- (30) day period, to be known as the open season, between October 1 and November 15 of each year, as may hereafter be designated for the respective counties by the board of fish and game commissioners, under the provisions of this act; *provided*, that there shall not be any open season on deer without horns, or "spiked buck," or male deer with unbranched horns or antlers, and that during such open season of each year it shall be unlawful to kill, catch, trap, wound, or pursue with the intent to catch, trap, injure, or destroy more than one deer with branched horns, except under conditions prescribed by the fish and game commissioners as provided in the above section; *provided further*, that the open season for deer in district No. 1 shall extend between October 1 and December 31 of each year; *provided*, that the county commissioners of any county in the state, upon the application of any person, persons, organizations, or governmental department, may appoint a committee of one each, sportsmen, livestock, U. S. forest service, game management division, fish and wild life service and Taylor grazing division, to consider the advisability of opening

hunting season on does in any district or specified portion of such county; and whenever in the judgment of said committee it appears that a limited reduction in the number of does is necessary for the protection to the ranges or watersheds of the particular area affected said committee shall make appropriate recommendations to the state fish and game commission, which commission is hereby authorized to permit licensed hunters to take not in excess of one (1) doe during the open season under such rules and regulations as said commission may prescribe.

Thus it appears that section 66 prohibits the hunting and killing of a fawn buck deer and only opens the door to the hunting and killing of doe deer under rules and regulations promulgated by the State Fish and Game Commission. Section 65 of the fish and game law, the same being section 3099, Nevada Compiled Laws of 1929, reads as follows:

It shall be unlawful at any time to hunt mountain sheep, goats, elk, antelope, or *doe or fawn* deer except at the time and places and in the manner as may hereafter be provided by the state fish and game commissioners.” (Italics ours.)

The Legislature in the enactment of said section 65 differentiated between doe deer and fawn deer and, we think, that by use of the term doe in the 1941 amendment, the Legislature did not intend to permit the hunting and killing of fawns at any time, whether such fawns be bucks or does, and that the Legislature used the term “doe” advisedly, for the very purpose of differentiating between such term and that of the term “fawn.”

It is said by competent authority with respect to the deer family as follows:

In most genera only the young (the fawns) are spotted, and lose their spots when they are about one year old. Deer breed annually, the young, one or two at a birth, being produced in late spring. The fawns remain with their mothers until they are about a year old, when they are sufficiently mature to become independent. 8 Encyclopedia Americana 583 (1939 Edition).

The Legislature not having amended section 66 so as to permit the killing of buck fawns and no doubt being fully advised of the state of the law on the subject upon which it was then legislating and limiting the effect of the amendment to doe deer only, and the members of the Legislature, no doubt, having knowledge of the fact that fawns followed their mothers for nearly a year, intended that mature does only were to be hunted and killed.

As stated above, the 1941 amendment to section 66 was incorporated therein by way of proviso. Provisos are to be strictly construed and to include no case not within the letter of the proviso. 25 R. C. L. 985, section 232.

Another pertinent rule of statutory construction is that “The expression of one thing is the exclusion of another.” In the instant matter, we have section 65 containing an express mention of does and fawns, and the conclusion must be that the Legislature intended to differentiate between does and fawn. In section 66 we have an express prohibition as to the killing of male fawns

when we consider the prohibition therein contained that there shall not be any open season on deer without horns or spiked buck or male deer with unbranched horns or antlers. The 1941 amendment takes out of the statute the prohibition therein contained against the hunting and killing of doe deer without mentioning fawn deer. The amendment contained in the proviso added to section 66 in 1941 being strictly construed as it must be under the rules of statutory construction, we think it necessarily follows that it is limited to doe deer only, and does not include within its provisions fawn deer, be they either bucks or does.

It is our opinion that section 66, as amended by chapter 112 of the 1941 Statutes, does not permit the hunting and killing of fawn deer as commonly known and as defined as hereinabove set forth.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

FISH AND GAME COMMISSION, Reno, Nevada.

B-76. Public Utility Law--Power to Make Rules and Regulations With Respect to the Extension of Public Water Utilities' Water Mains Into New Territory.

Public Service Commission has the power to promulgate reasonable rules and regulations governing the extension of a water company's water main into new territory in order to insure the installing and furnishing facilities whereby water would be delivered to the consumer. Public Utility Act of 1911 repeals by implication section 10596 Nevada Compiled Laws 1929.

CARSON CITY, January 29, 1942.

Public Service Commission of Nevada, Carson City, Nevada.

GENTLEMEN: Reference is hereby made to your inquiry of recent date as to the power of the Public Service Commission to approve rules and regulations of a public water utility with respect to the extension of such utility's water mains into territory within its jurisdiction heretofore not served by it. You further inquire as to the effect of section 10596 Nevada Compiled Laws 1929 upon the approval of such rules and regulations. We understand that it is thought your Commission does not possess the power to approve the rules and regulations in question, or to make changes therein.

With respect to section 10596 Nevada Compiled Laws 1929, beg to advise that such section was approved March 9, 1903, and consequently was approved long prior to the first Public Service Commission Act of this State, which latter Act became a law in 1911. It would seem if there had been no later law upon the question that such section 10596 would be binding

upon any water company, provided, of course, the conditions contained in such section were met by the person desiring service and facilities thereunder.

Without unduly prolonging this letter, we think the short answer to your inquiry may be found in the present Public Utilities Act. It is provided in section 6113 Nevada Compiled Laws 1929, as amended at 1933 Statutes, pages 228, as follows:

Every public utility shall file with the commission within a time to be fixed by the commission, schedules which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are in force at the time for any service performed or product furnished in connection therewith by any public utility controlled and operated by it. In connection with such schedule, and as a part of it, there shall also be filed all rules and regulations that in any manner affect the rates charged or to be charged for any service or product.

\* \* \* Copies of all new or amended schedules shall be filed and posted in the stations and offices of public utilities as in the case of original schedules; *provided*, whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the interested utility or utilities, but upon reasonable notice, to enter upon hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon, the commission, upon delivering to the utility or utilities affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than sixty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the date upon which the rate, fare, charge, classification, regulation, or practice is to go into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice has become effective.

From the foregoing quoted portion of the statute, we think it is clear that the public utility is required to submit to the Public Service Commission rules and regulations concerning charges and practices in addition to those pertaining to rates and fares, etc. Certainly, the extension of water mains into new territories requires some rule or regulation with respect to the installation thereof and the connections to be made with facilities of the water consumer. Such statute vests the jurisdiction in the Public Service Commission to determine the reasonableness of such rules and regulations which necessarily carries with it the right to approve such rules and regulations or to make reasonable changes therein.

We think that section 6117, Nevada Compiled Laws 1929, also lodges power in the Public Service Commission, in the interest of safety or service of a public utility, after hearing, to determine and order necessary equipment and appliances used or useful in public utility service. This power includes the power to approve reasonable rules with respect to the appliances necessary to furnish the consumer with the product furnished by the public utility.

It is well said in *Seward v. Denver & R. G. R. Co.*, 131 Pac. at page 984, as follows:

While the fixing of the rates, or the determination of the facilities to be afforded, in the first instance, is a legislative question, the determination of the reasonableness and lawfulness of the rate or other requirement is a judicial function. This being true, it was early recognized that legislative assemblies could not give to such questions the required time to investigate and determine in advance the reasonableness and justness of the proposed rate, or other requirement, necessitating, as such a question would, long and protracted hearings, and intricate knowledge of such matters. For this reason, we apprehend, the plan was devised, now in vogue in practically all the states, and adopted by the national government, of creating commissions supposed to be made up of especially trained men; and the delegation to such bodies of administrative and legislative powers. Such bodies are given great latitude and power in investigating all such questions, and upon them is conferred the duty of fixing rates and requiring proper facilities for the public accommodation.

Such, we think, was the intent of the Legislature in the enactment of the present Public Utilities Act, and that it intended to vest in the Public Service Commission ample power to not only regulate fares and charges, but also to regulate in a reasonable way the manner of installing and furnishing facilities whereby the product would be delivered to the consumer, thus vesting in the Commission the power to determine in each particular case what is and what is not in its opinion a reasonable regulation with respect to the furnishing of facilities, instead of leaving the matter to be provided for by a statute which in the nature of things could not be made reasonably applicable to all situations.

We are inclined to the view that the Public Utilities Act repeals by implication section 10596, at least so far as the conditions of a particular case could not reasonably be brought within the purview of such section.

Very truly yours,

W. T. MATHEWS, Deputy-Attorney General.

#### B-77. Hospital Trustees--Emergency Loans.

Hospital trustees of a legally formed hospital are authorized to apply for emergency loans.

Public school teachers' retirement salary fund board may loan money to properly constituted county hospitals upon receiving bonds or other legal evidence of such public

department.

CARSON CITY, January 29, 1942.

HONORABLE MILDRED BRAY, Superintendent of Public Instruction, Carson City, Nevada.

DEAR MISS BRAY: Dwight Dilts has presented this office with your memorandum of January 28, 1942.

In our opinion, the hospital trustees of a legally formed county hospital are authorized to apply for emergency loans. See Opinion of the Attorney-General A 34, page 169 of the 1938-1940 biennial report.

Subdivision 4, section 22 of the Retirement Salary Act of 1937, provides that retirement funds shall not be invested in any securities except such securities as those in which the funds of savings banks may legally be invested. Section 6 of the 1933 Banking Act, as amended, provides that the funds of any savings bank shall be invested in bonds of the United States or of any State of the United States or in the public debt or bonds of any county, city or school district of any State in the United States, which shall have been lawfully issued.

Under the provisions of chapter 169 of the 1929 Statutes of Nevada and chapter 67 of the 1931 Statutes of Nevada, we believe that the public debt or bonds of a legally constituted county hospital, which have been lawfully issued, are county obligations; therefore, if legally and properly issued, we believe that your board may loan money to the Mineral County Hospital Board upon receiving bonds or other legal evidence of such public county debt.

Sincerely,

ALAN BIBLE, Deputy Attorney-General.

B-78. Motor Vehicle Registration Law--Necessity that Vehicles Be Registered for the Current Year and a Registration Certificate Therefor Submitted at the Time of Transfer of Ownership of Vehicle.

It is not a legal requirement that a certificate of registration of the motor vehicle for the current year be submitted to the Motor Vehicle Department where transfer of title of the vehicle is sought. In doubtful cases where some well-founded doubt may arise as to the ownership of the vehicle, the motor vehicle commissioner may in his discretion require the production of such certificate.

CARSON CITY, February 6, 1942.

HONORABLE MALCOLM McEACHIN, Motor Vehicle Commissioner, Carson City, Nevada.

DEAR MR. McEACHIN: Reference is hereby made to your letter of February 3, 1942, with respect to the necessity that a motor vehicle be registered for the current year and a certificate of registration for the current year submitted at the time of the transfer of ownership of such vehicle. It is stated in your letter that it has been the administrative practice of your department to require the motor vehicle to be so registered before transferring title and you inquire whether such administrative practice is authorized by the registration law.

Permit us to say that we think in doubtful cases, that is to say, whether some doubt might arise in your mind as to the validity of the ownership of the motor vehicle in question, that such practice would be within your discretion.

However, we think, as a strict legal proposition, that if proper application is made for the transfer of the title of a motor vehicle, that such transfer can be legally made under the law without the requirement of the production of a certificate of registration for the then current year. Section 15 of the Motor Vehicle Registration Act does not specifically require that the certificate of title shall be for the current year. It is provided in section 7(b) of such law that in cases where the certificate of registration has been lost or unlawfully detained by one in possession of it or is otherwise not available, that the department, upon proper proof, is authorized to transfer the registration of such vehicle and issue new certificates of ownership and registration of such vehicle and issue new certificates of ownership and registration to the new owner. Likewise, we think the language in section 15 relating to the manner and form provided for in original registration is broad enough to take care of transfer of title as an original registration. Under an original registration, of course, no certificate of title under the laws of this State would be forthcoming.

Yours very truly,

W.T. MATHEWS, Deputy Attorney-General.

B-79. County Hospitals--Bond Issue for Hospital Purposes.

Petition submitted to Board of County Commissioners under the County Hospital Act petitioning for an election under such law for the purpose of issuing bonds to the extent of three thousand dollars, and an election thereafter held and authorizing such bond issue is binding upon the Board of County Commissioners and such board cannot thereafter issue additional bonds for a larger amount of money. Bond elections for county hospital purposes must be held under the law providing for two ballot boxes, that is, under chapter 70, Statutes of Nevada 1937.

CARSON CITY, February 9, 1942.

HONORABLE ROLAND H. WILEY, District Attorney, Clark County, Las Vegas, Nevada.

DEAR MR. WILEY: Referring to your letter of January 30, our reply thereto of February 2, and your letter of February 4 relating to the bond issue for hospital purposes in Clark County

pursuant to an election therefor on June 18, 1940.

Without rehearsing the matters contained in your letter of January 30 or February 4, we beg to advise that we have come to the following conclusions with respect to your inquiry:

First, we are of the opinion that by reason of the petitioner's for the bond election incorporating in their petition the following language: "We hereby specify the amount of three thousand (\$3,000) dollars as the maximum sum of money to be expended for the purchase or construction of additional buildings for said public hospital," the voters at the election being given notice of such limitation contained in such petition were lead to believe that that would be the maximum amount of money expended for the purpose of acquiring additional hospital buildings and that it is very, very doubtful that the Board of County Commissioners of Clark County can now legally base an issuance of bonds for \$150,000 upon such election.

We are of the opinion that another defect concerning such election exists and that is the failure to comply with the two ballot box bond election law. We are of the opinion that chapter 70 of the 1937 Statutes applied to the bond election of June 18, 1940, and that it would be extremely dangerous to attempt to issue additional bonds under that election by reason of the fact that such bond election law was not complied with.

Trusting this will answer your inquiries and be of assistance to you in this particular matter, and with kind personal regards and best wishes, I am

Yours very truly,

W. T. MATHEWS, Deputy Attorney-General.

B-80. Federal Fair Labor Standards Act--Employees of a County.

Federal Fair Labor Standards Act does not apply to the employees of a county.

CARSON CITY, February 11, 1942.

HON. MARTIN G. EVANSEN, District Attorney, Hawthorne, Nevada:

DEAR MARTIN: Your letter of February 9, in re whether the Mineral County Power System is obligated to pay its employees time and a half for overtime pursuant to the forty-hour week law.

We assume that the law mentioned as the "forty-hour week law" is the Federal Act known as the Fair Labor Standards Act, the same being found at Title 29, Sec. 201 et seq. F. C. A. or U. S. C. A.

It is our understanding that the employees of the Mineral County Power System are in



fact employees of Mineral County. If such understanding is correct, we think that they do not come within such Fair Labor Standards Act. Section 3 of such Act, being section 203 of Title 29, provides an exemption from the operation of the Act in the following language:

Employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee, but shall not include the United States or any State *or political subdivision of a State.*

Trusting this will answer your inquiry, I am

Sincerely yours,

W. T. MATHEWS, Deputy Attorney-General.

B-81. Minister of the Gospel--State Prison--Law Authorizing Holding of Religious Services at State Prison as Applicable to a Reader of the Christian Science Church.

Minutes of the State Board of Prison Commissioners authorizing the setting apart of one Sunday during the month for religious services of a nonsectarian character to the Christian Science Church, which was approved by the Attorney-General, as a member of said commission, held to show that it was the opinion of the Attorney-General that a reader of the Christian Science Church was in fact authorized by the law to hold such religious service at the State Prison.

CARSON CITY, February 18, 1942.

HONORABLE MALCOLM McEACHIN, Secretary of the State Board of Examiners, Carson City, Nevada.

DEAR MR. McEACHIN: Reference is hereby made to your letter of February 9, also to the letter of February 6 addressed to you by State Controller Schmidt which accompanied your letter of February 9 with respect to the claim of W. H. Bliss for ministerial services rendered at the State Prison during the month of January 1942. You request an opinion on this matter as to whether W. H. Bliss is a minister of the gospel within the provisions of the Act authorizing payment thereto for conducting religious services at the Prison. You enclose with your letter a copy of the minutes of the meeting of the State Board of Prison Commissioners on September 25, 1941, wherein it appears that the Board of Prison Commissioners on that date set apart one Sunday during the month for religious services of a nonsectarian character to the Christian Science Church and authorized the payment of \$10 as payment for the particular service so rendered. The minutes show that the Attorney-General, as a member of the State Board of Prison Commissioners, was present at the meeting of such board and voted for the foregoing provisions with respect to the Christian Science Church. By so voting for such proposition, the Attorney-General has approved the holding of services at the State Prison by the Christian Science Church and signified his approval of its reader whoever he may be conducting such services and further,

by his approval, has construed the provisions of the law authorizing the holding of religious services at the State Prison by ministers of the gospel as applicable to a reader of the Christian Science Church and clearly shows that it is his opinion that such reader, whoever he may be, is a minister of the gospel. Assuming that W. H. Bliss is such a reader of the Christian Science Church or society, the above-mentioned action of the Attorney-General clearly shows that his official opinion is as above indicated.

Very truly yours,

W. T. MATHEWS, Deputy Attorney-General.

B-82. School Laws.

School laws give Superintendent of Public Instruction and State Board of Education authority to promulgate rules to be used by teachers throughout the State in compiling their annual reports of the average daily attendance of various pupils in State schools.

CARSON CITY, February 25, 1942.

HONORABLE MILDRED BRAY, Superintendent of Public Instruction, Department of Education, Carson City, Nevada.

DEAR MISS BRAY: Reference is made to your letter of January 30, 1942, wherein you request our advice concerning the interpretation of a "school day." You state that the apportionment of State and county school funds is made on the basis of the average daily attendance for the preceding school year. The average daily attendance is computed by dividing the aggregate attendance of all the pupils in the school during a school month by the number of days school was actually in session that month.

In certain school districts of the State, due to the overcrowded conditions of the classrooms and lack of teachers during the present national emergency and the resulting influx of workers to defense areas within the State, the lower grades are divided into two groups, one group of which attends school from nine to twelve and the other from one to four. You state in your inquiry that the course of study adopted by the State Board of Education prescribes attendance by children in these grades in both morning and afternoon sessions.

You are anxious to learn whether or not the division of children in lower grades into groups, one group of which attends in the morning and the other group which attends in the afternoon, constitutes a full day's attendance for apportionment purposes.

In Attorney-General's Opinion 71, Biennial Report of 1931-1932, it was pointed out that apportionment of State and county moneys is made by yourself pursuant to sections 5798 and 5799 of the Nevada Compiled Laws of 1929, on the basis of the average daily attendance as shown by the last preceding annual school report. We further stated in this opinion that

paragraph 2c of section 5798, Nevada Compiled Laws of 1929, did not authorize you to substitute any rule or to accept any other report other than the preceding annual report of the average daily attendance of school pupils in a school district as a basis of apportionment. WE further stated "The paragraph in question only authorizes the Superintendent of Public Instruction to promulgate rules to be used by teachers, sections 5655-5687, Nevada Compiled Laws 1929, in the compiling of such reports."

Paragraph 2c of section 5798 provides as follows: "The Superintendent of Public Instruction is hereby empowered to establish uniform rules to be used in ascertaining the average daily attendance." As stated in Opinion 71, this section does authorize you to promulgate rules to be used by teachers in the compiling of reports. It is our opinion that this section gives you ample authority to determine the method to be used in ascertaining average daily attendance. In the absence of a statute or judicial decision on the question of what constitutes a school day, we believe that the Legislature has properly left this to your determination. Your letter suggests that the State Department of Education has provided a certain type of school register for the purpose of keeping attendance. In the cases of an emergency such as that presented in many defense areas throughout the State, we believe that it is within your province a different form of school register to meet emergency cases. Section 5655, subdivision 5. Likewise, section 5653 of the Nevada Compiled Laws of 1929, as amended, empowers the State Board of Education to prescribe and cause to be enforced the courses of study for the public schools. These sections, it seems to us, gives not only yourself but the State Board of Education ample authority to promulgate the rules to be used by teachers throughout the State in compiling their annual reports of the average daily attendance of the various pupils in State schools.

If we can be of further assistance to you or to your State Board of Education, do not hesitate to let us know.

Yours sincerely,

ALAN BIBLE, Deputy Attorney-General.

B-83. District Attorneys--Duty When Private Employment Conflicts with Official Duties as District Attorney.

When the official duty of a District Attorney conflicts with his duties to private clients in the private practice of the law, he should either withdraw from such private employment or resign as District Attorney; but the specific case mentioned does not relate to a matter in which the District Attorney obtained confidential information, and he is not, therefore, disqualified to act as District Attorney, and should perform his official duties as such after ceasing to act for his private client.

CARSON CITY, March 6, 1942.

HONORABLE HOWARD E. BROWNE, District Attorney, Lander County, Austin, Nevada.

Re State v. A. Zachrison, Complaint of Battle Mountain State Bank.

DEAR HOWARD: This will acknowledge receipt of your letter of February 21, 1942, concerning the above-entitled matter.

Under your statement of acts as shown by your letter addressed to Mr. W. G. Adams, Cashier of the Battle Mountain State Bank, it is apparent that you had nothing to do with either negotiating or arranging for the loan which is the subject of this controversy. You state that you believe you acknowledged the chattel mortgage and that at this time you were acting as Attorney for the Gray Eagle Mining Company in several other matters, and that, in fact, you still appear as Attorney for the Gray Eagle Mining Company in an action that has not been disposed of as yet.

In support of your statement that you feel that you are disqualified, you cite rule 5 of the Rules of Professional Conduct of the State Bar of Nevada, which reads as follows:

A member of the state bar shall not accept employment adverse to a client or a former client, *relating to a matter in reference to which he has obtained confidential information* by reason of or in the course of his employment by such client or former client. (Italics ours.)

In our opinion, since you had nothing to do as a lawyer with either the negotiating or arranging for the loan which is the subject matter of the present controversy and since you were Attorney for the Gray Eagle Mining Company only on *other* matters, it does not seem that you could have obtained any confidential information as a result of this employment which would disqualify you in the present case.

In addition, it seems to us that Rule I of the Rules of Professional Conduct is particularly important insofar as it provides as follows: "Nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequence of a violation thereof." Clearly, your first duty and obligation as the duly elected District Attorney of Lander County is to the State and your county. One of your chief duties is that of acting as public prosecutor therein. (Section 2073 of the Nevada Compiled Laws of 1929.) This provision of law is clear and except in those cases where you have obtained information as a result of your private employment as a lawyer arising out of the same transaction, we do not believe you are disqualified. Your own statement shows that you did not obtain the confidential information in this particular matter, and, in view of this fact, you are certainly not disqualified.

The very most that you knew about this transaction and, in your own words, this was simply a recollection, was that you acknowledged the chattel mortgage. Clearly, your act as Notary Public is separate, distinct and apart for your duties either as a prosecuting Attorney or a private Attorney. There is nothing so far as we know in your action of notarizing the document in question which would so furnish you with confidential information as to disqualify you from later acting as the prosecuting Attorney. Employment as a Notary Public to take

acknowledgments is certainly not employment as a lawyer.

In addition to the fact that we feel that you are not disqualified, we likewise do not believe that the statement from Mr. Adams to yourself is sufficient without further investigation on your part to justify your proceeding either criminally or civilly. In the first place, it is stated that Mr. Zachrison represented that all the personal property described was free from all encumbrances. It is not clear how this representation was made. In other words, was it in an oral conversation, or did Mr. Zachrison file a written sworn financial statement as to the personal property claimed to be owned by the Gray Eagle Mining Company? As a matter of proof, you no doubt realize the difficulty of proving an oral representation. If Mr. Zachrison be brought back and the representation was oral, he will no doubt deny having made it.

In the next place, it is stated that as part of the grounds of misrepresentation, Lander County later sold a compressor which was included in the chattel mortgage. It is not stated for what this compressor was sold, but we assume that it was sold in order to satisfy some tax lien. If this assumption is true, as you know, the tax lien being a preferred lien would take precedence even over the chattel mortgage. Thus this particular sale could hardly be held to make out evidence of a criminal misrepresentation.

The next statement made by Mr. Adams is that the Paul Equipment Company recovered a tractor sold under a conditional sales contract, and, of course, this transaction, if the tractor were warranted to be free and clear of encumbrances as a basis for making the loan, might well be a criminal misrepresentation if proven to the satisfaction of the court or jury.

It is then stated that the bank feels that perhaps it may not have any security due to these purported misrepresentation. This is certainly an unsatisfactory statement. The chattel mortgage shows as part of the security: Two trucks, a Ford pick-up, two stopers, one jackhammer, and miscellaneous mining equipment. Certainly proper investigation should be made to show exactly where this property is at the present time. Nothing whatever is said on this point, and we feel that this clearly is a proper part of a report which should be made before a criminal prosecution is considered.

In accordance with our views that you are not disqualified from acting as public prosecutor in this case, we suggest that you make a complete investigation to the end that you may have all of the facts before you as your guide in determining whether or not the criminal prosecution should be instituted, and then proceed as you think the facts justify.

My person regards,

Very truly yours,

GRAY MASHBURN, Attorney-General.

Section 47 of the school law of 1911 has been revised by section 100 of the general election law of 1917, and proper notation should be made in election law pamphlet.

CARSON CITY, March 11, 1942.

HON. MALCOLM McEACHIN, Secretary of State, Carson City, Nevada.

DEAR MR. McEACHIN: Attorney-General Mashburn has referred your letter of March 4, 1942, to me.

Your problem, as stated in your own words, is as follows:

Drawing by an analogy from the decision of the Supreme Court that the Soldier Vote Law of 1899 was revived by reference thereto in section 101 of the General Election Law of 1917 is it, or is it not, true that granting that chapter 284, Statutes of 1913, as amended in 1915, might be deemed to have superseded that part of the school law of 1911 relating to the qualifications of voters at school elections; that chapter 6, and especially section 47 therein, of the 1911 school law is revived by section 100 of the General Election Law of 1917, and that, therefore, section 5695 N. C. L. 1929 should appear in our election law pamphlet in that part relating to school elections, as it appears, unamended in N. C. L. 1929?

No specific repeal of chapter 284, Statutes of 1913, has been found.

In our opinion, section 47 of the school law of 1911 has been revived by section 100 of the General Election Law of 1917. As you have stated, the decision of the Supreme Court in reviving the Soldier's Vote Law for 1899 is controlling. See Maclean v. Brodigan, 41 Nev. 468.

Accordingly, we conclude that in preparing your election law pamphlet, section 5695 should appear as it now appears unamended in volume 3 of the Nevada Compiled Laws of 1929. We suggest that after this section there be added in parenthesis the following statement: "(See section 100 of 'An Act Relating to Elections,' approved March 4, 1917, 358.)"

Very truly yours,

ALAN BIBLE, Deputy Attorney-General.

### 335. Taxation Exemption--Veterans.

The only persons who are or have been engaged in the service of the army, navy, marine corps, or revenue marine service of the United States who have property in this State and are entitled to tax exemption on their property situated in this State are those who have "received an honorable discharge therefrom."

## STATEMENT

CARSON CITY, March 11, 1942.

Our attention has been called to the purported fact that some of the men who have enlisted and some of those who have been called as selectees and are now in the military service of the United States in World War II are claiming the exemption from taxation provided for in the seventh division of Nevada Compiled Laws 1929, section 6418, as amended in chapter 144, 1941 Statutes of Nevada, pages 344-346, both inclusive, although they have not “received an honorable discharge” from such service. These are men who are at present in the service of the army, navy, marine corps, or revenue marine service of the United States. We are further informed that some of the County Assessors of the counties of the State are granting the tax exemption so provided in said subdivision of said section to these enlisted and selected men in such service from their respective counties, while others are refusing to grant such tax exemption to these young men from their counties. Naturally, this difference in the manner in which the County Assessors handle this tax exemption results in discrimination in favor of those to whom the tax exemption is granted and against those who are denied it; and such discrimination has resulted in some dissatisfaction and complaint. Certainly, they should all be treated alike. Uniformity of taxation is required by article X of the Constitution of the State, and also by the laws of the State.

This situation has been called to the attention of the State Tax Commission by one or more of the County Assessors in the State; and the Tax commission has, therefore, through its statistician and chief clerk, asked for the official opinion of this office on the following inquiry:

## INQUIRY

Are persons who are now in the present war (World War II) in the service of the United States in the army, navy, marine corps, or revenue marine service of our country, and who have not yet actually been honorably discharged therefrom, entitled to the exemption from taxation provided for in Nevada Compiled Laws 1929, section 6418, subdivision seventh, as amended in chapter 144, 1941 Statutes of Nevada, pages 344-346?

## OPINION

While we would like very much to hold that these men who are giving so much for the defense of our country and at such little monetary compensation therefor, we must interpret and construe the law involved in this situation, as amended, exactly as it is written and was intended by the Legislature of this State, not as it should have been or as we would like to have it. We have followed this plan throughout our entire term of office. The Constitution and laws require the Attorney-General to interpret and construe these constitutional and statutory provisions exactly as written and intended, not as he would like them to be. The inquiry must, therefore, be answered in accordance with said chapter 144, 1941 Statutes of Nevada, seventh subdivision, which is in the following language:

Seventh--The real property owned and used by any post or unit of any national organization of ex-service men or women. The separate and/or community property, not to exceed the amount of one thousand dollars, of any person who has served in the army, navy, marine corps, or revenue marine service of the United States in the time of war and *who has received an honorable discharge therefrom*; provided that such exemption shall be allowed only to claimants who shall make an affidavit annually before the county assessor to the effect that they are actual bona fide residents of the State of Nevada, that such exemption is claimed in no other county within this state, and that the total value of all property of affiant within this state is less than four thousand dollars. (Italics ours.)

In the interpretation of statutes, the intent of the Legislature is to be gathered principally from the language used to express that intent and by giving that language its ordinary meaning; and in the construction of statutes a somewhat broader view of the language used may be had, for, while interpretation “is concerned only with ascertaining the sense and meaning of the subject matter, construction may also be directed to explaining the legal effects and consequences of the (entire) instrument in question. Hence interpretation precedes construction, but stops at the written text” under consideration. (Black’s Law Dictionary, page 639.) If the language is clear, express, and unambiguous, there is little room for construction; and the language used should be given its usual and ordinary meaning, unless there is something in the remainder of the Act under consideration or in the circumstances motivating the enactment which clearly shows a different intention. Courts do not generally distinguish between interpretation and construction; and this inquiry involves both interpretation and construction.

The Legislature of this State in enacting said chapter 144 and the Governor of this State in approving it used the expression “*and who has received an honorable discharge therefrom.*” (Italics ours.) While this same quoted and underscored language was in the old law before this amendment, it is evident that the 1941 legislature, like the former Legislature which enacted the law originally, intended that the tax exemption should apply only to such men as had been in the military service of the United States and had been honorably discharged therefrom, not to those who are still in such military service at the time of applying for such exemption and who had not, therefore, been honorably discharged therefrom. Since the language is brought into the new 1941 amendment, it can only be assumed that it was knowingly and intentionally brought into it. Since there is nothing in the language of the amendment or in the original Act to show that the Legislature and Governor intended that this tax exemption should apply to men who are now in such military service *and who have not heretofore been honorably discharged*, we must give the language used its ordinary and usual meaning and, therefore, hold that an “*honorable discharge*” from such military service is a condition precedent to obtaining the tax exemption provided for in the amendment. In other words, it is clear that a person in the military service who has not “*received an honorable discharge therefrom*” is not entitled to the tax exemption provided for in said amendment. It is clear also that it applies only to men who have been in such military service and have *received* an honorable discharge before they are entitled to the tax exemption provided for therein. The first legislation granting such tax exemptions to veterans was in 1917 Statutes of Nevada, chapter 61; and this original Act also contained the provision that only those



residents of the State who had been engaged in the military of the United States and who had “received an honorable discharge therefrom” should be entitled to this tax exemption. The legislative history of said seventh subdivision of said section is that it was brought into said section 6418 by the 1923 Legislature of this State, quite soon after the close of World War I. That is the first time said seventh subdivision appeared in said section 6418. The United States was not involved in any war at that time and there were, therefore, very few, at most, residents of this State then engaged in the army, navy, marine corps, or revenue marine service of our country. There were a great many residents of this State, however, who had then recently been engaged in such service and who had been discharged therefrom. It is evident from this situation that what the 1923 Legislature had in mind in enacting this seventh subdivision and what the Governor had in mind in approving it was to provide this tax exemption of \$1,000 to our boys who had been in this military service of the United States and had returned to this State or come to live in it. It was also the evident intent or purpose of the Legislature and Governor in enacting and approving this seventh subdivision that it should apply to and be in the nature of a reward to those who had honorably served our country and been honorably discharged from such service. Evidently, with this thought in mind, it was expressly provided that the tax exemption should apply only to those theretofore in such military service who had “*received an honorable discharge therefrom.*” That was the evident intent and purpose of including the last above-quoted language in said seventh subdivision. There were few, if any, residents of this State who were then in the army, navy, marine corps, or revenue marine service of the United States. While it is not necessary for us to determine why the Legislature and Governor of this State did not provide a similar tax exemption for those who were still engaged in such military service of the United States at the time of claiming the tax exemption, we mention the above legislative history and our above observations merely to show that it was probably not the intention of the Legislature to discriminate against men while in such military service and in favor of men who had already ceased to so serve their country.

Said seventh subdivision of said section 6418 has been amended several times since 1923; but in each case the last above-quoted language was brought into each of said amendment. These later amendments may be found in 1925 Statutes of Nevada, chapter 163, pages 249, 250; 1927 Statutes of Nevada, chapter 103, pages 139, 140; 1932 Statutes of Nevada, pages 44 and 217; 1937 Statutes of Nevada, page 156; and then 1941 Statutes of Nevada, pages 345. Since it was clearly the intent of the original legislation that this tax exemption should apply only to ex-service men who had theretofore “*received an honorable discharge*” from such military service, and this language has been so punctiliously included in each of the amendments to this subdivision since it was originally enacted in 1923, we cannot hold, consistent with the duties and authority of the Attorney-General, that this tax exemption applies to residents of this State who are now in such military service of the United States and have not “received an honorable discharge therefrom.” We must consider the language used and give it its ordinary and usual meaning. That meaning is clear and certainly must be held to apply only to such men in the military service, or heretofore in the military service of our country, who have received an honorable discharge. Such honorable discharge is a condition precedent to the allowance of the tax exemption so provided in said seventh subdivision.

It is a fundamental rule of the construction of tax statutes that taxation is the rule and

exemption therefrom the exception, and that such exception must be clearly expressed in the exemption statute.

For the foregoing reasons, it is the unqualified opinion of this office that the only persons who are or have been engaged in the service of the army, navy, marine corps, or revenue marine service of the United States who are entitled to the tax exemption provided for in said chapter 144, 1941 Statutes of Nevada, are those who have “received an honorable discharge therefrom,” and that residents of this State who are in such military service in the present war and who have not “received an honorable discharge therefrom” are not entitled to such tax exemption. Much as we regret it, the answer to the above-quoted inquiry must, therefore, be in the negative, except as to those men in such service who have heretofore received such honorable discharge.

In closing this opinion, we suggest that this situation should be called to the attention of the 1943 Legislature of this State, to the end that said seventh subdivision of said section may be amended so as to include those who are actually in the military service of the United States at the time they claim such tax exemption, notwithstanding the fact that they may not then have received their honorable discharge.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

NEVADA TAX COMMISSION,

Attention Mr. J. G. Allard, Statistician and Chief Clerk, Carson City, Nevada.

B-85. Nevada Agricultural Society.

Nevada State Agricultural Society has statutory authority to enter into lease for the Reno race track. Such a lease in our opinion is binding upon the successors of the Nevada State Agricultural Society.

CARSON CITY, March 24, 1942.

CARL F. DODGE, JR., ESQ., Attorney at Law, First National Bank Building, Fallon, Nevada.

DEAR CARL: This will acknowledge receipt of your letter of March 17, 1942, in which you ask whether or not it is within the powers of the Nevada State Agricultural Society to lease the Reno race track over which it has jurisdiction for a period of five years with an option in the lease to renew for a like period.

In our opinion, the Nevada State Agricultural Society is authorized to make such a lease.

The State Agricultural Society was incorporated as such with perpetual succession by

section 1 of the Statutes of Nevada of 1873, page 138, the same being section 310 Nevada Compiled Laws 1929. Section 1 of the Act of 1885, page 77, being section 315 of Nevada Compiled Laws 1929, declared that the State Agricultural Society was a State institution, and section 5 of this same Act provided that the State Board of Agriculture should be charged with the exclusive management and control of the State Agricultural Society as a State Institution.

Section 2 of the original Act, being section 311 Nevada Compiled Laws 1929, provides, among other things, that the society shall have power “to purchase, hold, and lease any quantity of land, not exceeding in the aggregate 640 acres, with such buildings and improvements as may be erected thereon, and may sell, lease, and dispose of the same at pleasure.”

We believe this express power gives your society the right to enter into the lease mentioned in your inquiry. Likewise, section 1 of the original Act gave your society perpetual succession with the power to contract and be contracted with. This is a further grant of authority for your present board to enter into a lease which in our opinion will be binding upon your successors.

In support of this latter proposition, we believe that the general law concerning municipal corporations is applicable, particularly since the problem involved in your inquiry is one concerning the business or proprietary acts of the Agricultural Society. See 37 Am. Jur., sec. 66, page 679, particularly footnote 8, to the effect that a council may lease its property for a term extending beyond the term of the council.

I note in reading the opinions of former Attorneys-General that in 1915 the Agricultural Society had leased their grounds to the Reno Jockey Club. (Attorney-General's Opinion No. 27, 1915-1916 biennium.) This seems to indicate that it has been the practice in the past for the Agricultural Society to lease their grounds.

With personal regards and best wishes, I am

Sincerely yours,

ALAN BIBLE, Deputy Attorney-General.

B-86. State Grazing Boards.

State Grazing Boards are authorized to enter into cooperative agreements with Federal Government, but there is no authority in State Grazing Act which would authorize State Grazing Boards to deposit money in bank and check against same on warrants of the district chairman.

CARSON CITY, March 24, 1942.

MR. THOS. W. MILLER, Improvement Supervisor Department of the Interior, Grazing Service, P. O. Box 751, Reno, Nevada.

DEAR MR. MILLER: This will acknowledge receipt of your inquiry of March 14, 1942, in which you asked whether or not the State Grazing Board of Elko District, Nevada No. 1, could disburse \$2,500 of their 50% fund for the purpose of paying fire fighters by depositing this amount of money in the bank at Elko and checking the same out on the warrants of their chairman.

Under date of December 26, 1941, we wrote a letter to Mr. Huling E. Ussery, a District Grazer, in which we held that the various State Grazing Boards could enter into cooperative agreements with the Federal Government in which they covenant and agree to furnish both labor and material for the completion of range improvement projects. I am enclosing a copy of this opinion, which I believe you will find self-explanatory.

I believe that your grazing boards could enter into a similar type of cooperative agreement with the Federal Government whereby the State Grazing Board agrees to furnish a certain specified amount of labor as part of the consideration of the cooperative agreement, and that this labor could be paid in the regular manner by presenting warrants signed by the chairman of the grazing board and supported by the proper resolution from the State Grazing Board involved, to the Board of County Commissioners and paid as a direct charge against your grazing district fund in the county involved.

I can find no authority in the grazing Act which would authorize the State Grazing Board to withdraw the money in the manner set forth in your letter. In the absence of such express authorization, I believe that the State Grazing Boards should follow the same procedure as in the disbursement of county funds generally.

If I can be of further assistance, do not hesitate to let me know.

Very truly yours,

ALAN BIBLE, Deputy Attorney-General.

B-87. Old-Age Assistance.

Since old-age assistance payments are made for current month, payments are in very nature an award for future assistance to needy aged persons.

If old-age pensioner dies before old-age warrant is delivered to him, the same should be returned by the County Clerk to the Division of Old-Age Assistance for cancellation.

Where warrant has been delivered to old-age pensioner and same is in his possession but has not been cashed before his death, uncashed warrant should be returned to Division of Old-Age Assistance for cancellation.

Where warrant has been delivered to old-age pensioner and he has cashed the same and

thereafter died, no claim for refund should be made.

CARSON CITY, March 26, 1942.

MR. HERBERT H. CLARK, Supervisor, Nevada State Welfare Department, Division of Old-Age Assistance, Reno, Nevada.

DEAR MR. CLARK: This will acknowledge receipt of your recent letter requesting the opinion of this office as to payments of old-age assistance. Since old-age assistance payments are made for the then current month, such payments are in their very nature an award for future assistance to needy aged people.

In view of the nature of the old-age assistance payments, it is our opinion that if the old-age pensioner dies before the warrant is delivered to him, the same should be returned by the County Clerk to you for cancelation. Likewise, we are further of the opinion that where the warrant has been delivered to the old-age pensioner and the same is in his possession but has not been cashed before his death, you are justified in requesting that this uncashed warrant be returned to you for cancelation. In those cases in which the warrant be returned to you for cancelation. In those cases in which the warrant has been delivered to the old-age pensioner and he has cashed the same, and thereafter dies, we do not feel that any claim for refund should be made.

We believe that the foregoing rules carry out as practically as possible the direct intent of payments of old-age assistance to the needy and deserving aged.

Very truly yours,

ALAN BIBLE, Deputy Attorney-General.

B-88. Secretary of State--Corporation Law.

An attempt to make nonassessable stock assessable does not comply with section 4 of the General Corporation Law of 1925, and since such defect is readily apparent from the face of the amended articles, the Secretary of State may exercise his discretion in refusing to file such papers.

CARSON CITY, March 26, 1942.

HONORABLE MALCOLM McEACHIN, Secretary of State, Carson City, Nevada.

DEAR MR. McEACHIN: This will acknowledge receipt of your letter of March 13, 1942, with which you enclosed a letter from Harold E. Haven of San Francisco, California, concerning the filing of amended Articles of Incorporation of the Double O Mining Company. I am returning this original letter to you for your files.

The duties of a Secretary of State in filing amended articles of incorporation is dealt with in the case of State v. Brodigan, 44 Nevada 212. The court therein says in part:

The duties of secretary of state, with respect to filing certificates of incorporation and papers relative to corporations, are ministerial. His duties are pointed out and prescribed by statute. If certificates of incorporation and papers relative thereto substantially comply with the statute, he has no discretion, but may be compelled by mandamus to file them. The discretion to be exercised by the secretary of state does not extend to the merits of an application for incorporation, although it may be exercised as to matters of form. Generally, such officer has no discretionary power to look beyond the face of the incorporation papers, and to determine from matters outside of such papers whether or not to file the papers. He cannot consider extraneous matters.

Section 1 of the General Corporation Law of 1925, as amended, being section 1600 N. C. L. of 1929, makes this Act apply to corporations organized and still existing under prior Acts.

Subdivision 6 of section 4, being section 1603 of N. C. L. of 1929, as amended, provides that the articles of incorporation shall set forth:

Whether or not capital stock, after the amount of the subscription price, or par value, has been paid in shall be subject to assessment to pay the debts of the corporation, and unless provision is made in such original certificate or articles of incorporation for assessment upon paid-up stock, no paid-up stock, and no stock issued as fully paid-up shall ever be assessable, or assessed, and the articles of incorporation shall not be amended in this particular.

It is noted that the foregoing provision seems to apply to cases where the original certificate or articles do not state that the stock shall be assessable. However, section 6 of the Domestic Corporation Law of 1925, being section 1606 N. C. L. 1929, states that any articles of incorporation so amended shall contain only such provisions as would be lawfully and properly inserted in an original certificate or articles of incorporation.

It is, therefore, our opinion that in view of this provision the amended articles of 1928 would take the same status under Section 4 of the General Corporation Law as original articles of incorporation. This being true, we are of the opinion that if the articles of incorporation are attempted to be amended by again making the stock assessable, such amendment does not comply with the law, and that this defect would be readily apparent from the face of the amended articles. By making nonassessable stock assessable, the amended articles would not substantially comply with section 4 of the General Corporation Law of 1925, and, therefore, we believe that you may exercise your discretion in refusing to file such papers.

Very truly yours,

ALAN BIBLE, Deputy Attorney-General.

B-89. Motor Vehicle Drivers' Records Open to Public.

Pursuant to section 5620 N. C. L. 1929, the files of the Motor Vehicle License Division containing applications for drivers' licenses are public records and as such are open to the public during business hours for inspection and copying, subject to the reasonable regulations and supervision of your Motor Vehicle License Administrator.

CARSON CITY, March 26, 1942.

MR. ROBERT A. ALLEN, State Highway Engineer, State of Nevada, Carson City, Nevada.

DEAR MR. ALLEN: This will acknowledge receipt of your letter of March 17, 1942, in which you ask whether or not the Motor Vehicle License Division, which is under your direction, should divulge information contained in the application for a driver's license, and if so to whom and to what extent.

There appears to be nothing in chapter 190 of the 1941 Statutes of Nevada making such applications confidential. Section 25 of this chapter refers to the method in which such application shall be filed.

In the absence of an express provision on this question, we must be guided by our general law, section 5620 of the Nevada Compiled Laws of 1929, which provides as follows:

All books and records of the state and county officers of this state shall be open at all times during office hours to inspection by any person, and the same may be fully copied or an abstract or memoranda prepared therefrom, and any copies, abstracts, or memoranda taken therefrom may be utilized to supply the general public with copies, abstracts, or memoranda of said records or in any other way in which the same may be used to the advantage of the owner thereof or of the general public.

We believe this provision is self-explanatory.

Your attention is likewise directed to Attorney-General's Opinion No. 283 in his Report for the period of July 1, 1938, to June 30, 1940, inclusive. We therein held as follows:

The records and files in the office of the Vehicle Commissioner are public records, and as such are open to inspection by the public during business hours. Section 4, Motor Vehicle Registration Act, section 5620 Nevada Compiled Laws 1929. Pursuant to these sections the public, during business hours, has the right to inspect and copy such records without fee, subject to reasonable regulations and supervision by and on the part of the Vehicle Commissioner. *Direct Mail Service, Inc. v. Registrar of Motor Vehicles*, 5 N. E. (2d) 545, 108 A. L. R. 1391; *State v. Grimes*, [29](#)

Nev. 50. There is no express provision in the Act requiring the Vehicle Commissioner to make search of his records, except as to stolen vehicles section 5 of the Act). But, as the statute as a whole contemplates the furnishing of information to people having a direct or personal interest in some particular vehicle, we think the inference to be drawn from the Act is, that as to such individual cases it is incumbent upon the Vehicle Commissioner to obtain and furnish the requested information, and by mail if necessary. But, as to the requiring of information to be furnished to credit concerns and other concerns, where such information requires extensive search, and if for the purpose of furthering the business of such concerns, it is our opinion that the Vehicle Commissioner may legally require that they come to his office, and pursuant to reasonable regulations and supervision for the protection of the records, personally inspect the same.

What we said there is applicable to your question. Accordingly, we believe that pursuant to the general law concerning public records, your files containing applications for drivers' licenses are public records and as such are open to the public during business hours for inspection and copying, subject to the reasonable regulations and supervision of your Motor Vehicle License Administrator.

Very truly yours,

ALAN BIBLE, Deputy Attorney General.

B-90. Fish and Game.

Section 65 of the Nevada Fish and Game Act contains an invalid delegation of legislative power to an administrative board. It will require a legislative Act to open the season on antelope.

CARSON CITY, April 9, 1942.

MR. E. J. PHILLIPS, Chairman, Nevada State Fish and Game Commission, Box 678, Reno, Nevada.

Attention: E. H. HERMAN, Assistant Secretary.

DEAR SIR: This will acknowledge receipt of communication from your Commission of April 7, 1942, reading in part as follows:

Your attention is called to section 65 of the Nevada Fish and Game Laws which read as follows:

SEC. 65. It shall be unlawful at any time to hunt mountain sheep, goats, elk, antelope, or doe or fawn deer, except at the time and places and in the manner as may hereafter be provided by the State Fish and Game Commissioners.



The Fish and Game Commissioners at their last meeting set an open season on antelope in accordance with suggestions and reports made by men in the field who have been studying antelope and who have reported that the antelope range in Northern Washoe County is overrun and overcrowded. We are anxious to do the right thing, and as it did take a legislative Act to pen the season on doe deer, we would appreciate your advising us if the action taken is correct.

In answer to your inquiry reference is made to our Opinion No. 257 issued May 26, 1938, Attorney-General's biennial Report for July 1, 1936, to June 30, 1938, inclusive, wherein, after quoting section 65 of the Nevada Fish and Game Act, which is section 3099 of Nevada Compiled Laws 1929, we held in part as follows:

If the State Fish and Game Commission possesses the power to declare an open season on doe deer it is contained in the above-quoted section of the law, as we think no other section of the Act delegates such power to the Commission. But does such section contain a valid delegation of power to declare an open season on doe deer? The protection of wild game and legislation pertaining thereto is a strictly legislative matter. The Legislature of this State is the only body having the power to say what the law shall be with respect to the instant question. All legislative power is vested in the Legislature by our Constitution. Sec. 1, art. III; sec. 1, art. IV, Const. Nev. And this power cannot be delegated, even by the Legislature to any other officer or board. Ex. Rel Ginocchio v. Shaughnessy, 47 Nev. 129; Moore v. Humboldt County, 48 Nev. 397. It may be that the Legislature may delegate to the commission the power to determine some fact or state of facts on which the law enacted by the Legislature will then operate, and permit the commission to promulgate rules and regulations with respect thereto, but it has not done so in said section 3099, because it has provided no limits within which the commission may declare an open season, it has placed no restrictions on the commission with respect to the time, place, and manner in which doe deer can be hunted, all of which is a necessary requisite if the statute is to contain a constitutional grant of power to an administrative board; in fact the Legislature in said section 3099 has attempted to delegate its legislative power to the commission to declare what the law shall be with respect to the hunting and killing of doe deer and the other wild game there mentioned. This the Legislature cannot do. Section 3099 is a delegation of legislative power, and is for that reason, we think, invalid.

We believe this opinion completely answers your inquiry. Section 65 of the Fish and Game Act, being section 3099 of Nevada Compiled Laws 1929, has never been amended, nor is there any other section of the Fish and Game Act authorizing open season on antelope. Accordingly, we feel that it will take a legislative Act to open the season on antelope for exactly the same reason that it took a legislative Act to open the season on doe deer. See section 66 of the Nevada Fish and Game Commission law, being section 3100 N. C. L. 1929, as amended by the Statutes of Nevada 1941, page 267. Also see Attorney-General's opinion No. 334 issued under date of January 14, 1942, to your Fish and Game Commission.

Yours truly,

ALAN BIBLE, Deputy Attorney-General.

336. State Employees--Annual Vacations or Leaves of Absence With Pay.

(1) Vacations or leaves of absence with pay are based upon calendar years, which means the year beginning January 1 and ending December 31 of the particular year, not upon employment years, and State Employees are not entitled to annual vacations with pay until they have worked six full months in the particular calendar year in which the particular vacation is taken. Such vacations with pay are limited by law to 15 working days in each calendar year.

(2) Vacation periods are not cumulative, but must be taken in the particular calendar year after having worked six months in that calendar year, or the right to have such vacation with pay is forfeited.

(3) No vacation with pay can lawfully be granted until it has been "earned" by the particular employee by a full six-months' service in the particular calendar year.

Such vacation must be taken while the employee is in the service of his particular employer, not after he quits or resigns or is dismissed. He is certainly not entitled to any "pay" while not in the service of the State.

(5) Such vacation pay is not a bonus, but simply for the purpose of giving the employee an opportunity for rest and relaxation while in State employment.

STATEMENT OF FACTS

CARSON CITY, April 9, 1942.

Nevada Compiled Laws 1929, section 7279, provides for a "leave of absence of fifteen days, with full pay, *in each calendar year*" but leaves it to the head of each office or department to fix the date of such "leave of absence" or vacation. This section of the law was enacted by the 1911 Legislature of this State and was approved by the Governor on February 21, 1911. Considerable misunderstanding has arisen ever since the enactment of this law providing for annual vacations, called in the law itself "leave of absence." It seems that an impression and attitude has grown up to consider the pay for such vacations in the nature of a "bonus," and to consider this bonus or pay as being severable, and that a particular employee, although not having worked for a full period of six (6) months in any one (1) calendar year, is entitled, upon leaving the service of a particular department in which he has been employed to a proportionate part of the fifteen (15) days full pay for the time actually served. In other words, some seem to believe that, if they have worked three (3) months in the calendar year in which they sever their connection with it at the end of said period of three (3) months' service, they are entitled to full pay for one-half (1/2) of fifteen (15) working days at their regular wages; or that said pay for said

fifteen (15) working days should be apportioned and paid them on the basis of the relationship of the time that has been actually worked bears to the six (6) months which the law requires them to work in the calendar year before they are entitled to either a vacation or the pay for a vacation. Such a plan is clearly not the law of this State. We have been asked for the official opinion of this office on this point in the following inquiry:

#### INQUIRY

May we have your opinion as to our authority to pay for vacations, part of which is earned and part not earned, to employees leaving this department and accepting employment in another State department or with the Federal Government on the day the employees leave the department, thereby being paid by two governmental agencies for the same period of time.

#### OPINION

Said section 7279 Nevada Compiled Laws 1929 reads as follows:

*Leave of Absence for State Employees.*

Each and every state employee who has been in the service of the state for six months or more, in whatever capacity, shall be allowed, in each calendar year, a leave of absence of fifteen days, with full pay, providing the head of each department shall fix the date of such leave of absence.

Honorable M. A. Diskin, while serving as Attorney-General of this State, gave an opinion in which he held that the fifteen (15) days mentioned in the above-quoted section of the law means fifteen (15) working days, although there is nothing in the section which indicates that the Legislature in enacting and the Governor in approving it intended working days as distinguished from calendar days. However, harm could hardly come from compliance with that opinion, as such employees would not ordinarily be called upon to work on Sundays and holidays at the end of said period of fifteen (15) calendar days even if they had returned at that time. This situation is not involved, however, in the above-quoted inquiry.

This office has dealt with this question of an annual vacation, or, as the section of the law specifies, "leave of absence," in three (3) former opinions, one (1) of them having been furnished to Honorable Frank B. Gregory, of the Unemployment Compensation Division, dated December 30, 1940, and, although in the form of a letter, is also a formal official opinion and somewhat in the form thereof. The other two (2) opinions are in the form of letters written to the State Highway Engineer, the first of them being dated January 17, 1941, and containing a reference to said opinion so furnished to Mr. Gregory; and the other one (1) being dated December 6, 1941. We here refer to and endorse and approve the opinions of this office contained in those letters. Although a study of these opinions reveals the fact that they do by implication determine the question involved in the above-quoted inquiry, they do not expressly and specifically decide the exact point involved.

In the first place, it must be noted that the above-quoted section of the law provides for annual vacations and expressly states they are to be allowed and taken “*in each calendar year.*” In other words, the Act does not even by inference or implication provide any vacation at all or, in the words of the statute, any “leave of absence” at all for the employment year. The above-quoted section of the law definitely and expressly divides the employment necessary to entitle the employee to a vacation “with full pay” into calendar years, not employment years. It has been held that a “calendar year” begins at the beginning of January 1 of the particular year and ends at the end of December 31 of that particular year. The section definitely blocks off the period of employment into calendar years, not employment years. It definitely provides that during any such calendar year, after the employee has worked six (6) months or more in that particular calendar year, he or she is entitled to a vacation (“leave of absence”) of fifteen (15) days, with full pay for that particular vacation of fifteen (15) days, which we are willing to assume means fifteen (15) working days.

It has been held that said vacation periods are not cumulative, and that, unless they be taken during the particular calendar year after the employee has worked at least six (6) months, the vacation period is thereby lost. We here again approve and endorse that holding. If said section of the law be construed to mean that the vacation so provided for applies to “employment years” as distinguished from “calendar years,” and that these vacations may be cumulative, then it would be a very easy matter for an employee to have two (2) vacations of fifteen (15) working days each during a single calendar year with full pay from the State. The expression in the above-quoted statute “in each calendar year” coupled with the expression “a leave of absence,” which simply means one (1) leave of absence, definitely negatives such a situation.

We believe the foregoing indicates quite clearly what this official opinion must be with reference to pay for vacations, “part of which is earned and part not earned.” We believe it is quite clear from what has already been said in this opinion and the above-mentioned three (3) opinions heretofore given on the point that a full six (6) months of service must have been rendered during the calendar year in which the vacation is taken before the employee can be entitled to any vacation at all. It is definite and certain and we are of the unqualified opinion that, in any event, no vacation can be paid for unless it has been “earned.” An employee is entitled to and has, therefore, “earned” either an entire vacation of fifteen (15) days, or is not entitled to any vacation at all for the particular calendar year. There is no such thing as a partly “earned” vacation or a partly “not earned” vacation. Unless the full six (6) months has been served in the particular calendar year, the employee is not entitled to any vacation at all with pay.

Knowing the facts out of which this inquiry arose, I have no hesitancy that the real issue or controversy out of which it arose is as follows:

Is an employee of the State in a particular department, who quits such employment or is dismissed from it before he has taken his vacation, entitled to the compensation or “full pay” for such vacation after he quits or is dismissed from such service?

It is our unqualified opinion that such an employee is not entitled to any compensation or “pay” after he so quits or is dismissed from such service. Certainly, a person who is not in the

service of the State is not entitled to a vacation while so not employed. He is certainly not entitled to any "pay" while not in the service of the State. If such an employee has worked for the State a full period of six (6) months during the calendar year and contemplates quitting the service, or the head of the department contemplates dismissing him, then the matter of the employee getting the vacation and the "full pay" therefor as expressed in the law could be very easily handled by an understanding between the head of the department and the particular employee to the effect that the State employment in that particular department would cease at a time far enough in the future for the employee to have his vacation before such employment ceased at "full pay" as provided for in said section of the law, and that the employee be given his vacation at such time that the vacation period would fully expire before the employment comes to an end. For an employee to have his vacation with pay after his employment in the particular office or department ceases would result in a situation by which the particular employee could immediately enter the employment of some other department of the State as soon as his former employment ceased (which situation often occurs), and it would necessarily follow that he would be receiving pay from two (2) different departments of the State for the same fifteen (15) day period of time. In other words, the particular employee would be receiving double pay for that fifteen (15) day vacation period, one (1) from the department in which he had been employed and the other in the department to which he transferred. The idea that such an arrangement for double pay would be within the law is probably based upon the idea that the compensation or "pay" the employee receives during his vacation period is a "bonus." Certainly it is not the intention of this or any other law of this State to give officers or employees bonuses. The salary provided for the position is under the law complete pay, and all the pay, any officer or employee is entitled to receive from the State. Vacation pay is not, in any sense of the word, a bonus.

The purpose of giving State employees said fifteen (15) day vacations is that they may rest during that vacation period and thereby be better able to perform, in their rested conditions, better and more valuable services to the State. This purpose would be completely destroyed by such a transfer from one (1) State department to another without such a period of rest. In addition to this, it might be arranged in such a way that the particular employee would have his vacation in a department in which he was formerly employed and also in the department to which he is transferred, both in the same calendar year, if such vacations were based upon employment years as distinguished from calendar years, which is certainly not what the law contemplates. The purpose of giving employees "full pay" during the vacations is two-fold, first, to encourage them to take such annual vacations and obtain the rest resulting therefrom; and, second, to insure them against loss of pay during that time.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

HONORABLE ROBERT A. ALLEN, State Highway Engineer, Carson City, Nevada.

B-91. County Public Hospitals--Bond Issue Essential To Build or Repair.

The County Public Hospital Act, consisting of Nevada Compiled Laws 1929, sections 2225-2242, particularly section 2240, as amended by chapter 105, 1937 Statutes of Nevada, page 196, and as further amended by chapter 13, 1941 Statutes of Nevada, page 14, mandatorily provides that hospitals may be constructed, or improved, or repaired, or additions made thereto, “only” upon bond issue voted by the people of the county, notwithstanding the fact that the county may have sufficient money in its General Fund or other proper fund provided therefor to construct, repair, or improve such hospitals or make additions thereto, which bond election should be held under the so-called two ballot box law of the State.

CARSON CITY, April 10, 1942.

HONORABLE ROLAND H. WILEY, District Attorney, Las Vegas, Nevada.

DEAR ROLAND: This letter confirms my telegram to you of April 4, 1942, in the following language:

Returel thirtieth ultimo. Cannot see how public county hospital can be constructed or enlarged in face of Nevada Compiled Laws, sections 2225 and 2240, as amended in 1931, page 231, and section 2240, as amended in 1937, page 196, without county bond issue. The word “only” in said section 2240 certainly limits procedure. It is our opinion law requires bond issue.

It was with much regret that the law required us to answer your inquiry as indicated in the above quoted telegram. When Clark County, or any other county for that matter, has sufficient money in its proper fund with which to construct, or repair, or improve, or make additions to a county public hospital, the layman at least can hardly see any reason why the county and taxpayers should be put to the considerable expense incident to the procedure necessary to issue bonds, and, in addition thereto, to pay interest for the redemption of such bonds. The only theory upon which anybody could reasonably approve such a requirement for bond issue is that the taxpayers who actually pay the bill in the long run should have something to say about the amount of the burden placed upon them by the issuance of such bonds or the making of such improvements.

Apparently the only reason for requiring bond issues and the sale of such bonds as a condition precedent to any such construction or improvement is the fact that this procedure for the issuance and sale of such bonds, as such a condition precedent, is that this procedure does give the taxpayers an opportunity to vote, not only on the amount of the bonds to be saddled upon them, but also upon the interest the bonds shall bear, and the period of time within which they shall be redeemed.

The only way given the taxpayers by law by which they can pass upon the amount of money to be expended for such construction or improvement is this law requiring a bond issue and that the bond issue be voted upon by the taxpayers.

In other words, the law does not give the taxpayers themselves any right mandatorily to limit the amount of taxes which may be levied against them for the purposes of ordinary county

government or county functioning. Under the law giving the County Commissioners the right to fix the tax levy upon the property of the taxpayers, does not give the taxpayers any right to limit the amount of tax which the County Commissioners may levy against them, other than the mere right to protest when the budget is published, from which the county tax rate is made up.

Under this County Public Hospital Act which limits such construction and improvements to money obtained by a bond issue and requires a petition of a certain percentage of the qualified voters of the county before the matter can be submitted to the voters (including among others the taxpayers), and then requires that, before the bonds can be issued, the question of issuing bonds, and the amount thereof, and the interest to be paid thereon, and the term within which the bonds must be redeemed, shall be voted on by the voters before the bonds may be issued, gives the voters (including the taxpayers) a good deal of control over the amount which the Board of County Commissioners may expend for these purposes.

In fact, under the two-ballot-box provisions of our law relating to bond issues, either the property owners or the nonproperty owners may veto or prevent the bond issue.

In other words, when the law requires that the election for a bond issue must be carried by the affirmative vote of both the property owners and the nonproperty owners, either of these classes may prevent the bond issue, as the law requires the vote of both classes before such bonds may be legally issued.

The above-mentioned provisions leave the entire question of whether such improvements or additions to such a hospital may be constructed by the affirmative vote of both of the property owners and their spouses and the nonproperty owners and their spouses of the political subdivisions seeking to construct or improve such county public hospitals. The matter of the burden to be imposed upon the taxpayers thereby is left, therefore, entirely to the determination of the voters as expressed in such elections.

In other words, this is a limitation on the authority of the County Commissioners to impose such burdens upon the people who must eventually pay the bill without their consent. There are two sides to the question of whether this is a good policy; and the policy of the law is, therefore, a debatable question, the County Commissioners generally taking the position that, since they are more familiar with county affairs than are the majority of the voters in the county, they are in a better position to determine the feasibility or necessity of such improvements than are the taxpayers generally, and the taxpayers generally taking the position that, since the burden must fall upon them, the matter should be left to their determination by an election as to whether the bonds should be issued, the amount thereof, the interest they shall bear, and the length of time within which they must be redeemed.

The question of policy, however, is not involved in the inquiry or in what our official opinion shall be on the point involved. Clearly, the law mandatorily requires a bond issue with which to obtain money for such construction or improvements, no matter how cumbersome the procedure therefor may be, and no matter what the difficulties involved may be, or how much delay may be caused thereby. We must take the law as it is written; and, so long as it remains as

it is, we must comply with it if we are to proceed legally in this matter.

If your county has sufficient money in its hospital fund, or any fund which may be legally transferred to that fund, already in the county treasury, this situation might suggest to the Legislature that it might be good policy to change the law under such circumstances so as to avoid a bond issue, if such an amendment could be properly safeguarded so as to protect the taxpayers from the imposition of unnecessary burdens upon them.

In considering any transfer of any portion of the \$60,000 paid to Clark County out of the \$300,000 recently received by the State Treasurer, it should be kept in mind that the Legislature of this State in the same chapter of the 1941 law under which this payment was made by the State Treasurer to the County Treasurer of Clark County, definitely and expressly earmarked that entire sum of \$60,000 as money to go into the County General Fund of your county. The Legislature having so earmarked this money, the transfer of the money to any other fund or the use of the money for any other purposes than county general purposes presents quite a serious question.

When the Legislature earmarks money for one fund and purpose, it is exceedingly doubtful whether the County Commissioners or any other officers or authority of the county could transfer the money or use it for some other county general purposes.

Yours truly,

GRAY MASHBURN, Attorney-General.

B-92. Motor Vehicles--License Fees.

Motor vehicles owned by the State of Nevada or by any board, bureau, department, or commission thereof, or any county, city, town, school district, or irrigation district in the State are exempt from the payment of license fees thereon.

CARSON CITY, May 1, 1942.

HONORABLE MALCOLM McEACHIN, Vehicle Commissioner, Carson City.  
Attention: MR. KENNETH BUCK, Deputy Commissioner.

DEAR SIR: This will acknowledge receipt of your letter of April 28, 1942, in which you state that one of the State Grazing Boards of the State of Nevada has applied to the Motor Vehicle Department for the issuance of exempt plates upon two horse trailers which are used by the administrative personnel of the Grazing Service and ownership of which, according to the affidavit on file in your office, is in the State of Nevada.

You ask whether or not your department may exempt registration plates upon these two vehicles.



In our opinion you may issue exempt registration plates.

Section 4435.05 of Nevada Compiled Laws, Supplement 1931-1941, provides that all motor vehicles owned by the State of Nevada or by any board, bureau, department, or commission thereof, or any county, city, town, school district, or irrigation district in the State shall be exempt from the payment of the license fee thereon.

Under section 5581.16 Nevada Compiled Laws, Supplement 1931-1941, there are “created State boards for each grazing district.” This same section provides for the manner of the creation, the members of the boards, their remuneration, etc. Under the exemption clause of the Motor Vehicle Registration Act, supra, the Grazing Board involved has the status of a State board and is, accordingly, exempt.

Very truly yours,

ALAN BIBLE, Deputy Attorney-General.

## SYLLABUS

337. School Teachers.

A member of the Public School Teachers’ Retirement System may withdraw his contributions to the Members’ Saving Annuity Account and leave his contributions to the Public School Teachers’ Permanent Fund in that fund.

## STATEMENT OF FACTS

CARSON CITY, May 1, 1942.

A member of the public school teachers’ retirement system who elected Plan No. 2 in 1937 now wishes to withdraw his contributions to the Members Savings Annuity Account and leave his contributions to the Public School Teachers Permanent Fund with the retirement system in order that, should he complete 30 years of teaching, he would then be eligible to a pension of \$600 a year. The member has resigned his position and is eligible to a refund under section 19 of the Retirement Act.

## INQUIRY

Can the member mentioned above withdraw his contributions to the Members Savings Annuity Account and leave his contributions to the public School Teachers Permanent Fund in that fund?

## OPINION

In our opinion your inquiry is answered in the affirmative and the member mentioned can withdraw his contributions to the Members Savings Annuity Account and leave his contributions to the Public School Teachers Permanent Fund in that fund. Section 19 of the Public School Teachers Retirement Act, being section 6077.39 of Nevada Compiled Laws, Supplement 1931-1941, provides that an original member “*shall be entitled to withdraw, upon demand, an amount equivalent to the total accumulations of the member in the members savings annuity account, together with, in the case of an original member adopting plan No. 2” certain other refunds. (Italics ours).*

The present board acting under the 1937 Act has certain powers as set forth in sections 22, 23, 24, and 25. These powers authorize the boards to promulgate and enforce certain rules and regulations. Pursuant to statutory authority under the old 1915 Public School Teachers Retirement Act, the board, under date of April 7, 1933, enacted a regulation enabling a teacher to withdraw money from the permanent fund and to be reinstated upon returning to that fund upon reentry into the teaching system all amounts with interest at 6%, which amounts with interest are to be returned during the first year of a teacher’s employment after reentry and are to be paid in two installments at the time and in the manner of the regular semiannual contributions to the fund. (Page 88 of book entitled “Minutes Public School Teachers Retirement Salary Fund Board.”) In our opinion this regulation was a proper exercise of the power and authority conferred upon the board.

The 1937 Act contains not only the same grants of power but contains broader grants of power, and we are of the opinion that the board may, by proper resolution, adopt rules and regulations permitting the teacher involved to withdraw the money as requested and as set forth above.

As you know, upon retirement the member may exercise certain options in lieu of receiving his annuity on the single life basis. Option 4 set forth in section 16 of the Public School Teachers Retirement Act of 1937, being section 6077.36 of Nevada Compiled Laws, Supplement 1931-1941, might be followed in the problem you have presented, when and if the member reinstates himself in the school system.

We respectfully call to your attention the fact that this method of repaying withdrawals into the system in order to reinstate the teacher is made dependent upon rules and regulations. Such rules and regulations, of course, might be changed by subsequent boards, and, in order to avoid this possible change, we respectfully suggest that a proper amendment be drawn to the present Public School Teachers Retirement Act to cover the situation presented by your inquiry.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By ALAN BIBLE, Deputy Attorney-General.

HONORABLE MILDRED BRAY, Secretary, Public School Teachers Retirement Salary Fund

Board, Carson City, Nevada.

## SYLLABUS

338. Fish and Game Law.

Persons not more than fourteen years of age hunting deer in Nevada must first secure a hunting license.

## INQUIRY

CARSON CITY, May 2, 1942.

Can a person not more than fourteen (14) years of age procure a deer tag for the purpose of hunting deer in this State without first securing a hunting license?

## OPINION

Section 55 of the fish and game law, being section 3089 Nevada Compiled Laws 1929, was incorporated in such law at the time of the enactment thereof in 1929, and provided as follows:

Every person in the State of Nevada, over the age of fourteen years, who hunts any of the wild birds or animals or who fishes without having first procured a license therefor, as provided in this act, shall be guilty of a misdemeanor.

Section 91 of the same law, being section 3125 Nevada Compiled Laws, 1929, as amended by Chapter 188, 1933 Statutes of Nevada, sec. 12, page 286, providing for the securing of deer tags prior to the hunting of deer, was also incorporated in the law in 1929.

Section 55 was amended at 1941 Statutes of Nevada, page 245, by inserting therein the words "traps any of the fur bearing animals." The section, however, was not changed in any other respect. Section 91 was amended at 1933 Statutes of Nevada, page 286, in some respects not material here, and its mandatory requirement that every person securing a deer tag must have a hunting license was not modified. The two sections of the law with respect to their relations to each other have been in no way changed by the above-mentioned amendments.

Where an amendment leaves certain portions of the original section unchanged, such portions are continued in force with the same meaning and effect they had before the amendment. In re Walter's Estate, 60 Nev. 172.

When two provisions of a statute are not reconcilable, the last one controls, and a special provision of the statute will control as against a general one. Ex Parte Smith, 33 Nev. 466.

Section 55, above quoted, is a provision relating to persons over fourteen years of age, and relates to hunting, fishing, and as amended, to trapping generally. Section 91, on the other hand, even as amended, relates to one specific matter, the hunting of deer and requires the securing of a special license or tag before deer may be hunted. Section 91 is specific in its requirements. It is also the later expression of the legislative will. Every person, regardless of age, must have in his or her possession when hunting deer the deer tag provided for in such section. To secure the tag every person desiring one must have and exhibit a hunting license for the then current year upon which must be written the serial number of the deer tag by the person issuing such tag.

Section 55 does not expressly exempt persons of not more than fourteen years of age from securing hunting, fishing, or trapping licenses. It only provides that persons over that age will be guilty of a misdemeanor in the event such licenses are not secured. On the other hand, section 91 applies to every person regardless of age and contains a penal provision making it a misdemeanor to violate any of the provisions of that particular section, and no qualification of its provisions is contained in any later provisions of the fish and game laws, save and except persons of the age of sixty years and upward are not required to pay any fees for hunting and fishing licenses and deer tags, although they must obtain such licenses and tags. See chapter 159, 1935 Statutes of Nevada.

Applying the rules of statutory construction stated hereinabove to the instant question, the conclusion must be that section 91 is irreconcilable with section 55 as to persons under fourteen years of age, and being the later expression of the legislative will and special in nature, controls as against section 55.

It is, therefore, the opinion of this office that every person not more than fourteen years of age desiring to hunt deer in Nevada must secure a hunting license for the current year and exhibit the same at the time of securing a deer tag to the person issuing such tag.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

FISH AND GAME COMMISSION, Post Office Box 678, Reno, Nevada.

#### B-93. Old-Age Assistance--Selling and Not Reporting Sale of Property of Recipient.

The intent of the Old-Age Assistance Law of this State is that all money received by recipients of old-age assistance shall be reported to the Division of Old-Age Assistance or to the supervisor of that division, and that the money so received shall be deducted from the amount of the old-age assistance furnished him, as the amount of assistance is based upon the monthly income of the recipient from all sources and is considered in determining the amount which it is

necessary for such a recipient to have in order that he may live in decency as provided for in said Act; but, the question of whether a recipient failing to report money so received shall be prosecuted for defrauding the State or your division under the law of this State depends upon the facts in each particular case, as knowledge and intent of the person involved enters into the question of whether the crime or offense was actually committed.

CARSON CITY, May 11, 1942.

MR. HERBERT H. CLARK, Supervisor, Division of Old-Age Assistance, Reno, Nevada.

DEAR MR. CLARK: I have your letter of May 1, 1942, relative to the sale of certain real estate, livestock, and other personal property by Joseph P. Kelsey in Elko County at a time when Mr. Kelsey was also receiving old-age assistance. It is noted that he did not report the sale of the property either to the Board of County Commissioners of Elko County or to your department.

It is also noted that you had submitted the matter to the Board of County Commissioners of Elko County and also to the District Attorney of that county with the view of prosecuting Mr. Kelsey upon the charge of fraud, but that such Board of County Commissioners and the District Attorney felt that Mr. Kelsey should not be prosecuted, and further that the District Attorney felt it would be impossible to secure a conviction under the circumstances.

You inquire now as to whether Mr. Kelsey should be continued on the rolls as a recipient of old-age assistance or whether he is permanently ineligible for old-age assistance under the circumstances. It is noted you desire an expression of this office with respect to this matter, in view of the fact that other like cases may arise in the future.

Upon an examination of facts as presented in your letter and also by our previous conversation, I am inclined to the view that prosecution in the instant case might not lie, and that even if prosecution were had it would be next to impossible to secure a conviction. My opinion in the instant case is that Mr. Kelsey should be denied relief under the old-age assistance Act until such time as he will have in effect replaced the \$780 paid under the old-age assistance Act from the proceeds of the sale of his property. That is to say, he should be denied relief during the period of time necessary to make up such amount. On the other hand, it may be that he will be in need of relief and I am informed that the Board of County Commissioners of Elko County would be willing to extend him such relief as may be necessary from the county indigent fund or by placing him on the county poor farm.

It is impossible to establish a general rule in these cases. Each case must stand on its own footing, as circumstances may be materially different in different cases.

Very truly yours,

GRAY MASHBURN, Attorney-General.

B-94. Old-Age Assistance Warrants.

Stamps and envelopes used by State Controller in mailing old-age assistance warrants are proper charge against administrative funds of Division of Old-Age Assistance.

CARSON CITY, May 12, 1942.

MR. HERBERT H. CLARK, Supervisor, Division of Old-Age Assistance, Reno, Nevada.

DEAR MR. CLARK: The Attorney-General has referred your letter of May 1, 1942, to me for answering.

In my opinion the stamps and envelopes used by the State Controller of Nevada in mailing old-age assistance warrants, as is provided in section 18 of the Nevada Old-Age Assistance Act, being section 5154.18 Nevada Compiled Laws, 1931-1941 Supplement, is a legitimate charge against the administrative funds of the Division of Old-Age Assistance.

As you know, the State's financial participation and tax levy is in part for the administration of old-age assistance. Likewise, section 18, quoted by yourself, provides in part that insofar as that portion of said moneys so deposited to pay on the expenses of the administration of the Act and in the distribution of such old-age assistance is concerned, it shall be disbursed in a specified manner. This language, it seems to us, is broad enough to provide for the payment of moneys necessarily expended in the distribution of old-age assistance.

In addition, we are advised by the State Controller's office that this is the method which has been followed since 1937. This, I believe, is a valuable precedent in the method of charging your division with these expenses. It could be suggested, of course, that in the event it was felt that this was more properly a charge against the State Controller's office, proper provision for such could be made in the very next session of the Legislature in January 1943.

With personal regards and best wishes I am

Sincerely yours,

ALAN BIBLE, Deputy Attorney-General.

B-95. Industrial Commission--Compensation for Injuries in Fighting Forest, Brush, and Range Fires.

Under Nevada Compiled Laws 1929, sections 1982-1983, sheriffs, their deputies, fire wardens and other peace officers of the State and national forest officers are given absolute authority to require all able-bodied male persons within this State between the ages of 16 and 50 years to assist in extinguishing fires in timber or brush, and thereby to impress them into service even against their own will for not more than five days in any one year, and makes it a

misdemeanor for them to refuse to fight such fires, except when they have good and sufficient reason for such refusal, and provides penalties for such refusal; and further provides that the men so impressed into fire-fighting service shall be considered employees of the county demanding their services and be entitled to the benefits of the Nevada Industrial Insurance Act.

CARSON CITY, May 20, 1942.

MR. HUGH A. SHAMBERGER, State Director State Council of Defense, Carson City, Nevada.

DEAR HUGH: In order that you may have a written answer to your letter to me of 16th instant, in which you ask for information as to the method of procedure under chapter 45, 1927 Statutes of Nevada, pages 68-69, which should be cited as Nevada Compiled Laws 1929, sections 1982, 1983, and the views of this office concerning the same in writing, I am confirming and supplementing my telephonic conversation with you of two or three days ago, as follows:

All sheriffs, their deputies, fire wardens, other peace officers, or any national forest officer, are given absolute authority under those sections to call all able-bodied male persons within this State, who are between the ages of 16 and 50 years, to assist in extinguishing fires in timber or in brush. If any such able-bodied male person refuses to obey such call or refuses to assist in fighting any such fire for a period of not more than five days during any one year, unless he can give good and sufficient reason for such refusal, then he shall be guilty of a misdemeanor and subject to punishment by fine of not less than \$15 nor more than \$50, or by imprisonment in the county jail for not less than ten days nor more than thirty days, or by both such fine and imprisonment.

Evidently this law considers such call as an *employment*. In any event, it expressly provides that, for the purpose of obtaining the benefits of the Nevada Industrial Insurance Act, any such person so answering any such call shall "be considered employees of the county demanding their services and \* \* \* shall be entitled to receive, for disability incurred by reason thereof, the benefits under the Act." Evidently even a call by a "national forest officer," although not a county officer, shall be considered a demand by the county for such services. The Act is silent as to the amount of compensation to be paid as wages for such services or even on the point as to whether any compensation may be paid; but the compensation for injury or disability to be paid under the Nevada Industrial Insurance Act is the compensation provided therefor in that Act itself. As to wages for actual services rendered, although the Act is silent on that point, the County Commissioners would no doubt allow reasonable wages for such services. This is a matter, however, about which the State Council of Defense should not be concerned, as it is a matter which the Act contemplates shall be handled by the County Commissioners of either the county in which the services are rendered in fighting the fire or in which the "call" for such services is made.

Another deficiency and uncertainty in the Act is that, while the officers above named have the right to call upon any such able-bodied male person from anywhere within the State of Nevada within the age limits mentioned, whether a citizen or resident of this State or not, the Act is silent as to what county shall pay the wages of the person so called for such services; that is to

say, whether the county in which the services are rendered in fighting fires or the county in which the "call" is made shall pay for them. To illustrate, a fire may be raging near Reno, but across the State line in California near a national forest, but in such position that there is no town or city near having a sufficient population to furnish the number of fire fighters needed, and the "national forest officer" may come to Reno and make a "call" upon such able-bodied male persons as he may find there to go and fight or assist in fighting the fire. In that instance, the call would be made in Washoe County, Nevada, and by a Federal officer, not by a Washoe County officer or any other Nevada officer, but the services would have to be rendered entirely outside of Nevada and in the State of California. The services would have to be rendered not only in a different county but also in a different State from the county and State in which the "call" was made. The question would naturally arise as to whether the County Commissioners of Washoe County should pay the wages of the men called in that county to render such services in California and entirely outside of Washoe County and the State of Nevada, or whether the person so rendering such services would have to look to California or the particular county in California in which the services were rendered.

The question might also arise as to whether there is any provision in the California law under which such fire fighters could legally be paid, or would be paid by California or the particular county in California in which the services were so rendered. The law is silent on this point, and, for that reason, this office cannot render any official opinion on it or give any legal advice on the point. Where the law is silent this office cannot make a law to cover the situation and cannot interpret or construe a law where there is no law. This office can only deal with the laws as written. Where there is no law, there is nothing to deal with or interpret or construe. This is simply a matter of adjustment between the officers of the two States or two counties involved. In view of the fact that it is difficult to adjust such matters before they occur, such adjustments might have to wait until after such situations actually arise. Certainly, no able-bodied man would refuse to render such services for the protection of life and property until such adjustments could be made. They would, no doubt, render such services for the protection of life and property even if they were not to be paid wages by anybody. In any event, this is a matter for adjustment between the counties or States involved, since the law is silent as to which should pay the wages for such services. The fact remains, however, that such able-bodied men, when called, must, at their peril, render such services, or by refusal to do so, subject themselves to the above-mentioned penalties.

Another possible deficiency and uncertainty in the Act is with reference to whether or not injuries or disabilities sustained in such services outside the State of Nevada, although the "call" therefor was made in the State of Nevada, could be legally compensated for under the Nevada Industrial Insurance Act, without some definite understanding therefor with the Nevada Industrial Commission as provided by law. This situation relates, of course, only to instances where such fires occur in an adjoining State and the "call" for men is made in this State.

This entire matter of compensation for injuries or disabilities occurring in the rendition of such services is a matter which requires negotiations and an understanding with the Nevada Industrial Commission. We suggest, therefore, that the matter be taken up with said commission. It is quite probable that similar situations have arisen and been handled by said Commission



under this law, and that the chairman of the commission is entirely familiar with the procedure heretofore followed in such cases, in view of the fact that this law has been in existence more than 15 years.

We suggest that you confer with the chairman of the Nevada Industrial Commission with a view to having some understanding with reference to this matter and the procedure required by the commission under the Act.

We reserve the right to prepare and file a formal official opinion of this office later on if we find it advisable to do so. In the meantime, you may use this letter opinion as the official opinion of this office.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

B-96. School Teacher's Retirement.

School teacher's retirement is governed by teacher's service in institutions supported by State, county, or district public funds. Question is one of fact to be determined from public character of school.

CARSON CITY, May 26, 1942.

HONORABLE MILDRED BRAY, Superintendent Public Instruction, Carson City, Nevada.

DEAR MISS BRAY: This will acknowledge receipt of your letter of May 21, 1942, addressed to Attorney-General Mashburn and by him referred to me for answering.

Under the statement which you have given to us concerning the qualifications governing Deputy Superintendents of Public Instruction, we believe that the State Board of Education on November 18, 1915, clearly allowed to the teacher in question credit for four years' teaching experience in Nevada and one year of teaching experience in the Ann Arbor Stenographic Institute in Michigan.

Whether or not the year of teaching in the Ann Arbor Institute in Michigan can be accepted by the State Public School Teacher's Retirement Salary Fund Board, as a year of teaching experience, depends, not upon the statute governing the qualifications of deputies, but rather upon the statute governing the retirement of school teachers.

The statute is clear and unequivocal, and in our opinion is subject to but one construction. The title of the Act governs retirement, salary, and annuities to *Public School Teachers of the State*. Section 1 of the 1937 Act, being section 6077.21 of the Nevada Compiled Laws, Supplement 1931-1941, defines the term public school as meaning "all kindergartens, elementary

schools, junior high schools, and district and county high schools supported by the state, county, or district public funds.” This same section also defines the term teacher, and includes in the definition various persons. Thus, in the question presented by you, the teacher in question can count all his teaching in the public schools as well as employment as deputy superintendent of public instruction. He can count his year of instruction in the Ann Arbor Stenographic Institute in Michigan if this institute was a school supported by state, county, or district public funds. If this institute was not so supported and was not a public school, then, in our opinion, he cannot count this year of service. Our answer, therefore, resolves itself into a question of fact and one which must be determined by finding whether or not the Ann Arbor Stenographic Institute in Michigan was a public school.

Yours truly,

ALAN BIBLE, Deputy Attorney-General.

339. Boulder Power Plan Revenues--Clark County's Participation--Constitutionality of Chapter 141, 1941 Statutes of Nevada.

Chapter 141, 1941 Statutes of Nevada, page 341, is constitutional and valid; and the State Treasurer should strictly comply with the provisions thereof by accepting the full amount of the payments provided for in the Boulder Canyon Project Adjustment Act when and as often as they are made to him; and then by “immediately” paying out of any such payments to the County Treasurer of Clark County, State of Nevada, twenty percent (20%) thereof to be deposited by said County Treasurer in the General Fund of Clark County; and then by placing the balance of any such payment in the General Fund of the State of Nevada in the State Treasury.

NOTE--SUPPLEMENTARY STATEMENT

CARSON CITY, June 30, 1942.

This is a rewrite of my official opinion presented in letter form to Honorable Dan W. Franks, State Treasurer, and for which he requested me in his letter of January 24, 1942, as to whether chapter 141, 1941 Statutes of Nevada, page 341, is constitutional and valid. Although I informed him orally on the same day I received his request that I was of the opinion that said chapter is constitutional and valid, and he informed the State Controller and newspapers and they, in turn, their readers, what my views on the matter were, I was delayed by sickness and confinement in the hospital in beginning the preparation and writing of my opinion until about February 5, 1942, and was further delayed by other more pressing official business and the restriction by my physicians of my hours of work to two hours a day. My written opinion was not completed and delivered to the State Treasurer, therefore, until about February 14, 1942. No harm resulted from such delay, however, because of the fact that the check in question expressly provided that it was good and payable for several months after the date thereof, and because of the further fact that the delay gave those who objected to the payment of the twenty percent (20%) thereof to the County Treasurer of Clark County ample time to take the matter into court

for determination. The first five or six pages of that letter opinion were devoted to clearing up certain published misinformation and misstatements as to my views, and also as to both the basis and provisions of said chapter 141, and to personal matters between the State Treasurer and myself, and are, therefore, eliminated from this formal official opinion.

The purpose of this rewrite, however, is not to change the substance and effect of my views as expressed in said letter opinion, but merely personal matters relating to said published misinformation and misstatements and to better coordinate my views as so expressed. This formal official opinion, therefore, does not change the substance and effect of my views as expressed in said letter opinion, but does enlarge upon and state them somewhat more fully.

In considering this opinion, however, it is necessary to keep in mind that Senator Pittman said that neither the \$300,000 allocated to and for use in this State annually nor the portion thereof which said chapter 141 requires be paid to the County Treasurer of Clark County, is a gift or donation. The entire sum of \$300,000 annually is solely and definitely compensation for taxes lost and potentially lost on the identical property--the identical pieces or items thereof, situated in Clark County alone. That was the express understanding as to why the power users and Congress agreed to the payment of this money to and for use in Nevada. It is definitely not a gift or donation to either the State or Clark County, but is solely to compensate the State and Clark County for Taxable property and, therefore, taxes lost because the Federal Government reached out and took this property in its own name and, therefore, rendered it nontaxable. Certainly, only those taxing agencies that lost property and, therefore, taxes by the nature of this enterprise could possibly be compensated. It must be kept in mind that none of this property was or is in any other county of the State than Clark County. Certainly, only those who lost property and, therefore, taxes (the State and Clark County) could be compensated; and, in all fairness, it will certainly be conceded that, if compensation is to be paid, it should be paid to all who lose taxes on the identical property which the Federal Government reached out and took over and thereby rendered nontaxable. As to any other county of the State, any portion of this money received by it would certainly not be compensation for anything it has lost by this particular project, simply because it certainly has not lost any taxable property, or taxes, or anything else, by this particular enterprise for which it could be compensated. It is impossible to compensate any person or anything for something he or it has not earned or lost.

There is no reason why the same Federal public policy should not be applied by the Federal Government to lands and other property taken by it in the name of the United States for the use of Indians and for irrigation and other conservation projects, or for any other Federal purpose, and which it thereby renders nontaxable, except that Congress has not adopted any legislation relating thereto to compensate the States and their taxing political subdivisions (counties) where such property is actually situated for taxes and potential taxes lost to each of them similar to that which it has adopted with reference to the property constituting Boulder Canyon Project and the property taken by the Federal Government for forest reservations, and as oil lands, gas lands, phosphate lands, etc. In both instances taxes are lost and potentially lost to the State and counties by the mere fact that the Federal Government reaches out and takes over the property so taken in its own name and thereby renders that identical property exempt from taxation, although it would be taxable if privately owned or potentially taxable if owned by the

United States as soon as it goes into private ownership by homestead or otherwise. The principle is exactly the same. All we need is congressional legislation allocating to the State part of these revenues from lands taken by the Federal Government for use of Indians and for other Federal purposes in order to have this relief. Such legislation should be so enacted and approved, especially in Nevada and other States where there is so much public land exempt from taxation and so little privately owned land subject to taxation. In Nevada, this is a serious situation in view of the many instances where the Federal Government is buying or condemning or otherwise taking property in its own name for the use of Indians and for other Federal purposes. We submit that this matter should be taken up with Congress, through our congressional delegation, and congressional legislation obtained through which the State and the counties thereof where the property so taken by the Federal Government is actually situated would obtain some part of the revenues derived from the property so taken in lieu of taxes lost and potentially lost by such action of the Federal Government.

*New Property in Clark County Immaterial.*

This \$300,000 annually to compensate the State and Clark County for taxes and potential taxes lost does not, however, cover or even relate to new property constructed in or brought into Clark County by private persons or companies to constitute industrial or other plants or for other private purposes in order to have them be near Boulder power plant and thereby have cheaper power and light. Such new property is not a part of the federally owned Boulder Canyon Project and is not exempt from taxation. It is all subject to taxation and is actually assessed, equalized and taxed by both the State and Clark County exactly the same as is all other taxable property in the State--by the State at exactly the same State tax rate that applies all over the State and by Clark County at its own county tax rate. No taxes or potential taxes are, therefore, lost to either the State or Clark County on any such new property; and there is not, therefore, any loss of taxes to compensate.

*Court Test Not Objectionable to Attorney-General.*

It must be understood that the Attorney-General has absolutely no objection to the presentation of this matter to and its determination by the courts of the State by anyone who desires a court test of the constitutionality and validity of said chapter 141. He has, in fact, courted such a test and determination, but his objection, even if he had any, would not affect anybody's right to such a court test. It must also be understood that he is absolutely satisfied with the matter as held by him in his official opinion. He has worked actively, diligently and almost constantly for about 10 years to get this money. He has sat and actively participated in conferences in Washington, D.C., Los Angeles, Las Vegas, Phoenix and many other places in the United States. These conferences were often lengthy conferences, sometimes for several days and at other times for weeks and months. They consisted of some of the best electrical engineers, experts, and accountants, and of some of the best lawyers in the United States, and were attended by from 10 to 50 of such engineers, experts, accountants, and lawyers, including also those of the Bureau of Reclamation and the Department of the Interior of the United States. Not only every section of said Boulder Canyon Project Act and of said new Boulder Canyon Project Adjustment Act, but also every sentence, every phrase, every clause, and almost every word therein were

considered and discussed in detail in said conferences. Even the prepositions therein were so considered and discussed. It was I who suggested and initiated the plan for the commutation (estimate, or calculation) in the new Boulder Canyon Project Adjustment Act, of the 37½% of the excess revenue, if any, during the period of amortization as provided for in the old Boulder Canyon Project Act, into a definite and certain fixed annual revenue to each of the States of Nevada and Arizona in lieu of said indefinite and meaningless provision of the old Boulder Canyon Project Act. It was understood and agreed upon by all concerned that this commutation did not change in anyway whatsoever the theory of "compensation for taxes lost" upon which said 37½% to the States of Nevada and Arizona, as provided for in the old Boulder Canyon Project Act, was based. It was understood and agreed that this annual payment of said \$300,000 was still in "compensation for taxes lost"--not a gift or donation in any sense of the word. Having sat in and actively participated in all of these conferences, I know the purposes for which this money should be used. There was not, therefore, any doubt in my mind on this point. The opinion was based, however, solely upon the question of the constitutionality and validity of said chapter 141, not upon the policy to be served by it. After studying the inquiry made of me, I was just as certain and positive that said chapter 141 is constitutional and valid as I have ever been of any law point in my life. There was not the slightest doubt in my mind on this point. There was not, therefore, any reason why I should "pass the buck" of deciding this matter to even a court of the State by submitting this point upon which I was so certain and positive to any court. There are, however, certain reasons why the constitutionality and validity of said chapter 141 should be submitted to the Supreme Court of this State and a final determination of this matter obtained by that court. That was not the point, however, upon which this office was asked for its official opinion. The inquiry limited our opinion solely to the question of whether said chapter 141 was and is constitutional and valid. Believing as I did as expressed in my said letter opinion to the State Treasurer, it would have been neither honest nor fair to the State Treasurer for me to have held otherwise than as so expressed, and to have put Clark County, which I held was entitled to this money, to the time, expense, and inconvenience of testing the constitutionality and validity of that Act in the courts. Certainly, all will concede that the test in the courts should be made by some person who believes the Act to be unconstitutional and invalid, not by one having a contrary view. They have had many months within which to do so.

Some publicity has been given to a statement that certain people of Clark County desire a court test of the right of Clark County to participate in these annual payments. My understanding is that they are not so much interested in having the constitutionality and validity of this particular chapter 141 tested in the courts as they are in having the entire question of the right of Clark County to participate at all in these annual payments, and particularly the amount or percentage of each of these annual payments Clark County is entitled to receive, so tested. In other words, they are not satisfied with the 20% of such annual payments as provided for in said chapter 141, and desire the Supreme Court of the State finally to pass upon and determine whether Clark County has any "legal claim" to any of this money and, if so, the amount or percentage of such annual payments upon which Clark County has such a legal claim. The fact of the matter is that, if Clark County has any "legal claim" upon said moneys, the courts would probably determine that the amount or value of any such "legal claim," if it were not for said chapter 141 or if that chapter be repealed, should be determined by the relationship between the State tax rate and the Clark County tax rate. If the court should so determine, Clark County

would certainly get much more than 20% of such moneys, probably 3 or 4 times as much as the State gets. Since the Legislature has spoken by enacting said chapter 141 and therein designated the percentage or amount of said annual payments Clark County shall have, the court might very properly leave this matter of policy as expressed in that Act of the Legislature so long as that chapter remains in force and effect, and not interfere with the policy so established by the Legislature in enacting said law and the Governor in approving it. This is a matter to which those who object to these payments to Clark County should give serious consideration in determining whether they desire a court test of Clark County's right to this money.

*Effect of This Payment to Clark County on Amount of Taxes in Remainder of State.*

This payment of \$60,000 to Clark County instead of spreading it over the entire State by depositing the entire \$300,000 in the General Fund of the State Treasury has little effect upon the amount of the taxes paid and to be paid by the taxpayers of the remainder of the State. Actual figures show that the repeal of said chapter 141 and spreading the \$60,000 over the entire State by depositing the whole \$300,000 annual payment in the General Fund in the State Treasury instead of paying the \$60,000 to Clark County would reduce the taxes to be paid by any taxpayer in any other portion of the State than Clark County, whose property is assessed at a valuation of \$3,000 (actual value about \$6,000), only eighty-five cents (85 cents) each year, which would be a reduction of each quarterly installment of his taxes of only twenty-one cents (21 cents). In other words, such a taxpayer in any other portion of the State than Clark County would lose only about the price of one cigar quarterly by compliance with the provisions of said chapter 141. An assessed valuation of \$3,000 on a taxpayer's property is considerably more than the average assessed value of the property of private persons.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

The following is a rewrite of my said letter opinion of February 5-14, 1942, to the State Treasurer, eliminating the portions thereof and making the changes in form but not in substance and effect relating thereto as expressed in the first two paragraphs of this note:

STATEMENT

On January 22, 1942, I read an item in the Reno Evening Gazette which stated, in effect, that the State Treasurer had received a check from the Comptroller General of the United States in the sum of \$300,000 to pay the first year's share of the amount allotted to this State pursuant to the so-called Boulder Canyon Project Adjustment Act (54 Statutes 774, which is now compiled at U. S. C. A., Title 43, secs. 618-618o). This was for the annual payment due and payable to this State pursuant to that Act for the year of operation ending May 31, 1938.

The 1941 Legislature of this State had enacted and the Governor approved a State law known as chapter 141, 1941 Statutes of Nevada, page 341, in which the State Treasurer was instructed and directed to accept the whole of each of such annual payments, and to immediately

transmit to the County Treasurer of Clark County 20% thereof, and then deposit the remainder thereof in the General Fund of the State in the State Treasury.

Said chapter 141 is in the following language:

SECTION 1. If and when said Boulder canyon project adjustment act becomes effective, and whenever and as often as any payments are made to the treasurer of the State of Nevada, the said treasurer shall accept the same and shall immediately pay out of any such payments so received, to the county treasurer of Clark County, State of Nevada, twenty percent (20%) of said sum, and the balance of any such payments shall be placed by the said state treasurer in the general fund of the State of Nevada.

SEC. 2. Any sums received by Clark County under the provisions of this act shall be placed in the general fund of said county.

Said news item stated that the State Treasurer and State Controller were both of the view that said chapter 141 was unconstitutional and invalid upon the ground that it is in conflict with Nevada Compiled Laws 1929, section 7534, which provides for the payment of moneys out of the State treasury only on a Controller's warrant; and that the Attorney-General agreed with them on this point. The fact of the matter was that the Attorney-General had never read and did not even know that the Legislature had enacted and the Governor approved said chapter 141, or any similar law.

Said news item was, therefore, news to the Attorney-General, not only that said chapter 141 had been enacted and approved into law, but also that the Attorney-General or anyone else was of the opinion that it was unconstitutional or invalid. It was not only erroneous on both points, insofar as the Attorney-General's views were concerned, but also was actually misinformation so furnished the public on both points, and was misleading.

*Grounds for Early Doubts of State Treasurer and State Controller of Constitutionality and Validity of Act.*

The ground upon which the State Treasurer and State Controller feared said chapter 141 was unconstitutional and invalid, according to said news item and also the letter of the State Treasurer to the Attorney-General of January 24, 1942, asking the Attorney-General for his official opinion, was that said old section 7534 provides that money from the State Treasury shall be paid out only on Controller's warrants, while said chapter 141 does not require a Controller's warrant for such payments to Clark County. As a matter of fact, both said section 7534 and said chapter 141 are mere statutory enactments, and either of them may be amended or repealed at any time by any session of the Legislature. Said section 7534 is a very old law. It was enacted by the Legislature and approved by the Governor of this State and became the law of this State in 1866, which was the second session of the Legislature of this State after Nevada was admitted to the Union. It was amended at least once, showing that it was and is not necessarily irrevocable in its original form. This amendment was also quite early in the history of this State, that is to say, away back in 1897, and said section as amended has been the law of this State ever since that

time; and the record does not show that anyone up to this time has ever questioned the right of the Legislature to amend said section 7534.

There is no provision in the Nevada Constitution similar to the provisions of said old section 7534 as amended. There is not anything, therefore, in the Constitution which prohibits the Legislature of this State from amending or even repealing said old section 7534. There is nothing in the Constitution of this State which prohibits the Legislature from providing any other method for the payment of money out of the State Treasury than Controller's warrants. In fact, we have several laws of this State which actually do provide a different method of payment of money out of the State Treasury even after it is deposited therein than by Controller's warrants.

### INQUIRY

As we understand your letter of 24th ultimo and your telephone conversation with me on 5th instant and your conversation with our Mr. Mathews on 6th instant, you request the official opinion of this office on the points of law covered by the following question:

Can the State Treasurer lawfully and constitutionally pay directly to the County Treasurer of Clark County the twenty percent (20%) of the payment received by such State Treasurer under the Boulder Canyon Project Adjustment Act without the State Controller issuing his warrant therefor, and will such payment comply in all respects with the law

### OPINION

A short, sufficient, and complete answer to the above-quoted inquiry is the single word "yes." Our invariable policy and custom, however, is to give those to whom we furnish official opinions, and the public generally who have enough interest in these matters to read our official opinions, not only the statutory law involved but also the pertinent provisions of the Constitution of this State and of the decisions of the Supreme Court of this State and of other courts of last resort dealing with the question involved and upon which our official opinions are based. It is also our policy and custom to include in such official opinions the factual background thereof and the reasons upon which our official opinions are based. We shall follow this policy and custom in this opinion, as the question involved is an exceedingly important one both to the entire State of Nevada and the people thereof and also to Clark County and its people, involving as it does a total of fifteen million dollars to the State of Nevada and, if said chapter 141 remains the law of this State as it now is, a total of three million dollars to Clark County and its people, during the period of 50 years through which these annual payments of \$300,000 are to be paid.

It should be kept in mind, however, that this official opinion is complete at the beginning of the subheading hereof entitled "Statements Made to Congress and Congressional Committees Showing Why Said Annual Payments Are Made to the State," page 65. That portion hereof after said subheading, page 65, deals with and quotes statements made by Senators Pittman, Ashurst, Hayden, and others on the floor of Congress and before congressional committees as to the purposes for which Congress provided for these annual payments to and for use in Nevada and Arizona, and the use to be made of this money, in said old Boulder Canyon Project Act and in



said new Boulder Canyon Project Adjustment Act. Since it is known by all who know anything at all about this congressional legislation that we could never have gotten anything at all through Congress without the representations made by these representatives of ours, and which were in the nature of and considered by them as promises or pledges as to how this money would be used in these States, we believe that the State Treasurer, State Controller, and all the people of this State are entitled to a full, exact, and correct statement of these representations, and that no one can possibly arrive at a just, fair, and proper determination of what the State of Nevada should do with these annual payments of \$300,000 without having this information and carefully studying it. It is for that reason that we make their statements in this regard and the discussion thereof a part of this official opinion.

*Provisions of Chapter 141 Not Prohibited by Constitution.*

As heretofore stated to you by the Attorney-General, there is absolutely no provision in the Constitution of this State making Controller's warrants mandatory in order lawfully to draw money out of the State Treasury. The Constitution is silent insofar as making Controller's warrants necessary to draw money out of the State Treasury. The manner of paying money out of the State Treasury was left, therefore, by the framers of our Constitution to be controlled by statutory laws enacted by the Legislature and approved by the Governor of this State. That is a matter of public policy which is left by the Constitution to the Legislature and Governor in office at the time to be handled in whatever manner they may deem proper at that particular time, and as they may see fit and for the best interests of the public. The Legislature and Governor are, therefore, left free by the Constitution to enact such laws as they deem proper, prescribing the method of drawing State money out of the State Treasury even after it has been deposited therein.

This entire matter is, therefore, statutory. There is nothing in the Constitution even slightly similar to the provisions of said old section 7534, as so amended. The requirement of Controller's warrants for such withdrawals or expenditures is, therefore, wholly statutory. There is no such constitutional limitation.

*Statutory Laws Always Subject to Amendment or Repeal.*

It is absolutely fundamental that any law enacted by the Legislature of this State may be amended by it or any future Legislature at any time. Such amendment may be either by express language referring to the law so amended or by enacting a later law which is in irreconcilable conflict with it. The last law enacted by the Legislature and approved by the Governor on a given subject, if otherwise constitutional, is the law of the State, and amends or repeals prior laws which are in irreconcilable conflict with such last legislative expression.

Even if the whole of said \$300,000 had actually been deposited in the State Treasury (but it had not, in fact, then been so deposited) said chapter 141 would certainly be in irreconcilable conflict with said old section 7534 as so amended, and would, therefore, amend the latter by expressly providing a wholly different method of payment in that the former does not require a Controller's warrant for the payment of 20% of all such moneys received under said Boulder Canyon Project Adjustment Act to the County Treasurer of Clark County. It must be kept in

mind, however, that, under said chapter 141, the 20% to be paid by the State Treasurer to the County Treasurer of Clark County is not deposited in the State Treasury at all. It never actually reaches the State Treasury. The State Treasurer himself (the man holding the office) is the way station or temporary stopping place of all this money under said chapter 141 on its journey to its destination. This new law makes him the distributing agent of the State. It is mandatory and directs him as to exactly what he shall do with all such moneys so received by him from the Federal Government under said new Boulder Canyon Project Adjustment Act. He has no choice. It tells him exactly what to do with the money. The fears or doubts of the State Treasurer and State Controller to the effect that said chapter 141 was unconstitutional and invalid because of their idea that it is in conflict with said old section 7534 as so amended were, therefore, without foundation, as shown by the authorities hereinafter cited. The State Treasurer was so informed by me the very day I received his letter of January 24, 1942, requesting my opinion, and he, in turn, so informed the State Controller and Reno Evening Gazette and it, in turn, informed its readers. Everybody, therefore, who objected to this payment to Clark County, and kept in touch with the situation, had ample time (about a month) within which to test its right to it before it was actually paid. At that time the State Treasurer informed me of the method he could use in transmitting to the County Treasurer of Clark County its share of said money.

*Legislature's Power to Enact Laws Unlimited Except by Constitution.*

The authority to enact laws for this State is vested solely in the Legislature. The Legislature possesses unlimited legislative power, except as limited by the Federal Constitution and such restrictions as are placed upon it by the State Constitution. Within the sphere of legislation, the Legislature is the exponent of the popular will and endowed in this respect with all the power which the people of the States themselves possessed at the time of the adoption of the Constitution, and which the people possessed at the time of the enactment of chapter 141, Statutes of 1941. Constitution of Nevada, Art. IV, Sec. 1; State v. Arrington, 18 Nev. 415; Gibson v. Mason, 5 Nev. 284, 295, 299 (whole case good).

*Duty to Support.*

As to the length the courts will go to sustain Acts of the Legislature of this State, I quote as follows:

\* \* \* The safest and best rule, and that most in harmony with our form of government and its distribution of power, is to maintain the supremacy of the legislature while acting in its law-making capacity, and uphold all laws enacted by it which are not in conflict with some provision of the federal or state constitutions. Nor are these views unsupported by authority. They are justified by the decisions of the ablest courts and the opinions of the most distinguished judges of the land.

\* \* \* The supreme court of the United States, in the case of Satterlee v. Matthewson, (2 Pet. 380) admitted the law under consideration to be unjust, but because not in conflict with an express constitutional provision it was upheld. And again, in Fletcher v. Peck, 6 Cranch, 87, it was said that while not transcending the

constitutional limits, even the passage of a law by means of corruption would not invalidate it. We conclude, then, upon principle and the weight of authority, that although a law may be opposed to the first principles of right or natural justice, still, if not in conflict with some constitutional provision, State or Federal, the Courts have no power to annul or set it aside. All arguments, therefore, founded upon the injustice or hardships of the act in question are entirely out of the case.

\* \* \* it may as well be stated in the outset that the law cannot be declared unconstitutional unless it be clearly, palpably, and plainly in conflict with some of the provisions of the Constitution. This is a rule recognized by all the courts, and probably has never been questioned. *Ash v. Parkinson*, January Term, 1869, and cases there cited. *Gibson v. Mason*, [5 Nev. 295](#), 299.

The people, and through them the Legislature, have supreme power in all matters of government when not restricted by limitations of our Constitution. [Wallace v. Mayor of Reno, 27 Nev. 71](#); [Ex Parte Boyce, 27 Nev. 299](#); [State v. Dickerson, 33 Nev. 540](#).

The power to make the law must necessarily carry with it the right to judge of its expediency and justice. *Gibson v. Mason*, supra; [School Trustees v. Bray, 60 Nev. 34](#) (decided 1941).

The possible abuse of legislative power is no argument against either the existence of such power or the exercise thereof when not prohibited by the Constitution. [State v. Irwin, 5 Nev. 112](#).

#### *Law Involved--Chapter 141.*

We believe it helpful to here quote said chapter 141, 1941 Statutes of Nevada, in full in order that the exact language thereof may be closely connected with our discussion of its provisions. It is exceedingly short, plain, clear, concise, and comprehensive. It contains only two (2) short sentences. Each section contains only one (1) sentence, and the entire Act is as follows:

SECTION 1. If and when said Boulder canyon project adjustment act becomes effective, and whenever and as often as any payments are made to the treasurer of the State of Nevada, the said treasurer shall accept the same and shall immediately pay out of any such payments so received, to the county treasurer of Clark County, State of Nevada, twenty percent (20%) of said sum, and the balance of any such payments shall be placed by the said state treasurer in the general fund of the State of Nevada.

SEC. 2. Any sums received by Clark County under the provisions of this act shall be placed in the general fund of said county.

It is the shortest law we have ever seen, except a few repealing Acts. It is so clear that it can hardly be misunderstood or misinterpreted or misconstrued. It is mandatory both as to the

State Treasurer and the County Treasurer of Clark County, and as to what each of them shall do with this money, and, in fact, earmarks it as to the fund into which each of such treasurers shall place this money, both as to the State's portion and as to the county's portion. Language could not be plainer or clearer. It is impossible for anyone with even ordinary intelligence to misunderstand it. It needs no interpretation or construction. Its meaning is as clear as language could make it.

As to the State Treasurer, it provides only the following three things, and all three of these things are mandatory upon the State Treasurer:

(1) The State Treasurer *shall* "accept" the money when and as often as any payments are made to him under the provisions of said Boulder Canyon Project Adjustment Act;

(2) he *shall* "immediately pay out of any such payments so received to the county treasurer of Clark County, State of Nevada, twenty percent (20%) of said sum"; and

(3) place the "balance" in the general fund of the State of Nevada in the State Treasury. (Italics ours.)

As to the County Treasurer of Clark County, section 2 of said chapter 141 mandatorily requires such County Treasurer to place the twenty percent (20%) thereof so received by him from the State Treasurer in "the general fund of said county."

Your said letter to me of 24th ultimo and our conversations show positively that you understood this language exactly as I have above stated, and that your only doubt and difficulty is that you appear to fear that said chapter 141 conflicts with said old section 7534 inasmuch as the latter requires a Controller's warrant before payments can be lawfully made out of the State Treasury, and said new chapter 141 does not seem to require such a Controller's warrant. You said in the third paragraph of your letter that there has been some "suggestion that it runs counter to the provisions of section 7534 Nevada Compiled Laws 1929." Even so, said chapter 141 must prevail since it is the last expression of the Legislature on this point and *deals with money not yet in the State Treasury and which cannot be lawfully placed in the State Treasury since chapter 141 is a valid and constitutional law*. The fact remains, however, that *after* said twenty percent (20%) of the money so paid the State Treasurer (\$60,000) has been deposited by the State Treasurer in the General Fund in the State Treasury, said section 7534 does and will apply to the payment of said \$240,000 out of the State Treasury. In other words, said \$240,000 *after* it has been deposited in the State Treasury must be paid out only on the Controller's warrants, as is provided for in section 7534.

*No Conflict--Different Methods Authorized.*

We are of the unqualified opinion that there is absolutely no conflict between these two laws, when the position and nature of the moneys involved in each of these instances is considered. The money dealt with under said old section 7534 is money which is already on deposit in the State Treasury at the time of its disbursement. The money received by the State Treasurer under said chapter 141 is not yet in the State Treasury at the time it is dealt with in that

chapter, and certainly cannot be lawfully placed in the State Treasury until after said twenty percent (20%) thereof has been paid by the State Treasurer to the County Treasurer of Clark County; and even after such payment to the County Treasurer only the remainder of the payment may lawfully be deposited in the State Treasury.

Since said old section 7534 is a mere statutory law, not a provision of the Constitution of this State, and there is no provision of our Constitution limiting the payments to be made even out of the State Treasury to cases where Controller's warrants are issued, the Legislature of this State had ample right, power, and authority to provide another and different method for the disbursement of funds out of the State Treasury, even if this payment had, in fact, been lawfully deposited in the State Treasury. In other words, the Legislature is free to provide whatever method it sees fit for the payment of moneys out of the State Treasury. Certainly, nobody will question the right, power, and authority of the Legislature to absolutely repeal any law enacted by it. It has the same absolute right, power, and authority to amend any law enacted by it. Such repeals or changes in the law by amendment may be made by any Legislature of any law enacted by itself or by any other Legislature. In other words, any Legislature of this State has had the absolute right, power, and authority, when in regular session, to repeal or amend said old section 7534 any time at all since February 24, 1866.

It is fundamental that the Legislature may validly and constitutionally provide for such a different method of disbursing this \$300,000 payment, and similar payments to be made under the Boulder Canyon Project Adjustment Act, from that provided for by said old section 7534, and, in fact, without even referring to said section 7534. Where the same Legislature or two different Legislatures enact laws relating to the same subject which are constitutional and they are contrary to and irreconcilable with each other, then the last law on the subject enacted by the Legislature and approved by the Governor prevails, and repeals or changes the old law as provided for in the new law, and that even without mentioning the old law. Such is the universal holding of all the courts of last resort. Norcross v. Cole, 44 Nev. 88, especially 91-93.

Where there are two acts upon a given subject, the rule is that in case they can be harmonized both will stand; *but, if the statute last enacted does not violate a constitutional inhibition but is inconsistent with the prior act, the latter act will control.* Norcross v. Cole, 44 Nev. 92.

Said chapter 141 simply provides a different method of disbursing, or rather of distributing, the money before it has been deposited in the State Treasury from that provided for in said old section 7534 which relates solely to State money which has already been deposited in the State Treasury and specifies the method of disbursement thereof after it has already been so deposited.

*Policy Recognized--Not Isolated Case.*

There are other instances where the Legislature by its enactment and the Governor by his approval thereof have exercised their constitutional right of providing for payments even out of the State Treasury without Controller's warrants, as hereinafter shown; and such payments out of

the State Treasury have been made without Controller's warrants for several years, and are even now being so made without any objection. Why this objection? It must be one to the legislative policy--not one of Constitution and law.

The portion directed to be paid to the County Treasurer is, so long as it is held by the State Treasurer, simply a special fund in his custody which belongs to Clark County for certain purposes of that county and as such special fund is not property of the State. Such portion of such money, while in his custody, occupies the same status as the Nevada Industrial Fund denominated as the "State Insurance Fund" occupied in State v. McMillan, 36 Nev. 383, wherein the Supreme Court held that even though the fund was paid into and actually deposited in the State Treasury, still it was not State money nor subject to be paid out on Controller's warrant, but that it was a special fund placed in the custody of the State Treasurer, as distinguished from the general taxes and revenues of the State, and was subject to withdrawal in accordance with the Nevada Industrial Insurance Act without Controller's warrants. Such is still the law and method of payment thereof in this State. The Court in the course of its opinion in that case said, among other things:

\* \* \* But if the fund be regarded as a special one, placed in the hands of the state treasurer for safe keeping, in trust for employees injured and the dependents of employees who are killed, and as separate from the state treasury, presentation of claims, to, or action by, the board of examiners or the controller is not required by these general laws relating to claims against the state treasury, or otherwise, for the Nevada industrial commission act does not provide that claims against the state industrial insurance fund shall be presented to the board of examiners or to the state controller.

The fact that the state treasurer is made the custodian of the fund does not necessarily make it a part of the state treasury.

The state insurance fund should be regarded as separate from the state treasury, as are county and city funds, which are derived under general or special acts of the legislature. The "state treasury" has a well-understood meaning, which does not include such a special fund as this one, providing for injured employees and their dependents, and we conclude that the requirements for presentation of claims against the state treasury to the board of examiners and the controller do not apply to the state insurance fund.

This office in Opinion No. 268, dated August 27, 1938, with respect to the payment of unemployment compensation contributions from the Unemployment Trust Fund actually on deposit in the State Treasury held that such funds or money could be lawfully withdrawn and expended without Controller's checks or warrants. That method has been used ever since that time without any objection from the Controller or anyone else.

In *State v. Olson, 175 N. W.*, the Supreme Court of North Dakota had under consideration the identical situation as our Supreme Court in the *McMillan* case above cited.

The North Dakota constitutional provision with respect to appropriations and statutory provisions providing the duties and powers of the State Auditor (comparable to our Controller) were identical with the Nevada constitutional and statutory provisions. That Court said:

The Workmen's Compensation Fund is a special fund, and is not a State fund. Hence the Legislature had the authority to designate such public officials as to it seemed proper, and impose upon them the duty of disbursing such fund in accordance with the provisions of the law, and had authority to prescribe the manner of the disbursement, as by vouchers, warrant, etc. The fund not being a public one, the State Auditor would have no authority to draw warrants thereon, unless specifically authorized so to do by the law under the provisions of which the fund is accumulated; the manner of disbursing the fund is specifically provided for in paragraph 1 of section 13 of the Act, which is above set forth. The Legislature had authority to provide for the disbursement of the fund in that manner, and the same is neither illegal nor unconstitutional.

*Appropriation Unnecessary for Moneys Until Actually Deposited in Treasury--Other Officers' Checks or Warrants Are Honored.*

In *State v. Kansas State Highway Commission*, 32 Pac. (2d) 493, decided May 3, 1934, the Supreme Court of Kansas dealt with the question of the necessity of an appropriation by the Legislature of moneys used in the construction of highways and the withdrawal thereof from the treasury in a manner other than upon warrants issued by the Highway Commission, the money in question being in excess of \$17,000,000 and obtained from the United States. The Kansas constitutional provision with respect to appropriations is identical with ours. The Court held that such constitutional provision prohibiting withdrawing of money from the State Treasury, except in pursuance of specific appropriation made by law, was inapplicable to *public funds not required by some constitutional or statutory provision to be deposited in the State Treasury*; that a legislative appropriation of such undeposited funds was not necessary; and that such funds may be paid to the State Treasurer to be disbursed under proper direction of *other* officials.

*Appropriation--Necessity of.*

We apprehend that it may be thought that article IV, section 19, of the Nevada Constitution, reading, "No money shall be drawn from the treasury but in consequence of an appropriation made by law," now prevents the carrying out the provisions of said chapter 141, because (1) there has not been an appropriation made from which the Treasurer of Clark County could be paid; and (2) there is no authorization for the State Controller to draw his warrant for such payment contained in the Act.

Even if it could be lawfully said that a specific appropriation by the Legislature in this matter is necessary, the language contained in said chapter 141, reading, "shall immediately pay out of any such payments so received to the Treasurer of Clark County, State of Nevada, twenty percent (20%) of said sum," certainly constitutes as definite an appropriation of money from the State Treasury as could be required by the word "appropriate," as the word "appropriate" has been construed by the Supreme Court of Nevada in the following cases; State v. LaGrave, 23

Nev.. 45; McCracken v. State, 41 Nev.. 49, particularly page 58; Norcross v. Cole, 44 Nev.. 88.

*Anticipated Money--This Is Same Situation as are Moneys Generally Appropriated by Legislature.*

At the time of the enactment of chapter 141, and for many months thereafter, no money had been received by the State Treasurer to be administered according to its terms. The Legislature, *anticipating* the receipt of the money, divested the State of title to and ownership of twenty percent (20%) of such money prior to its receipt by the State Treasurer and directed payment thereof directly to the County Treasurer of Clark County. It was and is only after the payment to the County Treasurer that any part of the payment received by the State Treasurer is directed to be deposited in the State Treasury. Said chapter 141 contains no provision directing the State Controller to draw his warrant for the payment directed to be made to the County Treasurer. But, as to this the Legislature was and is presumed to know the provisions of the law about which it legislates and, therefore, knew that the State Controller was generally authorized by law to draw his warrants upon moneys appropriated by the Legislature. This authority of the State Controller, however, is purely statutory, and, as we have above stated, may be changed from time to time by the Legislature. Further, the power and authority vested in the State Controller by legislative enactment in the general law pertains to his statutory power to examine *claims against the State* the payment of which is to be made from *moneys actually then on deposit in the State Treasury which have been appropriated for the payment thereof.*

From all of the foregoing authorities, the conclusion must be that the Legislature, having the constitutional power so to do, has in chapter 141 signified its will and intent to be:

1. That twenty percent (20%) of any payment made pursuant to the Boulder Canyon Project Adjustment Act shall belong to Clark County.
2. That the State Treasurer shall “accept” the payments made pursuant to the Boulder Canyon Project Adjustment Act.
3. That immediately upon receipt of any such payment he shall pay to the County Treasurer of Clark County twenty percent (20%) thereof as and for money belonging to Clark County, and without reference to section 7534 Nevada Compiled Laws 1929.
4. That the Legislature constituted itself the authority to direct the State Treasurer to pay the money to the County Treasurer of Clark County without reference thereof to the State Controller or the necessity of a Controller’s warrant.
5. That the balance then remaining shall be deposited in the General Fund of the State in the State Treasury as State money and thereupon become subject to withdrawals and disposition by Controller’s warrants as the general laws of the State now provide, or as succeeding Legislatures may provide.

*Law Is Constitutional and Valid.*



It is, therefore, my opinion that the State Treasurer is constitutionally and lawfully directed and fully empowered by said chapter 141, Statutes of 1941, to transmit to the County Treasurer of Clark County twenty percent (20%) of the said payment of money so received by him pursuant to the Boulder Canyon Project Adjustment Act by means of a properly drawn cashier's check or certified check without first obtaining the State Controller's warrant therefor. Said direction is mandatory upon the State Treasurer.

*Duplications More Apparent Than Real.*

We believe a careful study of this opinion will reveal the fact that each apparent duplication herein is set forth as the premise or basis of a somewhat different proposition of law or of fact which someone might otherwise believe should result in a different conclusion of law and opinion. In view of the importance of this matter because of the fact that these annual payments of \$300,000 will continue to be made over a period of the next 50 years (including this payment) making a total of said payments of the somewhat enormous sum of fifteen million dollars (\$15,000,000), it seemed to us advisable to cover in this one opinion all situations which might occur to the minds of the officers involved, as well as to the minds of the other people of the State who might be sufficiently interested in the matter to inform themselves of the pertinent facts necessary to a proper and complete understanding of the law and of the points included in this opinion. For the foregoing reasons and the fact that there are many other pressing official duties in this office to be performed by the Attorney-General and his deputies, we assume that no reasonable person who desires to base his views and comment on real information rather than misinformation or lack of correct information will object to the length of this opinion or of time it has required to prepare this opinion, which has required a great deal of time and research, especially in view of the fact that the courts are given by law ninety (90) days after the hearing of sworn testimony, the filing of three (3) extensive briefs and the hearing of oral arguments, in many instances, to prepare and file their decisions in matters presented to them. While our opinions are not as final as are theirs, we are certainly just as careful and just as anxious as they are to have our opinions correct. We are glad to say, however, that courts do not often require the entire time allowed them by law to decide cases presented to them; but it is always a wholesome situation to give plenty of time for such matters as it is always far better to do a thing right than it is to do it quickly.

*Defects in Legislative Procedure--Bound by History Endorsed on Enrolled Bill.*

We have examined the legislative history of this law (Assembly Bill 298) as endorsed by the legislative attache\_s on the bill itself. This is as far as we are authorized to go in this matter of legislative procedure and history, as the Supreme Court of this State has decided in several instances that even the courts cannot go further in determining the validity of a law. We must assume as to members of the Legislature, as well as to all other officers, that they properly perform their official duties. Like all other officers, that they properly perform their official duties. Like all other officers, they take the regular oath of office in which they swear that they will "well and faithfully perform all the duties" of their respective offices. Having so sworn, the law and the decisions of courts require us to assume they did "well and faithfully perform all of

the duties” of their respective offices. Three (3) of these decisions of the Supreme Court of this State in which it held that even the courts cannot go *behind* the enrolled bills in determining the validity of laws, except, of course, to construe the language of the Constitution and laws involved, are as follows: State v. Swift, 10 Nev.. 176; State v. Nye, 23 Nev.. 99; State v. Beck, 25 Nev.. 68.

*Legal Claim Against the State -- Presentation to State Board of Examiners.*

As to the suggestion that “*if*” this money paid to Clark County be a “claim” or legal claim by Clark County against the State of Nevada the Legislature had no power to “pass upon” it until the State Board of Examiners had acted upon such claim, we are definitely of the unqualified opinion that this is not a situation which constitutes such a legal claim or demand by Clark County against this State which requires the presentation thereof to the State Board of Examiners under the terms of article IV, section 21 of the Nevada Constitution (Nevada Compiled Laws 1929, sec. 107) as heretofore held by me. At the time I was called before the legislative committee of the Senate in 1939 and again when I was called before the Assembly Committee and the Senate Committee having under consideration the original bills relating to the division of this money between the State and Clark County, I expressly and positively stated that, in my opinion, there was no “legal obligation” on the part of the State to allocate any of this money to Clark County, but only a moral obligation on the part of the State to do so in order to carry out the representations made by our own Senator Key Pittman on the floor of the Senate and before congressional committees and hearings before the Department of the Interior on many occasions to the effect that this money was not a gift or donation, but solely to compensate for taxes lost to the State and its political subdivisions (Clark County) by reason of the fact that the property constituting Boulder Canyon Project was constructed and is permanently owned by the Federal Government and is hereby rendered tax-exempt, whereas such property would be taxable if privately owned. This is simply another way of saying that, in my opinion, Clark County has no such “legal claim” or demand against the State for this money, or any portion of it, as would require a presentation thereof to and action thereon by the State Board of Examiners. I stated at those times that, in my opinion, there was a strong “moral obligation” on the part of the State to carry out the representations so made by Senator Pittman and so relied upon by the power contractors and power users, and by Congress, when they consented and provided by law that the States of Nevada and Arizona should have this money to compensate for taxes so lost to them and their political subdivisions. That is still my unqualified opinion. I also stated at that time that it was only by this representation that this money was to be so used to compensate for taxes so lost that we obtained this concession and thereby this money, and that I was absolutely sure that we would never have obtained this money if it had not been for the representations so made by Senators Pittman, Ashurst, Hayden and others and so relied upon, and that we would never have gotten any of this money upon the theory that it was a “gift or donation.” That is still my unqualified opinion. I obtained this knowledge (and it is absolute knowledge) from actual and almost constant contact and discussion of this particular matter during the period of the last eight years or more in many conferences and discussions, each continuing over periods of from several days to several months. In these conferences and discussions by the power contractors and users, the Reclamation Bureau, the Department of the Interior, members of Congress, and representatives of the Seven Colorado River Basin States, every section, paragraph, sentence,

clause, and phrase and almost every word of what is now the Boulder Canyon Project Adjustment Act under which we obtain this money were rewritten many times, this portion of it at least 100 times, before it was in such form as satisfied these people who are actually paying this \$300,000 annually to the State of Nevada to so compensate the State and Clark County for taxes lost by them. Each of the experts and other people attending such conferences had his own views not only as to the substance of what should be contained in said Adjustment Act but also as to the language used to express the ideas and purposes intended, and even as to the punctuation to be used. In addition to the discussions had at such conferences, there was voluminous correspondence among the various representatives and others interested in the matter. It is simply impossible for anyone with the slightest degree of intelligence to have participated in such conferences and correspondence, as I have done, without knowing definitely and positively that it was the intention of the parties involved that this money was to be used in Nevada for the above-mentioned purposes.

There is enough left in the Boulder Canyon Project Adjustment Act as enacted by Congress and approved by the President to show that it was the definite and unquestionable intention of Congress (and of the power contractors and users who actually wrote the Boulder Canyon Project Adjustment Act as originally introduced in Congress by our own Congressman Serugham and who actually pay this money) that this \$300,000 annually is to compensate not only the State but also Clark County for all taxes lost by both of them by reason of the fact that this project and the property constituting it is federally owned and, therefore, exempt from taxation.

Immediately following the provision of said Boulder Canyon Project Adjustment Act in section 2(c) thereof requiring this payment of \$300,000 annually for a period of fifty (50) years, there is a subparagraph which is a part of the same section and paragraph requiring such annual payments and which quite definitely establishes the fact that it was the intention of Congress and of the power contractors, allottees and users that actually pay this money that said \$300,000 annually shall be all that shall be required to be paid to compensate for taxes lost, to both the State and Clark County during said period of 50 years.

The principal power contractors, allottees, and users refused to sponsor and assist in securing passage of the Act and to enter into new contracts under the new Boulder Canyon Project Adjustment Act until such a provision was written into the Act itself. They all had contracts for their allotments of the power generated and to be generated at the plant, all or practically all of which were made and entered into away back in 1930; and those contracts were under the old Boulder Canyon Project Act and were authorized by the Federal Government and Congress and signed by the Department of the Interior. It is fundamental that not even Congress may lawfully and effectively enact a law which impairs the obligations of existing contracts. For all these reasons, it was necessary to write such a provision into the new Adjustment Act. Without it, these principal power contractors, allottees, and users who insisted upon this provision would not have supported the Act and would have gotten their representatives in Congress to oppose it, and that, in turn, would have defeated the Act. In addition to that situation, they would not have released their old contracts and entered into new contracts under the new Act; and this also would have absolutely defeated the purposes of the new Act and

prevented our getting this \$300,000 annually for the next 50 years to compensate the State and Clark County for taxes lost.

*Claims Which Require Action by Board of Examiners Before Legislative Appropriation.*

What constitutes such a “legal claim” or demand against the State as to require action by the State Board of Examiners before the Legislature may constitutionally appropriate money for the payment of that claim or demand?

It should be noted that no one has positively and frankly stated that Clark County’s participation in this money constitutes such a “legal claim” or demand as to require action by the State Board of Examiners as a condition precedent to the appropriation of money to Clark County by the Legislature. The use of the word “if” in connection with the suggestion that “if” the money so distributed to Clark County is to be considered a “claim” by that county against the State, the Legislature was without power to distribute this money to Clark County until the State Board of Examiners had acted upon the matter, raises the inference that there is in the mind of the person making such suggestion a possibility that the Legislature had no authority to distribute this money to Clark County by the enactment of said chapter 141 or some doubt on the point. It is our opinion, as hereinbefore expressed, and as expressed by us many times prior to the giving of this official opinion, that the right of Clark County to participate in this money is not a “legal claim” or demand against the State, or any other kind of a claim or demand, which requires the action of the State Board of Examiners as a condition precedent to, or as a foundation for, this legislative action. It should be kept in mind always, in dealing with problems of this nature, that it is not every claim against the State which requires action by the State Board of Examiners. The Nevada Constitution itself expressly excepts from the claims which must be acted upon by the State Board of Examiners all “salaries or compensation of officers fixed by law.” It follows that, when the Legislature fixes the amount of such a claim by law, it is never presented to the State Board of Examiners for their action even before payment. It has been the universal practice in this State ever since it was admitted to the Union for the State Controller to issue his warrants for and the State Treasurer to pay all salaries and all compensation of all officers and employees of the State without any action whatever thereon by the State Board of Examiners when the amounts thereof have been fixed by law; and this practice has been approved by the Supreme Court of this State in a number of cases. If fact, no question of this practice has been raised for many years. Even the cases which have gotten into the Supreme Court of this State in which this practice has been questioned have all, or practically all, been cases where the law did not definitely and clearly fix the amounts of such salaries or compensation. The Board of Examiners has absolutely nothing to do with salaries and compensation the amounts of which have been fixed by law. They are always paid by the Controller and Treasurer without any action whatever by the State Board of Examiners, and that is the practice established by the Nevada Constitution and universally approved by our Supreme Court. Such salaries and compensation certainly constitute claims against the State. They are debts or obligations of the State, and yet they are not passed upon by the State Board of Examiners for the very simple reason that the Legislature has fixed the amounts thereof. It is only “legal obligations,” or debts, of the State, the amounts of which are not fixed by the Legislature, which must be presented to and acted upon by the State Board of Examiners. They have no right at all to act upon “moral obligations” of the State, as

determined in Mighels v. Eggers, 36 Nev.. 371, 372, from which we quote as follows:

If any *moral* obligation rests upon the State, when it is not shown that any *legal* liability was created by statute, relief can only be obtained through the legislature. Mighels v. Eggers, [36 Nev. 371](#).

The case of State v. LaGrave, [23 Nev. 387-390](#), involved a situation where Mr. H. C. Cutting had performed certain services as *ex officio* curator of the State Museum (which existed at that time). The office or position actually existed; the museum actually existed; and Mr. Cutting actually performed the services of the office or position. The 1891 Legislature of this State had enacted and the Governor approved a law known as chapter XC, 1891 Statutes of Nevada, page 104, fixing the salaries of various State officers. In that law, the salary of the Superintendent of Public Instruction was fixed at \$1,000, but it also provided that the Superintendent of Public Instruction, as *ex officio* Clerk of the Supreme Court, and *ex officio* State Librarian, and *ex officio* Curator of the State Museum, and Secretary of the Orphans' Home Board, should be paid an additional salary of \$1,400, making the entire salary of the Superintendent of Public Instruction and as such *ex officio* officers \$2,400 annually, \$1,000 of which was salary and compensation for the performance of the particular duties of Superintendent of Public Instruction, and \$1,400 of which was for the performance of the duties of said three or four *ex officio* offices or positions. In 1893, the Legislature of this State enacted and the Governor approved a law which is found in 1893 Statutes of Nevada, page 32, which repealed that portion of said 1891 Act which made the Superintendent of Public Instruction *ex officio* Clerk of the Supreme Court, and *ex officio* State Librarian, and added the duties of those *ex officio* offices to the office of Secretary of State. Although it repealed the 1891 Act, it did not say anything at all in regard to the salary of the Superintendent of Public Instruction as *ex officio* Curator of the State Museum and Secretary of the Orphans' Home Board. In other words, the repealing Act of 1893 took care of the duties and salaries of *ex officio* Clerk of the Supreme Court and *ex officio* State Librarian, but did not make any provision at all for the salary of the Superintendent of Public Instruction as *ex officio* Curator and Secretary. Said Museum and the Orphans' Home Board, and the duties of the Curator and Secretary, still existed under other laws of this State; and the duties of each of those positions still existed and had to be performed. Mr. H. C. Cutting was the Superintendent of Public Instruction of this State at that time; and, since other laws provided for him to perform said duties of Curator of the State Museum and Secretary of the Orphans' Home Board, he continued to perform those duties although the law, after said repeal of the 1891 Act did not provide any salary at all for said *ex officio* positions or offices, or any compensation for the performance of the duties thereof. It was the clear intention of the Legislature and Governor of this State in enacting and approving said 1891 Act and providing therein a \$1,400 salary for the *ex officio* officers therein named, including said *ex officio* Curator of the State Museum and Secretary of the State Orphans' Home Board that said *ex officio* officers should receive a salary or be compensated in some way for the performance of the duties of such Curator and Secretary. The fact remained, however, that there was no money appropriated for the payment thereof, and Mr. Cutting continued to perform the duties of these particular *ex officio* offices as required by other laws of the State. The State certainly owed him compensation for the services so rendered the State by him. This situation certainly constituted a debt of the State.

The services were rendered by Mr. Cutting at the time when there was no law of this State in existence which fixed the amount of his salary or the compensation to be paid for such services. After these services had been rendered, a relief bill was enacted by the 1897 Legislature of this State (1897 Statutes of Nevada, page 21) entitled "An Act to Provide for the Relief of H. C. Cutting," approved February 18, 1897, appropriating \$2,800 to pay for the services already performed by Mr. Cutting. No claim for the \$2,800 was presented to or passed upon by the State Board of Examiners. Application was made to the State Controller to draw his warrant for said sum of \$2,800 so appropriated to pay for the services so already rendered by Mr. Cutting. The State Controller refused to draw his warrant to pay the same or any portion of it, upon the sole ground that no claim therefor had been presented to the State Board of Examiners *before* the enactment of said relief bill and that the Act was, therefore, unconstitutional. Mr. Cutting then applied to the Supreme Court of this State for its writ of mandamus to compel the State Controller to draw his warrant for said sum of \$2,800 in favor of Mr. Cutting for the services so rendered by him, the amount provided for in said relief bill. In stating the question or point relied upon by the State Controller for refusing to draw his said warrant, the Supreme Court used the following language: "The point relied upon is that the claim was *not* presented to the Board of examiners prior to the passage of the enactment (said relief bill of 1897) by the Legislature." The Supreme Court denied the Controller's contention and overruled said point, and granted its writ of mandamus compelling the State Controller to draw his warrant in favor of Mr. Cutting for the \$2,800, notwithstanding the fact that the claim therefor had not been presented to the State Board of Examiners before the Legislature enacted said relief bill. The State owed the money to Mr. Cutting. It was an indebtedness of the State to him. The services had already been rendered during a time when there was no law of this State fixing the compensation for such services. Mr. Cutting certainly had a claim against the State for compensation for the services so rendered by him. That compensation was *later* fixed by the Legislature at \$2,800. No claim for said compensation had ever been presented to the State Board of Examiners. Notwithstanding the fact that this was a claim against the State and the compensation therefor had not been fixed by law prior to the rendering of such services by Mr. Cutting, and notwithstanding the fact that no claim for such compensation was presented to the State Board of Examiners prior to the enactment of said 1897 Act and the Legislature enacted and the Governor approved said law without the presentation of the claim therefor to the State Board of Examiners, the Supreme Court of this State held that no such presentation to the State Board of Examiners was required by the Constitution of this State, and sustained the constitutionality of the Act appropriating said sum of \$2,800 for such compensation, and mandatorily directed the State Controller to draw his warrant to pay the same. There are many similarities between that situation and the situation now under discussion with reference to said chapter 141 and the payment of the money required thereby to Clark County.

The fact is that most of the warrants issued by the State Controller are to pay claims against the State which have never been presented to the State Board of Examiners, and which the Constitution and laws of this State do not require to be presented to that Board. In other words, the mere fact that a claim exists against the State for money does not make it necessary that such a claim be presented to and passed upon by the State Board of Examiners. If the amount of the claim is fixed by a law in existence at the time the claim arose or is presented for

payment, then there is no necessity of presenting it to the State Board of Examiners. Neither the audit by the State Board of Examiners nor the audit by the State Controller is in the slightest degree controlling upon the Legislature. It has a perfect right under the Constitution and laws of this State to appropriate money for the payment of claims, notwithstanding the fact that they have been disallowed by either or both the State Board of Examiners and the State Controller. The Legislature and Governor of this State are the sole judges of both the purposes and the amounts for which the State moneys are appropriated, unless some provision of the Constitution is violated in making such appropriations. In fact, the Legislature may direct that moneys out of the State Treasury be expended for such purposes and in such amounts as are not prohibited by the Constitution of this State without labeling or earmarking their Acts in doing so as appropriations. So long as the language actually used directs that money be paid out of the State Treasury, or even by any officer before it is deposited in the State Treasury, it is an appropriation or serves the exact purpose of an appropriation, and is effective as such unless prohibited by Constitution. This chapter 141 simply makes the State Treasurer the distributing agent of the State in distributing said moneys. There is absolutely no dissent to this proposition. (See authorities hereinbefore cited.)

This distributing agent of the State (State Treasurer) is required to distribute said moneys even before they reach the State Treasury and before they are deposited therein. Let it be understood that there is no contention that said chapter 141 constitutes an appropriation to Clark County of 20% of the moneys so collected any more than it could be considered an appropriation to the State of the remainder thereof. It simply constitutes a distribution of the moneys received in lieu of taxes lost to the State and Clark County before they reach the State Treasury. The language of said chapter 141, however, is as sufficient to create an appropriation as any law which has ever been enacted and approved in this State, if it be insisted that distribution to Clark County can be made only by an appropriation, although said other laws may actually designate the money so allocated as an appropriation.

*Action by Board of Examiners and Controller Only Advisory to Legislature.*

The Board of Examiners and the Controller have no power at all to bind the Legislature by their examination and audit of claims against the State. Their action is only “*advisory*” to the Legislature and is not intended as a check upon legislative extravagance or any other legislative action. The only check upon legislative action is the Constitution of the State and the Constitution of the United States. The sole power of the Board of Examiners in disposing of claims against the State is merely to allow or to reject them in whole or in part as filed, and to take evidence. State (Ash) v. Parkinson, 5 Nev. 30.

*Presence of Money in State Treasury No Necessary in Order to Lawfully Appropriate.*

The theory that money cannot be appropriated by the Legislature unless it is actually in the State Treasury at the time of the enactment of the appropriating law is incorrect and has no foundation in fact or in law. Practically every general appropriation Act appropriates money which is not in the State Treasury at the time of the enactment and approval of that Act. There is seldom any of the moneys so appropriated in the State Treasury at that time. Such appropriations

look to the future and are enacted in contemplation of money not yet received in the State Treasury, but to be received in the State Treasury by taxation for the two years covered by such appropriation Act. Very little money appropriated by the Legislature is ever in the State Treasury at the time of the enactment and approval of the appropriating Act. That was the situation in the case of State (Ash) v. Parkinson, [5 Nev. 15-35](#). That case involved the payment of certain expenses of the Legislature and also the purchase of several articles of property. *None of the claims for the payment thereof were ever presented to or acted upon by the State Board of Examiners, either before the enactment and approval of the appropriating Act or thereafter or before applying for the Controller's warrant for the payment thereof.* State Controller Parkinson refused to issue his warrants for the payment of said claims upon the ground that they were not presented to or acted upon by the State Board of Examiners. In addition to this, the money was not actually in the State Treasury at the time of the enactment and approval of the law involved and script or certificates of indebtedness were issued to show such indebtedness. In discussing this case, the Nevada Supreme Court quoted with approval as follows from the case of State of California v. McCauley, 15 Cal. 455: "These revenues may be appropriated in anticipation of their receipt as effectually as when actually in the treasury." (Page 25). And also from the case of McCauley v. Brooks, 16 Cal. 28, as follows:

It is not essential to its validity that funds to meet the same should be at the time in the treasury. As a matter of fact, there have seldom been in the treasury the necessary funds to meet the several amounts appropriated under the general appropriation acts of each year. The appropriation is made in anticipation of the receipt of the yearly revenues. Ash v. Parkinson, [5 Nev. 25](#).

### *Claim Against State--What Is?*

In discussing what constitutes a "claim" against the State, the Supreme Court of this State uses this language:

A claim is a demand by some one *other than the State* against it for money or property; *but when the claim originates with the State*, or in its behalf, and contemporaneously with its origin, and means and manner of payment are provided, as in the case of a bond, it does not then constitute a claim proper against the State, *but a liquidated and legalized demand against the treasury.* Ash v. Parkinson, [5 Nev. 31](#). (Italics ours.)

The use of the language above in italics by us is significant. It will be noted that, in order to constitute a "claim" against the State, it must be in favor of some one "other than the State" and must not originate with the State. This is significant in view of the fact that the Supreme Court of this State has held in many cases, as have the other courts of last resort of the other States, that the counties of the State are mere arms of the State and are, in fact, the State itself. Certainly, no informed person will contend that it is not the counties of the State which constitute the State itself. The State is composed of its counties. In a sense the State is its counties and each county constitutes its proportionate part of the State. In all of the decisions of the Supreme Court of this State dealing with the question, the same rights, privileges, and immunities are



extended to the counties as are extended to the State upon the theory that the particular county is an arm of the State and, therefore, the State itself. The Supreme Court of this State has even gone so far as to classify power districts created under the law as arms of the State (the State itself) and extended to them the same tax exemption on their property as is extended to the State on its property. Lincoln County Power District v. State (improperly indexed and listed as State v. Lincoln County Power District), [60 Nev. 401](#).

The last above-quoted language also holds that when the amount of the claim is a fixed, or liquidated, demand against the treasury, it does not thereafter “constitute a claim proper against the State.” In other words, when the Legislature fixes the amount thereof and thereby liquidates it, it is no longer a claim against the State which must be presented to the State Board of Examiners. In discussing this feature of the case, the Supreme Court states a case of this kind and in this language:

Suppose the passage of a statute whereby the Legislature passes upon a claim against the State, which has never been acted upon by the board of examiners. Is such statute void, or only irregular? The mode prescribed by the constitution has not been followed; what is the consequence? If there is nothing upon the face of the bill to show that the board of examiners have not acted, how is that fact to be ascertained? Ash v. Parkinson, [5 Nev. 3](#)..

And again it furnishes this illustration:

Suppose A had a claim against the State which he had not submitted to the Board of Examiners, and the Legislature knowing the fact passed the bill, saying nothing about the claim, but donating absolutely the amount. Here there is no passing upon the claim, either so far as the face of the bill goes, nor practically; and yet an object is accomplished indirectly, which, it is said, cannot be directly.

Upon the theory that the action of the State Board of Examiners is merely “advisory” to the Legislature, our Supreme Court held, in effect, that the presentation of the claim to the State Board of Examiners and its action thereon is not an essential, or not mandatory, and that its failure to act did not render such a legislative Act unconstitutional, and directed that the writ of mandamus be issued and thereby compelled State Controller Parkinson to pay the claims. It further defines such a claim as follows:

There can be no legal claim for money except upon a matter of debt or damage \* \* \*.  
Ash v. Parkinson, [5 Nev. 32](#).

It has not been the policy of this State to require counties to present claims to the Board of Examiners for its action thereon before the enactment and approval of laws appropriating money to such counties. Many appropriations have been made by the Legislature to counties of this State without the presentation of claims therefor to the Board of Examiners. The purposes to be served in such counties by such appropriations have never been held by our Supreme Court to constitute claims against the State. Such appropriations by the Legislature to counties prior to

and without the presentation of claims therefor to the Board of Examiners have been universally sustained by our Supreme Court when such appropriations have been questioned in that Court. This is evidently upon the theory that counties are the State or constitute the State, and are mere arms of it. An example of this situation is found in County of Esmeralda v. State, [21 Nev. 195-197](#). This case involved an appropriation made by the Legislature of this State appropriating money to pay the expenses of the various counties of the State in the holding of a special election on constitutional amendments. It was conceded, and the Courts actually held, that such expenses are county expenses and a county burden, as are the expenses of the holding of all elections covering the entire State. It must be kept in mind that election expenses are county expenses and county burdens. No claim was presented to the Board of Examiners by any of the counties of the State for the contemplated or estimated expenses to that county of the holding of said election therein prior to the making of said appropriation by the Legislature. The money so originally appropriated, without action of the State Board of Examiners, proved insufficient and the Legislature appropriated a further sum of money to pay the deficiency in the counties of the State where such deficiency existed, again prior to and without presenting a claim therefor to the Board of Examiners for the amount of such deficiency in each of such counties, or in all of them combined. In other words, no claim was presented to the Board of Examiners prior to legislative appropriation as a condition precedent to obtaining either the original appropriation or the later appropriation to cover the deficiency. The claims of Esmeralda County for reimbursement of the moneys expended by it in the holding of such special election were presented to the Board of Examiners after the appropriation therefor had been actually made by the Legislature. The Board of Examiners allowed a part of such claims of Esmeralda County and disallowed the remainder thereof. Esmeralda County brought suit for the portion of said claims which was not allowed; and, apparently, the District Court entered judgment in its favor. It did not do so upon the ground that no claim was presented to the Board of Examiners *before* the appropriation Acts were enacted and approved. It raised no question at all on this ground, as to the judgment entered in the District Court for the deficiency. Since the Supreme Court remanded the case to the District Court for further action, it certainly would have discussed this failure to present claims to the Board of Examiners before the appropriations were made by the Legislature if it had deemed that such presentation was a necessary condition precedent to such appropriations.

Another case involving the same appropriation bills arose with reference to the expenses of said special election in Lyon County. That case is entitled Lyon County v. Hallock, [20 Nev. 326](#). Hallock was State Controller at the time. The Supreme Court states (page 328) the question involved was as follows: "The question is whether the legislature can require the controller to draw his warrant for the amount ascertained to be due by the *board of county commissioners*, or whether the *state board of examiners*, under the provisions of the constitution, should have audited the claim," and refers to Article V, section 21. It must be kept in mind that the claim referred to by the Supreme Court and which was handled by the Board of County Commissioners instead of by the State Board of Examiners, is not the claim, or alleged claim, which has been suggested should have been passed upon by the Board of Examiners before the enactment of the appropriation bills, but was the claim of Lyon County for reimbursement of the moneys expended by it in paying the costs and expenses of the election after the election was held. In other words, it was the claim of the county for reimbursement of its expenses of the election, not only after the election had been held but long after both the original appropriation

bill and the appropriation bill covering the deficiency had been enacted by the Legislature and approved by the Governor. It was not the claim referred to in this language of article V, section 21, of the Nevada Constitution:

and no claim against the state (except salaries or compensation of officers fixed by law) *shall be passed upon by the legislature without having been considered and acted upon by said board of examiners.*

It was the ordinary claim of the county for reimbursement which was involved in that case. That claim was approved by the County Commissioners of Lyon County, and never presented to the State Board of Examiners. Again, as in the Esmeralda County case, *supra*, the Supreme Court did not pass upon the question of whether the failure to present a claim to the State Board of Examiners for such contemplated expenses of said special election prior to the making of the appropriations by the Legislature rendered the Act unconstitutional. The most that was decided in that case was that it was the State Board of Examiners, not the Board of County Commissioners of Lyon County, which should have passed upon and approved the claim for the reimbursement before applying for the Controller's warrant. On this point, the Supreme Court held that the Controller could not be required to issue his warrant for the payment of said reimbursement claim until it had been presented to and approved by the State Board of Examiners, not the Board of County Commissioners. The Court in that case held, however, that the very purpose of the creation of the Board of Examiners and its authority and duty were to pass upon "unliquidated claims" or claims which had not theretofore been fixed in amount and authorized by the Legislature. It further held that there are few claims which require action by the Board of Examiners before the Legislature may constitutionally appropriate money to pay them; and as to the necessity of action by the State Board of Examiners before the Legislature may constitutionally act upon the same, it held:

and action by the legislature upon such claims is generally final without further submission to the board (of examiners). If a claim of this character is allowed by the legislature, the form of the law is generally such as to create a *liquidated* demand for which a warrant upon the treasury is issued.

The "few" claims referred to above by the Supreme Court as requiring presentation thereof to the State Board of Examiners before the Legislature may constitutionally appropriate money for the payment thereof are claims which constitute actual claims, or debts, or legal obligations against the State. Constitution of Nevada, article V, section 21; *Esmeralda County v. State*, *supra*; *Lyon County v. Hallock*, [20 Nev. 329](#); *State (Ash) v. Parkinson*, [5 Nev. 31-33](#).

And that relief bills for damages caused by the State or some department thereof to others, or for "services" actually rendered to and for the benefit of the State, but for the payment of which no prior appropriation had then been made by the Legislature, or for "advances" made or moneys paid out for the recognized benefit of the State, but for the payment of which the Legislature had not previously appropriated money, are familiar examples of claims which must first be presented to the Board of Examiners for their action thereon before the Legislature may constitutionally appropriate moneys from the State Treasury to pay the same. Although not so

numerous as they were formerly, all are still familiar with the bases or purposes for which such relief bills may be enacted and approved, and with the necessity of presenting claims therefor to said Board of Examiners before presenting such bills to the Legislature. None of these elements or situations are involved in the payments to Clark County as provided for in said chapter 141. These payments to Clark County are certainly not for damages sustained by it, or for services rendered by it to the State, or for advances made by it to the State. Said chapter 141 simply makes the State Treasurer the distributing agent of the State as between the State and Clark County in disbursing or distributing said money before it is actually deposited in the State Treasury, and specifies the amount which it mandatorily directs him to pay to each of them, all to compensate each of them for the taxes lost to it because of the fact that the property constituting Boulder Canyon Project is now federally owned and, therefore, tax-exempt, but much of which had been subject to taxation by both of them for a long time prior to the time it was taken over by the Federal Government and the remainder of which would now be taxable by both of them if privately owned.

It must also be kept in mind that the money which goes to Clark County under said chapter 141 is mandatorily required by that law to be placed in the General Fund in the county treasury of Clark County. It must also be kept in mind that the purposes for which the General Fund of Clark County, or any other county of the State, may be used, are the general governmental public purposes of that county. It is, therefore, to be used for the public purposes of that county in carrying on its county government. It cannot, therefore, be used for private purposes. For this reason it does not constitute a gift or donation, or a loaning of money or the credit of the State, in violation of article VIII, section 9, of the Nevada Constitution, as hereinafter shown.

*Board of Examiners Act Upon What Claims Before Legislature May Constitutionally  
Appropriate Money to Pay Them--Constitution and Statutes.*

Although it is our positive opinion that the right of Clark County to the money distributed to it pursuant to said chapter 141 does not constitute such a claim of that county against the State of Nevada as requires presentation thereof to the State Board of Examiners before the Legislature may appropriate money for the payment thereof, and that said Act does not constitute an appropriation in the general sense usually covered by that word, as hereinbefore shown, we think it well to take time and space here to quote the provisions of the Constitution and of the statutory laws of this State which specify the character of legal "claims" against the State which must be presented to the State Board of Examiners before the Legislature has any constitutional right to appropriate money with which to pay them. The language of the Nevada Constitution on this point is as follows:

no claim against the state (except salaries or compensation of officers fixed by law) shall be passed upon by the legislature without having been considered and acted upon by said board of examiners. Article V, section 21; Nevada Compiled Laws 1929, sec. 107 (latter part).

The statutory law of this State on this point is in the following language:

It shall be the duty of the board of examiners to *examine* into all claims against the state, presented to them by petition, *for which no appropriation has been made*, and which require to be acted upon by the legislature. Nevada Compiled Laws 1929, sec. 6921.

It should be kept in mind that Nevada Compiled Laws 1929, section 6922, does not relate in any manner whatsoever to claims which must be presented to the Legislature after the State Board of Examiners has acted upon them in order to obtain an appropriation to pay them. While this section does specify the claims which shall be presented to the Board of Examiners for their action, or to give them an opportunity to act upon them before the State Controller may lawfully draw his warrant to pay the same, it does not relate in anyway whatsoever to claims for which the Legislature has not already authorized the payment and made an appropriation therefor; but it makes the audit and payment of such claims by the Controller subject to the action of the State Board of Examiners by prohibiting him from drawing his warrant to pay any claim which has not been approved by said board, or for a greater amount than allowed by the board. Certainly, the distribution of this money to Clark County is not for “services or advances”; and, even if it were for services and advances, the amount to be paid Clark County has been “liquidated and fixed” by the Legislature in said chapter 141 itself. When the amount to be paid for a specified purpose has been definitely “fixed” by legislative action, there is no need of presenting a claim therefor to the Board of Examiners before application is made to the State Controller for his warrant to pay it. All the cases so hold. The Supreme Court of this State has said with reference to such situations:

There is nothing for the board of examiners to audit and allow. State v. Eggers, 35 Nev. 257.

*Public Purposes--Money Appropriated for Such Purposes Is Not a Gift of a Loaning of the Credit of the State*

It is quite universally held by the Supreme Courts and other courts of last resort that the allocation, or distribution, or earmarking, or appropriation of money by the Legislature for public purposes does not constitute a gift or a donation or a loaning of the money or the credit of the State in violation of the provisions of State Constitutions prohibiting such gifts or donations or such a loaning of the money or credit of the State, as is prohibited by such provisions of State Constitutions as are contained in article VIII, section 9, of the Constitution of Nevada, even when such public purposes are not directly essentially State purposes. This is particularly true when such moneys are to be used for governmental purposes as distinguished from private purposes. *Veterans' Welfare Board et al., v. Jordan*, 22 A. L. R. (Cal. 1922) 1524-1530.

The last above-cited case discusses a number of situations where Supreme Courts and other courts of last resort held that moneys appropriated or bonds issued to raise money for veterans and for other public purposes of a somewhat similar nature do not violate the provisions of constitutions which prohibit gifts or donations, or the loaning of money, or the credit of the State. With reference to this situation, the Supreme Court of California said, on page 1524, first

column, in discussing a Minnesota case, “It was held that the purpose of the loan was public and the act constitutional.” It also discussed a State of Washington case on a similar point and used the following language: “But in discussing whether the purpose of the Act (bonus to veterans) was public, the court did say that moral obligation to make a compensation (to veterans) rested on the State.”

In discussing a Wisconsin case in which the objection was made that the devoting of money or the issuance of bonds to raise money in aid of veterans (the purpose of the act involved) violated the Constitution of the State prohibiting the giving or loaning of the credit of the State, the Supreme Court of the State of California said that the Act “did not create a debt, because there was no assumption of any obligations, and the arrangement was to give money to the veterans when obtained from year to year by taxation.” It also used the following language in a case involving the purchase, subdivision, and settlement of lands in aid of veterans (page 1525, last column):

If the purpose achieved by the purchase and subdivision and settlement of the land is a public purpose and justifies the expenditure of public money, and if the scheme provided by the Veterans’ Bond Act and the Veterans’ Welfare Act for the purchase and subdivision of such land accomplishes this public purpose, it may well be that we would not be justified in declaring such a law unconstitutional \* \* \*.

This language is also used (page 1526, first column):

As has frequently been said, doubts are to be resolved in favor of the constitutionality of a statute. And if the injection into this scheme of the separate and distinct public purpose involved in land settlements raises such a doubt, the law should be upheld as constitutional.

It then discusses the question of what it takes to constitute a “public purpose,” but does not undertake to define that expression, saying that each individual case is to be determined by its own peculiar circumstances, and then discusses many cases in which the enterprises were held to constitute “public purposes” and sustains a Montana Act providing for loans to farmers as “public purpose,” using the following language (page 1528, first column):

The supreme court of Montana, in the case of Hill v. Rae, 52 Mont. 378, L. R. A. 1917A, 495, 158 Pac. 826, Ann. Cas. 1917E, 210, held that a statute providing for loans to farmers authorized the raising of money by taxation for public and not private purposes.

In the same column, the California Court used this language:

This court has taken a liberal view in determining what constitutes a public purpose.

This case cites and discusses many other cases dealing with the distinction recognized in the law as to what are “public purposes” as distinguished from private purposes. It is clear from

this case and the cases cited therein and the other cases cited at the end of this paragraph that this money allocated or distributed by the Legislature to Clark County and placed in the general fund of that county is money devoted to a “public purpose.” *People v. Pacheco*, 27 Cal. 175 (appropriation to aid railroad); *Argyle Dredging Co. v. Chambers*, 181 Pac. 84; *Yosemite Stage etc. Co. v. Dunn*, 83 Cal. 264, 23 Pac. 369; *Blanding v. Burr*, 13 Cal. 343; *Creighton v. Board of Supervisors of San Francisco*, 42 Cal. 446; *County of Alameda v. Chambers*, 170 Pac. (Cal.) 650; *Reclamation Board v. Chambers*, 189 Pac. (Cal.) 479; *Board of Directors v. Nye*, 97 Pac. (Cal.) 208; *Sacramento and San Joaquin Drainage District v. Riley*, 152 Pac. (Cal.) 207; *City of Oakland v. Garrison*, 228 Pac. 433; *Carmichael v. Riley*, 205 Pac. (Cal.) 478; *Patrick v. Riley*, 287 Pac. (Cal.) 455.

## CONCLUSION

From the foregoing, we are of the unqualified opinion that chapter 141, 1941 Statutes of Nevada, is in all respects constitutional and valid; and that the State Treasurer of this State should “accept” said annual payments of \$300,000 when paid to him; that he should then “immediately pay out of such payments so received” twenty percent (20%) thereof to the County Treasurer of Clark County, and then place (deposit) the remainder (balance) thereof in the State Treasury in the General Fund of the State of Nevada; and that, as to the money so transmitted to the County Treasurer of Clark County, it “shall be placed in the general fund of said county.”

The foregoing completes this opinion and my discussion of the bases thereof.

## FACTUAL BASIS

### *Statements Made to Congress and Congressional Committees Showing Why Said Annual Payments Are Made to the State.*

We have made little effort to make this opinion short, for the reason that the receipt and proper disposition of this money is an important matter to the taxpayers of this State, involving as it does \$15,000,000 over the long period of the next 50 years, and the raising thereby of the burden of taxation from their shoulders to the extent of \$15,000,000; and for the further reason that I have always believed that the officers to whom the Attorney-General furnishes his official opinions, and the people of this State generally, are entitled to as full and complete a statement as is reasonably possible of the facts and of the provisions of the Constitution and laws and of the decisions of the courts of last resort and other authorities relied upon by the Attorney-General as the bases of his official opinions, to the end that they may for themselves know that such official opinions are not arbitrary or without foundation if they are sufficiently interested to read and study the bases so given for such official opinions; and for the further reason that they are entitled to know all of the facts, as well as all of the law involved, if they care to arrive at right and proper conclusions as to such matters. We realize that people who do not care to know the facts before arriving at their conclusions will not read and study such discussions, no matter whether they be short or long. Any person who is not conscientious or who comes to his conclusions by guesswork or merely because of his own personal interests or selfishness, or because of the locality in which he lives, or from a desire to build up his own pet theories, really does not care about the

facts and finds them disagreeable and unpleasant to read. He really does not want to know the facts because they are distasteful to him. This opinion is also made longer because of the fact that it discusses each law point involved in direct connection with the facts relating thereto, which necessarily results in considerable duplication in stating the same fact in connection with each point of law and as the basis of the portion of this opinion relating thereto. Another reason which has induced me to make this opinion as full and complete as possible is that I so actively participated in planning and obtaining the enactment of the Boulder Canyon Project Adjustment Act and the new contracts made thereunder and in the many long and large conferences incident thereto, and in thereby assuring the people of the State that we could never be deprived of this money during the next 50 years without a violation of the Federal and State Constitutions which positively prohibit the impairment of the obligations of existing contracts, and in that way gained such an extensive knowledge of all of the facts and circumstances and information contained in this opinion; and the further reason that I am soon to retire from office and may not have another occasion to make a record of these matters and to again discuss them. This opinion does not make a public record of said facts, circumstances, and information, and enables anyone desiring accurate information as to how and why we obtain this money and what it is to be used for to readily find it herein.

It is simply impossible for any person, regardless of his ability as a lawyer and regardless of his intelligence, to arrive at a just and correct conclusion as to what is a proper disposition of this money without a long and careful study of all these facts and of the laws involved and without a definite knowledge as to the purposes for which this money is allocated to Nevada or for use in this State. This is too important a matter to the taxpayers of this State to have it disposed of by snap judgment, or guesswork, or local prejudices, or for the purpose of building up anybody's pet theory, or to serve the political ambitions or purposes of any person or group of persons. We got this money solely by making certain definite representations in the nature of promises, pledges, or commitments as to the purposes for which this money is to be used. It is a simple matter of right and wrong as to whether we will be loyal to and carry out those representations or commitments. We cannot determine this question of what is right or wrong in this matter without a full and complete knowledge of what those representations or commitments were and of the pertinent provisions of the constitutions and laws relating thereto, as well as of the decisions of the courts in cases involving similar facts and points of law. This knowledge can only be gained by reading and studying the facts, and laws, and decisions of the courts pertinent thereto. The length of this opinion is due solely to the fact that I desire to be fair with the public and to give those who wish to arrive at a proper and correct conclusion in this matter an opportunity to read and study the information relating thereto and contained herein. My official duty and responsibility are thereby fully performed.

*Clark County's Share--Bases of Claim of Its Right.*

The remainder hereof is devoted to a discussion of the right of Clark County to participate in these \$300,000 annual payments in lieu of taxes, not so much to the points of law or to the facts connected with the enactment of chapter 141, 1941 Statutes of Nevada, or to the legislative procedure relating thereto. It must be kept in mind, however, that this opinion does not take into consideration at all the question of whether said chapter 141 is morally right. That is a matter



solely for the determination of the Legislature in enacting any law and the Governor in approving it. That is a matter of public policy which the Constitution of the State leaves to the Legislature and the Governor alone, as hereinbefore shown.

The remainder hereof has some bearing, however, on the facts upon which Clark County necessarily relies to establish its right to share in this money under said chapter 141. It constitutes the background and reasons relied upon by Clark County for its participation in this money. It also amplifies and corroborates the statements made in the opinion to the effect that we get this money solely because of certain definite representations made by our United States Senator Key Pittman and other representatives as to the purposes for which this money is allocated to the State. It also amplifies and corroborates the statements hereinbefore made that said definite representations so made by Senator Pittman and others were taken by the power users who actually pay this money in the first instance, and, in turn, by the Congress, to be in the nature of promises, pledges, or commitments as to why we are entitled to this money and as to the purposes for which it will be used. Senator Pittman and the other members of our congressional delegation were our representatives. They were sent out by us (the State) to get some money for us. In order to get it, they were compelled to make these definite representations or commitments. That is conceded by all who know the facts. The power users and the Congress let us have this money because they had faith and confidence in us as a State and people and relied upon those definite representations and commitments so made by Senator Pittman and others, and in our good faith and intention to comply with said representations and commitments. These representations and commitments and their confidence in us constitute the consideration we paid for this money. We got this money only by making said representations and commitments and through the faith and reliance of the power users and Congress in our integrity. I believe that we should not betray that confidence, and that a majority of the people of the State who know the facts would not approve our betrayal of that confidence. We sent our representatives out to get this money for us. They got it. But they had to make certain promises and commitments in order to get it. We are accepting the benefits of this money. Certainly, we should not accept those benefits without keeping the promises and commitments so made for us and by which alone we got this money. It seems but fair that we should fulfill our promises if we accept this money. It is not so much a question of what we would like as it is a question of what we represented or promised we would do with this money. It is a question of complying with those representations or promises.

Much as the Attorney-General would like to have his opinions be popular and meet the approval of the people of the State generally, he cannot permit his desire for popularity to influence his opinions as to what the law actually is and as to whether or not it is constitutional and valid. The Constitution itself and the laws themselves as they are actually written, not as we think they ought to be written, and the decisions of the courts interpreting and construing them, are absolutely the only guides which the Attorney-General can take into consideration in giving his official opinions, uninfluenced by friendships or prejudices, or personal interests, or his desire for popularity. He must use his own best judgment, not the judgment of anyone else, as to whether a law is constitutional and valid. There is not any other consideration or basis for this opinion.

*Facts and Authentic Information Promote Full Understanding.*

It is always helpful to the conscientious officers and people involved in understanding the law and points involved in official opinions to know the background or basis thereof. There has been so much misinformation circulated with reference to this matter and so much suppression of actual information on these points, and so much wild talk based upon such misinformation and lack of information, and so much wishful thinking, and so much of the personal element and of prejudices indulged in as to the reason why Congress allocated these annual payments of \$300,000 to or for use in this State, that we believe it will be more satisfactory to such officers and people to take the time here to again state the bases and reasons for these payments to the State Treasurer of this State, and the purposes for which this money is to be used, in the exact language used by Senators Pittman, Ashurst, Hayden, and others in discussing these matters before Congress, and congressional committees and Federal departments; and, for this reason, we hereinafter quote the language so used by them. No person with ordinary intelligence and ability to understand the English language can read the statements made by them and hereinafter quoted from the Congressional Record and the records of the various hearings before congressional committees and Federal departments, without coming to the definite conclusion that these annual payments are not in any sense of the word gifts or donations, but are simply and solely compensation for taxes and potential taxes lost to the States and their political subdivisions. In other words, to the conclusion that these annual payments are and constitute tax moneys, not only tax moneys of the States but also of the taxing political subdivisions (counties) of the States where the property involved is actually situated.

A reading of those statements certainly reveals the fact that there was at the time of the enactment and approval of said congressional legislation, and still is, in Clark County much property which had theretofore been taxable and actually taxed in and by that county and which would have continued permanently to be taxable by that county if it had not been submerged in the reservoir in Clark County and the State above Boulder Dam and thereby taken out of taxation by the Federal Government. It follows, therefore, that both Clark County and the State lost taxes by reason of that situation. The language so used by Senators Pittman, Ashurst, Hayden, and other representatives, and hereinafter quoted, shows definitely that Congress was just as solicitous as to Clark County as it was to the State of Nevada in protecting in this way both the State and Clark County against the loss of taxes by reason of this Federal project, and just as anxious to compensate Clark County for taxes so lost as it was to compensate the State therefor. We who actively participated in obtaining this money for the State and Clark County were constantly slapped in the face by members of Congress and its committees with the statement that they would not even consider the making of a gift or donation to the States of Nevada and Arizona. There were even statements made by the members of Congress to the effect that the old Boulder Canyon Project Act was wrong in allocating to each of these States 18 3/4% of the excess revenues, if any, during the period of amortization, and threats made to amend that provision of the old law and thereby deprive these States and their taxing political subdivisions thereof of any share in the revenues derived from Boulder Canyon Project. Since Senator Pittman was the leader in obtaining this arrangement for 18 3/5% of the excess revenues to each of these States, and knew the reasons advanced by him for the allocation of these revenues to these States better than anyone else, we called upon him many times, when said situations arose, to come before the

congressional committees and again state the theory upon which this money is so paid for use in these States, and the purposes for which it would be used in these States. In this way, we heard Senator Pittman go through this discussion and make these same statements many times and, therefore, know exactly the theory advanced by him and the purposes for which this money is to be used. It was only by convincing Congress in that way that these payments to the States were not in any sense of the word gifts or donations but simply compensation for taxes lost to each of them that we ever succeeded in obtaining anything at all for these States and their political subdivisions. As the \$300,000 annually to each of these States as provided for in the new Boulder Canyon Project Adjustment Act simply takes the place of the 18 3/5% of excess revenues to each of these States as provided for in the old Boulder Canyon Project Act, and this money is to be used for the same purposes, it is not only pertinent but essential to a proper and correct understanding of this situation and of these purposes that we here quote from the Congressional Record and from the transcripts of hearings had in Congress, and before congressional committees and Federal departments, exactly what Senators Pittman, Ashurst, and Hayden and others actually said of the theory upon which this money is paid to these States and their taxing political subdivisions (counties) and the purposes for which this money is to be used.

The statements so made are as follows, the italics and parentheses and the language enclosed within the parentheses being ours for the purpose of clarifying and making more certain the meaning of the language used:

Senator Pittman's statement indicating that private persons or concerns would probably build and operate the project and were willing to do so is in the following language:

*Senator Pittman:* That dam could have been built with private capital and private capital wanted to build it and power would have been available to us just the same is it is now.

There were plenty of them willing to build it and pay the taxes. They wanted to built it. (Hearings before the Committee on River and Harbors, House of Representatives, in March, April, May, and June, 1937, page 437.)

Senators Ashurst and Hayden of Arizona were the first to state on the floor of the Senate, in debating the proposition of sharing the revenues from Boulder Dam Project with the States of Nevada and Arizona, that the money to be provided for in the Boulder Canyon Project Act for these States was "in lieu of taxes," not only to the States but also to their political subdivisions (counties) and used the following language:

*Mr. Ashurst:* \* \* \* if private interests were to develop such power, taxable property would be set up, and Arizona, therefore, in accordance with precedents of many States, asks, in lieu of the taxes she might have levied and collected were private power plants constructed, that a certain revenue be paid to her. (Congressional Record, vol. 68, part IV, page 4301.)

*Mr. Ashurst:* It is expressly agreed and understood that the signatory States in this compact, *and their political subdivisions*, shall possess the right to derive revenue for

public purposes from power developed within their territory or on their boundary.

Such revenue may be derived by any manner or kind of taxation *in* each State as may be imposed *by such State under its constitution and laws*, but whatever kind or manner of taxes are imposed, the total revenue derived from such taxation in any State shall be limited to the amount that would be derived from a property tax, at the rate levied by such State or *taxing districts therein* \* \* \*. (Congressional Record, vol. 68, part IV, page 4501.)

*Mr. Hayden:* The right of the States to secure revenue from hydro-electric power by taxation *similar to that levied on other property* is hereby recognized. In case of a Government-built project the States in which such projects are built shall be entitled to compensation equivalent to what they (and their taxing political subdivisions--counties) would receive in taxation from private projects, \* \* \*. (Congressional Record, vol. 68, part V, page 5827.)

*Mr. Hayden:* In case of projects built on the main Colorado River by the Federal Government or those constructed on the boundaries of two or more States, the States *and the legal subdivisions* on the boundaries of which such projects are built shall be entitled to compensation equivalent to what they would receive from the utilization of their natural resources by a tax on private or corporate development, if these projects were within their own borders. (Congressional Record, vol. 69, part X, page 10271, et seq.)

It must be kept in mind that it was Senator Pittman's amendment to the Boulder Canyon Project Act (Swing-Johnson Bill) which was actually adopted by Congress and which amendment actually provided for 18 3/4% of the excess revenues, if any, derived from the operation of Boulder Canyon Project during the period of amortization (repayment to the United States of the money advanced by the United States to build and equip the project) to each of the States of Nevada and Arizona. This was the first congressional Act which provided for any revenue at all to these two States. Since this amendment was Senator Pittman's, it was he who lead the discussion and debate in the United States Senate for the adoption of his amendment, and it was he, more than anyone else, who was depended upon by all the parties interested for an explanation of the theory upon which these two States were entitled to participate in said revenues and the purposes for which this money was to be used. In debating and discussing these matters, Senator Pittman approved and adopted the statements hereinbefore quoted made by Senators Ashurst and Hayden to the effect that this money was to compensate both the States and their political subdivisions (counties) for taxes lost by each of them, and then amplified his views by the following language:

*Senator Pittman:* All that the proposed amendment provides is that a portion of the excess revenues shall be paid to Arizona and Nevada in the nature of a compensation in lieu of the loss of taxable property (to States and counties) through the acts of the United States Government. (Congressional Record, vol. 69, part V, page 5276.)

*Senator Pittman:* Congress had authority to withdraw such lands from entry and

acquisition by private owners. While it was a good policy, it injured the State in which the policy was put in force and effect because it withdrew forever from the possibility of taxation (by State and Clark County) such lands and mineral resources. The State's ability to maintain through taxation the State (including counties) cannot exist unless there is property to tax. Whilst there was no legal obligation on the part of Congress to grant any royalties to the States, they considered it just and right that it should be done to compensate to some extent the State (and county) for the loss of potential taxable property.

*Senator Pittman:* That resolution holds that when the Congress of the United States takes possession of State land and uses it for a national purpose, the policy adopted by Congress in the past should prevail, and that is that the States (and counties) *in all justice and morality* should be granted by Congress some compensation for having taken away their taxable property. (Congressional Record, vol. 69, part VII, page 7387.)

*Senator Pittman:* If the Government (Federal Government) did not reach out and take this great power site for flood control, and if a private corporation then did it, that private corporation would have to comply with the laws of our State (the taxing laws of the State of Nevada), and the dam and the power house it (the private corporation) built would be subject to taxation (State and county taxes) and help to support our State. (Congressional Record, vol. 69, part VII, page 7387.)

*Senator Pittman:* If any individual built that dam under the *Federal Power Act*, what would happen to Nevada? \* \* \* it (the dam, power plant, etc.) would be subject to taxation (State and county) by the State of Nevada at the regular rate of taxation (State and county) that exists. In other words, since our taxation rate (both State and county) in Las Vegas is about 5 percent, \$5 on the hundred, the taxes that we (State and Clark County) would receive from that enterprise would be over \$750,000 a year.

In agreeing with Senators Pittman, Ashurst, and Hayden in their above-quoted arguments, Senator Simmons used the following language:

*Senator Simmons:* I think if the Senator (Pittman) will put it upon that ground (loss of taxes to the State and its taxing political subdivisions where the property is situated) he will be upon a pretty solid and logical foundation. (Congressional Record, vol. 69, part VII, page 7387, et seq.)

*Public Policy of United States Is to Compensate States and Counties for Taxes and Potential Taxes Lost When United States Takes Public Lands Permanently.*

When members of Congress objected to these payments to Nevada and Arizona upon the ground that they were merely gifts to these States and that it was against the public policy of the United States to make gifts or donations to the States, Senator Pittman called the attention of Congress to the fact that it had long been the public policy of the United States (ever since about

Theodore Roosevelt's administration, or 1908) to compensate the States and their political subdivisions where the property was actually situated when it reached out and took public lands permanently in its own name and thereby rendered them exempt from taxation, for national forest reservations and for other public purposes, and, in so doing, used the following language:

*Senator Pittman:* It (the land) is in the same position as were the *forest lands*. The forest lands were owned by the Government and were withdrawn from (by our Federal law creating our national forest reservations) entry or acquisition, and in lieu of withdrawing them from taxation (by States and counties) \* \* \* the Government pays the State 25 percent of the *gross* receipts for such *forest reserves*.

The whole situation is that no State (including its political subdivisions) can maintain its sovereignty in the proper way and cannot exist without the power of taxation, or, necessarily, without the property to tax. (Congressional Record, vol. 69, part VII, page 7387, et seq.)

The law above referred to by Senator Pittman relates to national forest reservations established by the United States, and is now compiled as United States Code, title 16, section 500, and definitely provides, as stated by Senator Pittman, that when forest lands are so taken permanently by the United States for national forest reservations, 25% of the revenues derived from the cutting of timber and as grazing fees, etc. within such reservations shall be paid by the United States Treasurer to the State or States to be distributed to the county or counties, etc., as provided for by the Legislature of the particular State or States in which such reservations are situated for the purposes therein named. It is a matter of common knowledge that the State of Nevada and the counties thereof in which such national forests are situated in this State or in this State and some contiguous State have been receiving money derived from these sources for many years. Even last year the State and its counties so situated received money from the United States Treasury from these sources, as they had done for many years. No informed person can, therefore, question the correctness of the above-quoted statement by Senator Pittman, or the fact that the United States had established many years ago the public policy of sharing such revenues with the States and counties in which it established such national forest reservations, and that is the public policy of the United States at the present time. Every informed person, who is familiar with the history of the legislation by which Congress established this national public policy and the reason for the establishment of that public policy, will concede that the sole reason and basis upon which that public policy is based is the fact that such forest lands were subject to homestead and entry by private persons prior to and up to the time the United States established forest reservations covering such forest lands, and that by establishing forest reservations covering that land, the United States took the forest lands included in such reservations permanently out of the possibility of homestead and entry by private persons and, in so doing, permanently removed said lands from the possibility of taxation.

In other words, so long as these forest lands were not included in national forest reservations, they could have been homesteaded and entered by private persons and thereby become taxable. The mere establishment of such reservations by the United States made such lands permanently tax exempt. Up to that time they were potentially taxable lands and, if and when homesteaded or entered by private persons, they would have become taxable, and both the

State and county would have immediately taxed them, exactly as each of them taxes all other privately owned property. Both the State and the county or counties in which such reservations are actually situated are deprived permanently of the right to tax said lands by the mere establishment by the Federal Government of the reservation in which such lands are situated. Both the State and the county or counties, therefore, lost at least potential taxes by the mere establishment of such reservations. It was to compensate the State and county or counties for these taxes or potential taxes lost by each of them that this Federal public policy was established and the 25% of said revenues are so paid. The land taken by the Federal Government for the establishment of Boulder Canyon Project, and the canyon and its high and precipitous walls, and the waters so rapidly flowing in the bottom of the canyon, constitute as much of a natural resource as do such forest lands. The situations are the same in both instances; and there is fully as much reason why the State of Nevada and Clark County should receive a part of the revenues derived from this natural resource (Boulder dam and power plant) as there is why said revenues from national forests should be divided with the State and the counties where such national forest reservations have been established. Exactly the same Federal public policy is involved in the one as in the other. It certainly ought to be clear to everyone who will study the situation that, in neither instance, does the money paid constitute a gift or donation to either the State or to Clark County, but that it is clearly and unquestionably compensation for taxes actually lost and taxes potentially lost by both the State and Clark County. That is the very reason why Senators Pittman, Ashurst, and Hayden were so positive in their statements that this money is in lieu of taxes and that, as to Nevada, it is to compensate both the State and its taxing political subdivisions where the property constituting Boulder Dam Project is actually situated for taxes lost by each of them, and the reason why Senator Pittman was so clear and positive in his many statements to the effect that such payments do not constitute a new Federal public policy.

In discussing this same situation and Federal public policy and in showing that the same Federal policy has been adopted by the United States with reference to the public lands of the United States where oil, oil shale, gas, coal, phosphate, and sodium are situated. Senator Pittman later (1937) used the following language in discussing this policy of the Federal Government to compensate the States and their taxing political subdivisions (counties) for taxes lost and potential taxes lost when such lands are taken over permanently by the United States from revenues derived therefrom:

*Senator Pittman:* Now, I say to you that the proposition of giving compensation to the States of Arizona and Nevada in lieu of taxation was discussed for 7 years and was reported with the bill out of the committee. Why? Because way back in Theodore Roosevelt's time when you established the Forest Reserve policy of this county, we fought it out. They were going to take millions of acres of the finest timber in the world and take it out of taxation and that would ruin those States. Those laws were *repealed* by taking it into the Federal Government and so what was provided way back there was that 25 percent of all proceeds, forest proceeds and grazing and cutting timber, should go to the States. Utah enjoyed that, Colorado, Wyoming, enjoyed it, and Nevada enjoyed it. Do you know nearly one-quarter of the State of Arizona is today nontaxable by reason of Indian reservations, forest reservations, and parks for the benefit of the whole public of this country, and we

followed that policy down through the *oil-lease bill*? *I had charge of that bill for six years in the Senate.* But we passed the *oil-lease bill*. But what did we do? They followed (in old Boulder Canyon Project Act) the policy of the Forest Reserve Act and they provided that 37½ percent of the royalties obtained for the *lease of oil wells* should go to the States. That is where you get your 37½ percent. (In old Act, 18¾% to Nevada plus 18¾% to Arizona = 37½%). Not only that, they provided that 53 percent should go into those funds to be used in the semiarid States where the oil was. This whole thing was the *policy* from beginning to end. *It is the fixed policy of the Government.* \* \* \*

That dam could have been built by private capital *and private capital wanted to build it* and power would have been available to us just the same as it is now. Not only that, but the dam would produce; the estimated production of electricity from that plant would return \$600,000 a year in taxes to us at that time. But that is not all; *they have flooded our mineral lands* (in Lake Mead), all our copper lands, gold and silver lands; an area larger actually than the area of the State of Rhode Island. (Hearings before the Committee on Rivers and Harbors, House of Representatives, March, April, May, and June, 1937, page 436.)

The laws referred to by Senator Pittman as establishing this Federal public policy to compensate the States and their taxing political subdivisions (counties) are found in 41 Stats. 450. They are also compiled as United States Code, title 30, section 191; 41 Stats. 437; 44 Stat. 1058. This Federal law definitely provides, after production from such mineral lands begins, for 37½% of the amounts derived from bonuses, royalties, and rentals of such leased mineral lands by the Secretary of the Treasury of the United States each fiscal year to the State and its political subdivisions where such lands are situated; and this disposition of the moneys so received for sales of such products and as bonuses, royalties and rentals, is provided for in the following language:

*and for production thereafter 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivision thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct.* (U. S. Code, title 30, section 191; 41 Stat. 450.)

As to such mineral lands, this Federal public policy was adopted by the United States shortly after the so-called “Teapot Dome Scandal” when the Federal Government found it advisable for its own protection to stop the location, patent, and actual sale of such mineral lands in the manner other mineral lands were and still are located, patented and sold to the locators thereof, and to adopt as a public policy the mere leasing of such mineral lands to the locators of oil, oil shale, gas, coal, phosphate, and sodium, and the payment of royalties and rentals therefor. In other words, under the old policy which was followed by the Federal Government prior to that time, the locators of such mineral lands could eventually obtain title to such lands. Such mineral



lands would, therefore, go into private ownership, and would be immediately taxable; but, when the Federal government stopped that policy and took over such lands permanently in its own name and adopted the system of merely leasing them, there was no possibility for them to go into private ownership and be taxable. That change of Federal public policy naturally and unavoidably results in such mineral lands being permanently taken out of the possibility of taxation by either the State or the county, as property belonging to the Federal Government simply is not taxable. Upon the same theory adopted as to forest lands within national forest reservations, the Federal Government provided by law that the States and counties deprived of the potential right to tax such properties must be compensated for taxes so lost by them, and expressly provided, therefore, that 37½% of the revenues derived from such bonuses, royalties, and rentals shall be paid to the States and their taxing political subdivisions to compensate them for taxes so lost. It will be noted that Senator Pittman said in his last above-quoted statement that that was exactly where he got the 37½% mentioned in the old Boulder Canyon Project Act as the portion of the excess revenues, if any, which should be paid to the State during the period of amortization in lieu of taxes or in compensation of taxes lost.

It is interesting to note that when Senator Pittman was discussing this matter of taxation and the tax rate, as hereinbefore quoted, he included both the State tax rate and the county tax rate when he referred to the "taxation rate in Las Vegas" as being "about 5%" or \$5 on the \$100 valuation of property. In other words, this shows definitely that in figuring these tax moneys lost, he figured both the tax moneys raised in Clark County by its county tax rate and the tax moneys raised under the State tax rate, as it would require both the State tax rate and the county tax rate to amount to anything like \$5 on the \$100 of the assessed valuation of property. Everybody who knows anything about the State tax rate in this State, or the amount thereof, or who will study this situation, knows definitely that the State tax rate has never amounted to anything like \$5 on the \$100 assessed valuation of property. The fact of the matter is that at no time since 1921 (as far back as we have examined the laws establishing the State tax rate) has the State tax rate exceeded 73 cents. It was that high only in the two years 1937 and 1938, and was as low as 58 cents several years during that period of 21 years. This situation alone and the fact that Senator Pittman referred to the "taxation rate" involved as being \$5 on the \$100 assessed valuation of the property definitely establishes the fact that Senator Pittman in discussing the amount of taxes lost to the State had in mind the taxes lost not only by the State but by Clark County by reason of the fact that this property was definitely and permanently taken out of the realm of taxation by the mere fact that the Federal Government took over the property constituting Boulder Dam Project in its own name and, therefore, made it exempt from taxation.

*Taxation by State and Taxes Lost by State in Congressional Contemplation Include Also County Taxes.*

It will be noted and should be kept in mind that Senator Pittman, in his above-mentioned discussion of taxes lost, referred to the rate of taxation at Las Vegas as being about \$5 on the \$100 assessed valuation of the property on which taxes were lost, and that, in order to make his statement correct as to that rate of taxation, it was necessary for him to include in it taxes both at the State tax rate and at the Clark County tax rate. The State tax rate alone at that time was either 58 cents or 64 cents on the \$100 assessed valuation of property. It must, therefore, have included both the State tax rate and the county tax rate, both of which did amount at that time to about \$5

on the \$100 assessed valuation, which makes his statement correct. He referred to the taxes lost as "taxation by the State of Nevada" and said that the taxation referred to by him was "at the regular (biennial) rate of taxation." If he had not included taxes at the Clark County tax rate in his expression "taxation by the State," it certainly could not have amounted to a \$5 tax rate. This situation alone certainly makes it clear that he and other Congressmen in discussing this matter in the quotations from their discussions contained herein intended that their expressions "taxation by the State" and similar expressions included taxation of every kind under the State laws--taxes for the support of the State government at the State tax rate and taxation for the support of the county government, city government, hospitals, schools and all other purposes at the Clark County tax rate. The same situation exists throughout their discussions in Congress, not only with reference to the Boulder Dam Project but also with reference to the Tennessee Valley Authority, Bonneville, Coulee, and other Federal projects of this kind where a part of the revenues are allocated to the state in compensation for taxes lost. It must be kept in mind, therefore, that wherever United States Senators and others discussing this matter of State taxation used the expression State taxation, or taxation by the State, or taxes lost by the State, or payments to compensate for taxes lost, or payments to the State in lieu of taxes, or payments to compensate the State for taxes lost, these expressions mean all taxes lost under or which are imposed by State laws. In order to understand the expression so used in Congress and in Federal laws relating to such taxation by the particular State, we must keep in mind that they refer to and include all taxes of every kind and nature whatsoever imposed by the laws of the particular State, and not simply taxation at the State tax rate.

Further statements made by Senator Pittman in discussing this situation before congressional committees and Federal departments in 1937, were as follows:

*Senator Pittman:* All the people pay taxes. We all help to pay, and when you take-- when you have taken in taxable property away from a State in which 90 percent, even 99 percent, of it is not for the benefit of your State but for other States, you must consider that States (including their counties) have the right to live and they have to pay taxes.

*Mr. Parsons:* But the area itself was not paying any taxes?

*Senator Pittman:* There were plenty of them willing to build it and pay the taxes. They wanted to build it. (Hearings before the Committee on Rivers and Harbors, House of Representatives, March, April, May, and June 1937.)

At the same hearings, and in connection with this same matter, Senator Pittman used the following language also:

*Senator Pittman:* Now, we must not say we gave something to these States or granted something to these States. As a matter of fact, the State of Nevada joined in wholeheartedly with our friends from the other States and they were always our friends and accepted this 18¾% in lieu of taxation, which was not something new. That matter was debated in the committee seven years and every member of the

upper States supported us in that equitable purpose \* \* \*. (Hearings, before the Committee on Rivers and Harbors, House of Representatives, March, April, May, and June 1397, pages 434-435.)

The first sentence in the last-above quotation cannot possibly mean anything else than that this money is not a gift or donation. As stated many times by Senator Pittman, it is compensation to the State and its political subdivisions (Clark County) for taxes lost by both of them.

*Federal Departments and Power Contractors and Allottees Agree With Senator Pittman.*

On April 15-16, 1937, the Department of the Interior held a conference and hearing, presided over by Dr. Merriam, acting for Secretary Iekes, in Washington, D. C., with was attended by representatives and counsel of the various Federal departments involved and by members of Congress and representatives of the seven Colorado River Basin States consisting of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, including the Governors of some of those States and the Attorneys-General of practically all of them, and by representatives and attorneys, engineers, and other experts of Southern California Edison Company and City of Los Angeles (the lessees and generators of all of the electrical energy generated at Boulder power plant), Metropolitan Water District of Southern California, and other power contractors and allottees. The purpose of this meeting was to discuss a proposal to amend the old Boulder Canyon Project Act and the lease and other contracts for electrical energy made under it. Some objection was made at that meeting, however, to the provision of the old Boulder Canyon Project Act allocating to each of the States of Nevada and Arizona 18<sup>3</sup>/<sub>4</sub>% of the excess revenues, if any, derived from the operation of Boulder dam and power plant, and to any payment at all to either of those States out of that revenue. The State of Nevada was represented at said hearing by our entire congressional delegation and all members of the Nevada-Colorado River Commission, the Attorney-General of the State, and Professor Jay A. Carpenter of the University of Nevada. It was a large meeting and composed of some of the most able and nationally known experts in water and electrical engineering. Our own Senator Pittman was particularly active in behalf of Nevada, and made it a point to bring out the views of many of the representatives present as to why Nevada was given said portion of the revenues so derived, and as to the purposes for which Nevada's share of these revenues was to be used. He was particularly insistent in having said representatives express their views as to whether it was proper and in line with Federal public policy to compensate these States and their political subdivisions (counties) for taxes lost by reason of the fact that the Federal Government had reached out and taken over this great natural resource in its own name and thereby deprived the States and their political subdivisions (counties) from the taxes which they would otherwise have received from the property constituting Boulder Canyon Project. In answer to direct questions asked them by Senator Pittman, the following representatives, engineers, and experts definitely agreed with Senator Pittman in his contention that whatever moneys the States and their political subdivisions (counties) received from these revenues was, and should be, in lieu of taxes lost and in compensation for taxes lost to them because of this action of the Federal Government in depriving them in this way of property which would otherwise have been taxable by them, and, in turn, of the taxes they would otherwise have received from the property constituting this

project. All of them finally agreed with Senator Pittman on this point, among them being the following: John C. Page, Commissioner of the Bureau of Reclamation, Washington, D. C.; James H. Howard, General Counsel for Metropolitan Water District of Southern California; E. F. Scattergood, Chief Electrical Engineer and General Manager, Los Angeles Bureau of Power and Light, Los Angeles, California, a capable and well known electrical engineer of many years practical experience; William J. Carr, tax expert and attorney for said Bureau, Los Angeles, California; Fred B. Lewis, Vice President and General Manager, Southern California Edison Company, a well known hydro-electrical engineer of many years practical experience; Jay A. Carpenter, University of Nevada, and Special Industrial Engineer of the Nevada Colorado River Commission, and many other capable and well known electrical engineers and other experts on the subjects involved.

*New (Present) Adjustment Act.*

In our long and numerous hearings before the Committee on Rivers and Harbors of the House of Representatives of Congress, in March, April, May, and June 1937, and at many other hearings before this and other congressional committees incident to the amendment of the old Boulder Canyon Project Act, and in obtaining the enactment and approval of the present Boulder Canyon Project Adjustment Act, Senator Pittman was the recognized leader in the effort to secure such new legislation. It was he who was more responsible than any other member of Congress in securing the enactment of the old Boulder Canyon Project Act, and particularly the provision thereof allocating to each of the States of Nevada and Arizona 18<sup>3</sup>/<sub>4</sub>% of such excess revenues. When objection was made to these States having any of the revenue derived from Boulder dam and power plant upon the ground that it was merely a gift or donation to these States, Senator Pittman was called upon many times to explain the principle and theory upon which each of these States should share in this revenue; and he always gladly responded and restated the same position he and Senators Ashurst, Hayden, and others had maintained in their debates on the original Boulder Canyon Project Act as hereinbefore quoted. The Constitution of the United States and rules and regulations of the Congress required that Boulder Canyon Project Adjustment Act be introduced in the House of Representatives of Congress, as it was a revenue measure; and our own Congressman, J. G. Scrugham was unanimously selected as the congressional representative who should introduce this new measure as the representatives of the power contractors and allottees and of the Bureau of Reclamation and Department of the Interior had written it; and he gladly and willingly introduced the bill in the House of Representatives, which became the basis of our present Boulder Canyon Project Adjustment Act. When it reached the United States Senate it was referred to the Senate Committee on Irrigation and Reclamation, and on June 6, 1940, Senator Pittman, of that committee, filed his written report of the committee with the Senate (Calendar No. 1871, Report No. 1784), in which he again stated the principle and theory upon which these annual payments of \$300,000 are to be made to each of the States of Nevada and Arizona, and in which, among other things, he used the following language:

- (c) Payment of \$300,000 annually to each of the States of Arizona and Nevada. These payments are in commutation of the payments provided for in the Project Act, *and involve no new question of policy*, nor do they set any precedent. The pending

legislation commutes the payments of a percentage of excess revenues into fixed annual amounts. They are *not* payments by the Treasury *but by the power contractors* via the Colorado River Dam Fund. It being the intent of Congress that this Federal project--its use and output--should be free of taxation by the States *and their political subdivisions*, provision is made that, in the event of an attempt to levy such taxes, any amounts which may be so collected, notwithstanding the provisions of this subsection, shall be deducted from the \$300,000 payments provided for. (Senator Pittman's Report to the Senate on said Boulder Canyon Project Adjustment Act, page 6.)

It will be noted from the above that it is not the Federal Government at all that actually pays these annual installments of \$300,000 for use in each of the States of Arizona and Nevada, but that it is, in fact, the contractors or users of the power itself who pay these annual installments of \$300,000. Even our Nevada power users pay their prorata share of these annual installments. All that the Federal Government does is to transmit, as a matter of convenience, the moneys collected from the power users for these annual payments--both the power users in Nevada and the power users in Southern California and elsewhere. Even the United States pays it on Basic Magnesium power and light.

It will be noted also that the payment of the \$300,000 annually to each of these States does not involve any "new question of policy," that is to say, these annual payments are still in lieu of taxes or to compensate the States "*and their political subdivisions*" for taxes lost. This is definitely shown not only by the last-above quotation from said report of Senator Pittman and his committee to the United States Senate, but also from the following language quoted from it, and, in fact, throughout that report:

In view of this comment, the House committee revised the provisions so as to exclude the expression 'in lieu of taxes,' and those words are not used in this bill, S. 4039. The omission of these words is because of the suggestion of the (United States) Attorney-General and should *not* be construed as indicating any intent to depart from the principle on which the provision for payments to these States was inserted in the existing Project Act, viz, that such payments were to be in lieu of taxes and other benefits which those States would have enjoyed if the project had not been federally constructed. (Senator Pittman's Report to the Senate on said Boulder Canyon Project Adjustment Act, page 6.)

The above-mentioned suggestion of the Attorney-General of the United States was simply a "doubt" expressed by him as to the "advisability" of the "phraseology" and a fear that the use of the words "in lieu of taxes" in this Act might lead to the inference and contention *in future congressional Acts* relating to the construction of future similar projects that the Congress had thereby conceded that the States had a right to tax federally owned projects and property itself constituting them and thereby lead to controversy and probably to unconstitutional legislation and the embarrassment of Congress and the Federal Government and handicap, hinder, and delay the construction of future similar federally owned projects. He conceded the correctness of the principle and the policy of compensating the States and taxing political subdivisions for taxes

lost. He doubted only the advisability of the use of the words “in lieu of taxes” in the bill, not the principle or policy of such compensation for taxes lost. In fact, his “doubt” as to the advisability of the use of this language was not so much an objection to its use in this particular Boulder Canyon Project Adjustment Act as it was to its possible confusing effect on future congressional legislation. The language of his opinion clearly shows that situation. As Senator Pittman clearly stated in the last above-mentioned quotations, the fact still remains that the \$300,000 so paid annually is, in fact, in lieu of taxes, that is to say, simply tax moneys.

Much of the language quoted herein from Senator Pittman which precedes this subheading “New (Present) Adjustment Act” also relates to our present Adjustment Act and is quoted from his discussions thereof. This is particularly true with reference to the somewhat lengthy quotation herein from him with reference to the length of time this policy of compensating for taxes lost was discussed in Congress, and in which he referred to “Theodore Roosevelt’s time” and similar legislation of Congress since that time, and the other quotations herein from him following that quotation. We have stressed his attitude toward the compensation of the States and their taxing political subdivisions (counties) for taxes lost because of the fact that it was he who succeeded in getting through the United States Senate the original Boulder Canyon Project Act, particularly the provision thereof for the payment to each of these States of 18<sup>3</sup>/<sub>4</sub>% of the excess revenues, if any, derived from the operation of Boulder Canyon Project during the period of amortization; and the further fact that he was the leader in Congress in securing this later Adjustment Act. He was the choice of all the representatives of the power contractors, allottees, and users to lead the long fight in Congress and with the Federal bureaus to secure the enactment and approval of this legislation, both, because of his success in securing the original Boulder Canyon Project Act and also because of the fact that he was more familiar with the theory and public policy upon which this legislation is based than were the other members of Congress. For this reason, even the Southern California power users made many concessions to Nevada in the various negotiations and hearings beginning in 1937 and continuing through the final enactment and approval of the Act in 1940. He had been a member of the Senate longer than had been most of the other prominent members thereof and through the entire history of the legislation relating to Boulder Canyon Project, and knew the background thereof better than they could be expected to know it.

This prominence given to Senator Pittman should not be taken, however, as any reflection upon the activity of any of the other members of our congressional delegation. They were all active and exceedingly helpful in securing this legislation which is so beneficial to Nevada. Senator Oddie and Congressman Arentz were particularly active and helpful in securing the enactment and approval of the original Boulder Canyon Project Act. Senator McCarran and Congressman Scrugham were also active, cooperative, and helpful in securing the enactment and approval of our present Boulder Canyon Project Adjustment Act. In fact, it was Congressman Scrugham who was unanimously selected and who introduced our present original Adjustment Act. All of them deserve great credit for their helpfulness.

We regret very much that this opinion has grown so long; but, in view of the importance of this matter to the State of Nevada and the long period of time over which we are to receive these annual payments of \$300,000 (50 years), amounting to \$15,000,000, we are sure that we

are justified in giving the people of this State the background and basis of these annual payments. The discussion of this background and basis and the quotations hereinbefore given are certainly necessary in order for any person to really understand and be able to formulate a correct conclusion and opinion as to whether or not there is any obligation, either moral or legal, for the Legislature of this State to allocate a part of this money to Clark County as it did in said chapter 141, 1941 Statutes of Nevada. The people of this State are entitled to all these facts and this background and basis upon which the Legislature acted in enacting this law and upon which the Governor acted in approving it. Certainly, no fair-minded person will attempt to suppress or distort this information. It is essential that the people themselves have an opportunity to avail themselves of all these facts. All conclusions, especially on such important matters, should be based upon all the facts involved. Certainly, fairness and justice to all concerned can be promoted only by a fair and unprejudiced presentation of all these facts. Knowing them, as I do, it would be almost criminal for me to withhold from them any of this information or at least an opportunity for them to have it. That is the only reason I have for the length of this opinion, particularly the length of this statement of the background and basis for sharing this money with Clark County. After having furnished this opportunity to know this background and basis, I feel that my duty in this regard is fully performed. It is for the people of this State, through their Legislature and Governor, to determine whether there is any obligation at all to share this money with Clark County, and whether that basis constitutes a legal obligation or merely a moral obligation, and the amount Clark County shall have, if any, to discharge such obligation. It is also for them to determine whether this State shall carry out the representations, promises, or commitments made in this regard by Senator Pittman and our other representatives. We could not have gotten this money in any other way than by making such representations, promises, or commitments. What we should do about the matter, however, may be a matter to be determined upon the conscience of each individual concerned. The question to be determined is: Shall we comply with the representations, promises, or commitments, made in our behalf by our own representatives who succeeded in getting this money for us only by making them?

There cannot be any controversy as to what was said by our above-mentioned representatives in Congress. They are statements and matters of public record and are recorded in the Congressional Journal and transcripts of hearings before various congressional committees and Federal departments. The quotations have been checked and are correct. The only room for disagreement is as to whether those statements and representations do constitute a moral obligation of this State. The answer to this question depends a good deal upon the frame of mind, traits or character, and the ideas of fairness of the persons considering these statements. We know that the members of Congress considered these representations as being in the nature at least of assurances, promises, or pledges that the moneys received through these annual payments would be used in this State to take the place of taxes lost to the State and its taxing political subdivisions. We believe that the people of this State generally, when they are fully informed of these facts, will consider that the State is under a moral obligation at least to comply with the plan and express representations made by our representatives in Congress by and through which we obtain this money if we accept it.

*The Law Still Open to Court Contest.*

The people who are opposed to this law and desire to have its constitutionality and validity contested in the courts have had ample opportunity to do so for almost a year. They have known that it was the intention of the State Treasurer to comply with the Attorney-General's official opinion and pay this money to Clark County immediately upon receipt of it for almost that period of time. This certainly lays the proper foundation for a test of the law. Where the intention of a person charged with the duty or responsibility of doing any certain thing is known, any interested person opposed to the plan so intended to be carried out has a right to test the matter immediately in the courts.

*Taxes Lost.*

Some question has been raised as to whether Clark County lost a sufficient amount of taxes by reason of the Federal ownership of Boulder Canyon Project to amount to as much of this money as it is receiving under said chapter 141. The value of the property constituting Boulder Canyon Project, if owned by private persons or concerns and, therefore, taxable, is sufficient to produce tax moneys for the State and Clark County amounting to as much as \$300,000 annually, if multiplied by the amount of both the State tax rate and county tax rate. It is not sufficient, however, to produce State taxes alone to the amount of \$300,000 annually, as the county tax rate is 3 or 4 times as much as the State tax rate. In order that said property produce taxes in the amount of \$300,000 annually, if privately owned, it would be necessary to apply both the State tax rate and the county tax rate to it. It was upon this basis that we were able to secure as much as \$300,000 annually in lieu of taxes or to compensate for taxes lost--taxes lost by both the State and Clark County.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

HONORABLE DAN W. FRANKS,  
State Treasurer,  
Carson City, Nevada.

340 M. Elections--Full Period Six Months' Actual Residence in State, Thirty Days in County, Required to Vote at Any State or County Election.

CARSON CITY, July 14, 1942.

HONORABLE ROLAND H. WILEY, District Attorney, Las Vegas, Nevada.

Can a person of requisite age who will not have been a resident of the State for the full period of six months prior to the primary election, but who will have been such resident for the full period of six months prior to the general election in November, now register and vote at the September primary election?



The Constitution of Nevada requires a full period of six months' actual residence in the State and thirty days in the county before a person is entitled to vote at any State or county election. Section 1, Article II, Constitution.

Pursuant to the constitutional mandate contained in section 6, article II, of the Constitution, the Legislature has enacted registration laws, the present law was enacted in 1917, being chapter 231 Statutes of 1917, and also sections 2360-2393 Nevada Compiled Laws 1929. Such law has not been amended in any material respect that is pertinent to this opinion.

In 1918 the then Attorney-General of Nevada rendered an opinion upon the same law and the identical question of the right of a person to vote at the primary election who would not have been in the State six months prior to such election. He held that such person could not vote at the primary election unless he had resided in the State the full six months at the time of such election. Opinion No. 199. Report of Attorney-General, 1917-1918.

We concur in the foregoing opinion and adopt it as the opinion of this office on the question. The inquiry is answered in the negative.

There remains the question of whether such person may register to vote prior to the primary election. The registration law itself answers such query in the negative.

The law requires that registration offices shall be open for registration during general election years from May 1 up to the twentieth day preceding the primary election day. Section 2370 Nevada Compiled Laws 1929, as amended, 1935 Statutes, page 111.

The County Clerk shall close all registration for the full period of such twenty days for the purpose of preparing and furnishing precinct registers so that the election boards may have proof of and know who are qualified to vote. Such proof is particularly applicable to primary elections as such registers must show the political affiliations of the voters. Section 2376 Nevada Compiled Laws 1929, as amended, 1935 Statutes, page 113, Section 2378, supra, as amended, 1935 Statutes, page 114.

Lastly, section 2372 Nevada Compiled Laws 1929 provides:

If any applicant for registration has not resided within the State of Nevada or the county for the required length of time, but is otherwise eligible to registry, the county clerk or deputy registrar shall register such applicant: *provided, that it shall appear to the county clerk or deputy registrar, from questions propounded to the applicant, that he will be a fully qualified elector by the time such election is held.* (Italics ours.)

The proviso in the foregoing section of the law, we think, definitely and expressly requires that the applicant for registration, must show that he or she will have been a resident of the State and county for the constitutional and statutory time by the time of the primary election before such applicant can be legally registered to vote at such election.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

341 M. Motor Vehicles--Court Record Is Sufficient Evidence of Conviction Requiring Revocation--Uniform Motor Vehicle Operators' and Chauffeurs' License Act Provides No Express Punishment for Failure to Forward Record to Driver's License Division.

CARSON CITY, July 16, 1942.

HON. ROBERT A. ALLEN, State Highway Engineer, Carson City, Nevada.

The 1941 Legislature of this State enacted the so-called "Uniform Motor Vehicle Operators' and Chauffeurs' License Act," which is chapter 190, 1941 Statutes of Nevada, pages 529-542, inclusive. Section 33 of that Act provides for the *revocation* by the "*department*," which department is defined in section 6 of that Act as being "the State Highway Department of this State acting or through its duly authorized officers and agents," of driver's licenses issued to "any operator or chauffeur upon receiving a *record* of such operator's or chauffeur's conviction" of certain crimes and offenses named in said section. Section 34 of said Act provides for the mere *suspension* by said department of such licenses "*without preliminary hearing* upon a showing by its records (the records of the department) *or other sufficient evidence* that the licensee" has committed any of the offenses and crimes named in said section 34. The crimes and offenses named in section 33 which make it mandatory for the "department" to "*revoke*" such licenses forthwith are of a graver and more serious nature than those named in section 34. The offenses and crimes mentioned in section 34, however, are also very grave and serious, although they authorize the mere *suspension* of such licenses. In this connection, we call attention to the fact that paragraph 1 of section 34, a violation of which authorizes a mere *suspension* of a license, not a revocation thereof, includes all of the offenses and crimes mentioned in section 33 which make it absolutely mandatory upon the department to "*revoke*" such licenses. The language of this paragraph 1 being as follows:

Has committed an offense for which mandatory revocation of license is required upon conviction.

We call attention to this language and situation in order to point out more clearly, definitely, and positively the difference between the situation which mandatorily requires the "*revocation*" of such licenses and the situation which merely authorizes the department to "*suspend*" such licenses. The difference is not so much in the nature of the offenses and crimes which requires mandatory revocation of licenses and the nature of the crimes which merely authorizes suspension thereof, although most of those mentioned in said section 33 are somewhat graver and more serious than most of those mentioned in section 34. The chief difference in the situation which mandatorily requires the department to revoke such licenses as distinguished from the situation which merely authorizes the department only to suspend such licenses, is one of the proof or evidence which mandatorily requires such revocation as distinguished from that

which simply authorizes the department merely “to suspend such licenses.” The proof or situation necessary to require a mandatory revocation immediately by the department after receipt thereof is the “*record*” of the conviction of the licensee coupled with the further condition that the “conviction has become final.” The finality of such a conviction does not arise until after the time within which to appeal to a higher court has fully expired and no appeal has been taken.

The proof or evidence necessary to require the department merely “to suspend the license” is much less positive and definite, or weaker, than that required for revocation. That required to authorize mere suspension is only the “records” of the department itself as distinguished from the record of a court of “*other sufficient evidence,*” evidently any other evidence which the department itself deems sufficient to convince it (prove to it) that the licensee has committed any of the crimes or offenses named in said section 34. At least, that is all that is necessary to authorize the department to suspend a license unless and until the licensee takes the matter to the court and the court determines that the evidence relied upon by the department for such suspension is not “sufficient.”

Under these circumstances, the department asks the official opinion of this office on the following inquiries:

1. Is a record furnished by a municipal police department sufficient evidence of a conviction requiring revocation of a driver’s license under section 33 of the Driver’s License Act?

2. Is there any legal procedure whereunder the State of Nevada, on behalf of its Driver’s License Division, can require compliance by a municipal court with the requirements of section 32 of said Act?

1. Stated in the language you have employed in your first inquiry such a “record” of conviction furnished by a police department, if the department has and can furnish any such “record” of conviction, would be sufficient; and, upon the assumption that the police department “record” is an authentic record of the court conviction, as distinguished from a mere oral or even written report or statement of such conviction, the answer to your inquiry should be in the affirmative. However, the “record” of conviction necessary to mandatorily require the department to immediately revoke such license is, no doubt, the court’s record of conviction. If the police department, or a policeman, obtains such a written record of the police court, or other court, of the conviction of the licensee and merely hands such a record to the Driver’s License Division, such a “record” of conviction would, no doubt, be sufficient to require the mandatory revocation of the license by your department. In fact, the Act does not expressly state how the department is to obtain the “record” of conviction if the “court having jurisdiction over offenses committed” under the Act should fail or refuse “to forward to the department a record of the conviction” of the licensee. While section 32(b) of said “Uniform Motor Vehicle Operators’ and Chauffeurs’ License Act” makes it the mandatory duty of every such court to forward to the department a record of the conviction of any such licensee, there is nothing in the Act which prohibits the department designated in that Act from obtaining such a “record” from any other source from which it may obtain such an authentic “record” of conviction. Ordinarily, when a court “record” is referred to, it means the record of that court certified or furnished by that court or under its

authority. The court itself or its clerk is made by law the custodian of its own records. A “record” of conviction is certainly more authentic and trustworthy when certified or furnished by the court itself or its clerk. In other words, the “record” is the written order, judgment, or decree of the court, usually signed by the court or judge thereof. In a criminal case, it is composed of all the papers and pleadings filed in the case, together with the written record of the action of the court in the case. This “record” of conviction of the licensee necessary to mandatorily require the department to revoke the license of the licensee forthwith could certainly not be anything less than the written order, judgment, and decree of the court either signed by the judge himself or copied from the minutes of the court where the court is not what the law defines as a “court of record,” finding the licensee guilty of the particular crime or offense and fixing his punishment. That is the “record” of conviction referred to in said sections 32 and 33 of said Act. While said section 32(b) makes it mandatory for the court to furnish the department with such a “record of conviction,” and it is certainly his mandatory official duty to do so, there is nothing in said Act which prohibits the department from obtaining that same “record of conviction” from the police department, or from a policeman, or from any other person, so long as it is the actual written “record” of the court recording the “conviction” of the licensee. In other words, the court “record” necessary to a revocation is actually the record of conviction of the licensee made by the court, or pronounced by the court and recorded; but if the court in which the conviction was had fails or refuses to furnish its “record” thereof, then there is nothing in the Act which prevents the department from obtaining the “record” actually made by the court from some other source, if it is driven to that method of obtaining the actual court record of conviction by such failure or refusal of the court to furnish it, or the department actually obtains such an authentic court record from such other source.

Such a serious situation would be created by failure or refusal of the court in which such a final conviction is had to furnish the department with its “record of conviction” of the licensee; and the provisions of said Act are so clear, positive, and mandatory on the points involved, that we are here quoting sections 31, 32, 33, and 34 of said Act in full, and urging the officers involved and others interested in the matter to also study carefully sections 29 and 30 of the Act, which also deal with the question of the cancellation and suspension of such licenses and the conditions under which such licenses may be revoked or suspended.

SEC. 31. *Suspending Resident’s License Upon Conviction in Another State.* The department is authorized to suspend or revoke the license of any resident of this state or the privilege of a nonresident to drive a motor vehicle in this state upon receiving notice of the conviction of such person in another state of an offense therein which, if committed in this state, would be grounds for the suspension or revocation of the license of an operator or chauffeur.

SEC. 32. (a) Whenever any person is convicted of any offense for which this act makes mandatory the revocation of the operator’s or chauffeur’s license of such person by the department, the court in which such conviction is had shall require the surrender to it of all operator’s and chauffeur’s licenses then held by the person so convicted, and the court shall thereupon forward the same, together with a record of such conviction, to the department.

(b) Every court having jurisdiction over offenses committed under this act, or any other act of this state or municipal ordinance regulating the operation of motor vehicles on highways, shall forward to the department a record of the conviction of any person in said court for a violation of any said laws other than regulations growing [governing], standing or parking, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted.

(c) For the purposes of this act the term "convictin" shall mean a final conviction. Also, for the purpose of this act a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction.

SEC. 33. The department shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction of any of the following offenses, when such conviction has become final:

1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle;
2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug;
3. Any felony in the commission of which a motor vehicle is used;
4. Failure to stop and render aid as required under the laws of this state in the event of a motor vehicle accident resulting in the death or personal injury of another;
5. Perjury or the making of a false affidavit or statement under oath to the department under this act or under any other law relating to the ownership or operation of motor vehicles;
6. Conviction, or forfeiture of bail not vacated, upon three charges of reckless driving committed within a period of twelve months.

SEC. 34. (a) The department is hereby authorized to suspend the license of an operator or chauffeur without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:

1. Has committed an offense for which mandatory revocation of license is required upon conviction;
2. Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage;

3. Is an habitually reckless or negligent driver of a motor vehicle;
4. Is an habitual violator of the traffic laws;
5. Is incompetent to drive a motor vehicle;
6. Has permitted an unlawful or fraudulent use of such license; or
7. Has committed an offense in another state which if committed in this state would be grounds for suspension or revocation.

(b) Upon suspending the license of any person as hereinbefore in this section authorized the department shall immediately notify the licensee in writing, and upon his request shall afford him an opportunity for a hearing as early as practical within not to exceed 20 days after receipt of such request in the county wherein the licensee resides unless the department and the licensee agree that such hearing may be held in some other county. Upon such hearing the commissioner, or his duly authorized agent, may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers, and may require a reexamination of the licensee. Upon such hearing the department shall either rescind its order of suspension or, good cause appearing therefor, may extend the suspension of such license or revoke such license.

2. In answer to said second inquiry, we must hold that the Act itself does not expressly provide any punishment for failure of a municipal court, or any other court, to “forward to the department” its “record of conviction” of such a licensee, or any other “legal procedure” whereby such a court may be required to furnish such a “record.” It will be noted, however, that the Act makes it the mandatory duty of any such court to furnish its “record of conviction” of such licensee to the department. There is, of course, a remedy which may be invoked by any injured person for failure of a judicial officer, or any other officer, to perform his official duties; but certainly it will not be necessary to invoke such a remedy, especially against judicial officers. Usually, they perform their duties willingly, promptly, and efficiently. Certainly, it will not be necessary to go further in obtaining such “records” from judicial officers than merely to call their attention to the fact that the law requires them to furnish the department with such records of conviction and to respectfully request them to comply with this provision of the Act. In connection with the mandatory duties imposed upon such courts by said Act, we respectfully call attention to the provision of the above-quoted section 32(a) which imposes the additional mandatory duty upon any such courts to “require the surrender to it (the court) of all operator’s and chauffeur’s licenses then held by the person so convicted, *and the court shall thereupon forward the same*, together with a record of such conviction, *to the department.*” This language certainly makes it mandatory that such courts not only take up such licenses of persons who are convicted but also *to forward them to the department.*

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

342 M. Employment Security--Clerks--Stenographers--Nevada Salary Schedule Law.

CARSON CITY, July 16, 1942.

HONORABLE ALBERT L. MCGINTY, Executive Director, Employment Security Department,  
Carson City, Nevada.

DEAR MR. MCGINTY: Reference is hereby made to your letter of July 10, 1942, inquiring whether the job specification found under "Examples of Work Performed" in the paragraph numbered "4" for the position of Office Assistant describes a position of "Stenographer," "Typist," or "Clerk" such as is intended to be covered by the provisions of section 7562 Nevada Compiled Laws 1929, as amended by the Statutes of 1941.

This office has carefully considered the inquiry in connection with the specification above mentioned. It is also noted that the regional attorney for the Social Security Board in San Francisco expressed his opinion concerning the same question, and that it was his opinion that the fourth job description as mentioned in said paragraph 4 fell within the Nevada Salary Schedule Law, i.e., said section 7562, as amended by chapter 82, 1941 Statutes of Nevada, page 121.

We are of the opinion that the regional attorney was correct in his opinion, and that the examples of work as detailed in said paragraph 4 fall within the type or types of work indicated in said section 7562, as amended, with the exception of that example therein mentioned, to wit: "to take and transcribe hearings and conferences and technical and confidential dictation requiring a high degree of accuracy." As to this quoted example, we are of the opinion that it falls in the same category as that of court reporting, which is of a higher grade and requires more training and ability than the other examples set forth in said paragraph 4. I believe, however, that the secretaries (stenographers) in some of the other offices and departments do similar reporting and are still paid only the salary provided for in said salary schedule law.

We desire to call your attention to a letter opinion of this office addressed to you January 30, 1941, in which we held, with respect to the types of work included in said section 7562 and as the same is now amended, as follows:

It is my unqualified opinion that it was the intention of the Legislature to cover and include in the words used: "stenographer, typist, or clerk," all work of every kind and nature whatsoever done by stenographers, stenotypists, operators of calculating machines, typists, and all work done on typewriting machines or machines of a similar nature, and all clerical work of every kind and nature whatsoever in all of the State offices and departments, \* \* \*

Another matter to be taken into consideration in the preparing of examples of work performed and the assignment of persons to perform such work, in order to make definite and

certain that such persons are not classed as stenographers, typists, or clerks and bring them specifically within the statute, is that their designation and assignment should expressly state their title in such word or words as would negative the idea that they are either "stenographers, typists, or clerks," and that such title so appear upon the pay roll and in warrants paying their salaries. For example, here the person assigned "to take and transcribe hearings and conferences and technical and confidential dictation requiring a high degree of accuracy" should be designated "administrative secretary and reporter." In this connection, we think that the time and place of such hearings and conferences can easily be arranged so that taking and transcribing of the proceedings thereof should not require more than one or two such reporters, to the end that other offices and departments bound by said salary schedule law (chapter 82, 1941 Statutes of Nevada, page 121) may not have any real reason, although a possible excuse, for trying to boost the salaries of their employees who come under that law by simply changing the designation or classification of their employees or adding something to their duties which would not be wholly "clerical" and require only a little of their time. Such a plan, if adopted by all the offices and departments, would soon wreck the salary schedule law. While I am not in sympathy with that law, the Legislature has undertaken the responsibility of fixing such salaries, although its members know little or nothing of either the duties, qualifications, or efficiency of such employees. The Legislature is clearly within its constitutional rights in assuming this responsibility when it chooses to do so. We are bound by this law whether we like it or not. It applies to all as written. Exceptions cannot be made unless written in the law. I am in favor of good salaries, but must interpret and construe the law, as written, the same for all.

In connection with this letter opinion, we desire to point out that said section 7562, as amended at 1941 Statutes, page 121, applies to all clerical work in all the offices and departments of the State, including the Employment Security Department, unless expressly excepted in the law itself, and that as to all the stenographers, typists, and clerks in State employment not so excepted, and the type of work performed by them, it is binding on all such departments; and it was the intention of the Legislature that no one department should have any advantage over any other department, or that the stenographers, typists, and clerks employed in any one department should have any advantage over those in any other department, unless expressly exempted therefrom in the statute itself.

Trusting that this will answer your inquiry, I am

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

343 M. Public Schools--Compulsory School Age Between 7 and 18 Years--Trustees May Adopt Rules and Regulations Concerning Children Who Have Not Reached Age of 6.

CARSON CITY, July 27, 1942.

HONORABLE MERWYN H. BROWN, District Attorney, Winnemucca, Nevada.



The Public School Board of Winnemucca School District adopted in 1925 a rule and regulation in which it was provided, among other things, that children who had not reached six (6) years of age at the opening of school in September would not be admitted to school until the opening of school in the immediately following January, although they might have become six (6) years of age during that interim; and that children who had not reached the age of six (6) years by the opening day of school in January of each year would not be admitted to school until the opening of school the immediately following September, although they might have reached the age of six (6) years during that interim between the opening of school in January and the closing of that term of school. On April 21, 1942, only about six (6) weeks before the closing of school for the term beginning in January of that year, a parent brought his child to the school building of the Winnemucca School District and presented a birth certificate to the superintendent showing that his said child was born April 15, 1936, and, therefore, that the child was six (6) years of age on April 15, 1942, six (6) days before the child was so presented, and then and there demanded that the child be admitted to school, although the term of school had almost closed as above indicated. The parent claimed that the provisions of Nevada Compiled Laws 1929, section 5715, paragraph 18, are mandatory, and required, by implication at least, school trustees to admit children to school as soon as they arrive at the age of six (6) years. We cannot so interpret and construe the provisions of said section and paragraph.

In this connection, it must be kept in mind that the compulsory school attendance law of this State applies only to children who are between the ages of seven (7) and eighteen (18) years. The provision of the Nevada law in this regard is as follows:

Each parent, guardian, or other person in the State of Nevada, having control or charge of any child between the ages of seven and eighteen years, shall be required to send such child to a public school during the time in which a public school shall be in session in the school district in which said child resides; \* \* \*. Nevada Compiled Laws 1929, sec. 5849.

This is still the law of this State; and is the only law specifying the ages between which it is compulsory for children to attend school. While it relates to parents or other persons having supervision or control over children, and makes it mandatory for them to send children between 7 and 18 years to school, there are certain exceptions which the Board of Trustees of school districts may make even as to those children. In other words, the Board of School trustees of a school district have authority to excuse even children between those two ages from attendance at school under certain facts and circumstances specified in the law. The point is that Boards of School Trustees have some right of discretion to excuse children from school even within the ages where the law makes it compulsory that such children attend school; and they have authority to so excuse such children from attending school.

Upon these facts we have been asked for the official opinion of this office on the following inquiry:

May Boards of School Trustees lawfully adopt a rule and regulation which provides,

among other things, that resident children who have not reached the age of six (6) years at the opening of school in September may not be admitted to school until the opening of school in the immediately following January, although they may become six (6) years of age during the interim between such September and such January; and that children who have not reached the age of six (6) years by the opening day of school in January of each year may not be admitted to school until the opening of school the immediately following September, although they may become six (6) years of age during the interim between such opening of school in January and the closing of that term of school, and, pursuant to that rule and regulation, exclude children from admission to school during such interims?

It is the unqualified opinion of this office that the answer to this entire question and separable portion thereof is “yes.”

If we were satisfied to merely answer a question without discussing its various ramifications and giving our reasons for the official opinions of this office, the foregoing answer would be entirely sufficient. We have always believed, however, that public officers asking for and entitled to the official advice and opinions of this office, and the public generally who are affected by such advice and opinions, are of sufficient importance and intelligence that they are entitled to the reasons for such legal advice and official opinions and a quotation or, at least, a citation, of the laws or decisions of the courts upon which the Attorney-General bases such advice and opinions, and to a discussion of the various ramifications incidental to such advice and opinions and which may be more or less involved therein. We have always, therefore, adopted that plan, although it might, and often does, lengthen such official opinions to such an extent as to seem unnecessary to those who are not involved or concerned. We have never considered that the words necessary to clarify a situation or sufficiently state the basis of legal opinions were such an expensive luxury as to justify this office in merely answering the inquiry made and expecting the people involved or concerned to merely take the word of the Attorney-General as the law without giving the reasons upon which his official opinions rest. We have never considered the office so important that we should expect such docile submission. In fact, over a period of many years in the active practice of the law and in the reading of the decisions of the courts, we have noted that even they take time to quote and cite the law and give the reasons upon which their decisions are based.

We shall now give the basis for the opinion expressed in the first paragraph of this opinion. Certainly, it will be admitted that Boards of School Trustees have some power, authority, and jurisdiction over school matters. These powers and this authority and jurisdiction are stated, in part, and at considerable length (much as words seem to offend some people) in Nevada Compiled Laws 1929, section 5715. This section of the law contains 24 complete paragraphs, and covers more than four pages. It is still the law of this State, and has been so satisfactory that it has not been amended since the approval of our Public School Law on March 20, 1911. In view of the many amendments to the school law, this particular section setting forth a portion of the powers, authority, jurisdiction, and duties of Boards of School Trustees must have been quite satisfactory. Other duties, powers, authority, and jurisdiction of Boards of School Trustees are set forth in several of the other sections of the school law. The length to

which the Legislature of this State has gone in setting forth these things in so much detail is certainly conclusive evidence that the public schools of this State are considered not only of great importance but also that the duties, authority, and responsibilities of Boards of School Trustees are also considered of great importance to the children of our State.

Among the things specified in said section 5715 is the power and duty to make and enforce rules *for their own government and the government of schools*. This power and duty is found in paragraph 7 of said section 5715, which paragraph is in the following language:

To prescribe and enforce rules, not inconsistent with law or those prescribed by the state board of education, for their own government and government of schools, and to transact their business at regular or special meetings, called for such purpose, notice of which shall be given each member. Nevada Compiled Laws 1929, section 5715, paragraph 7.

In paragraph 18 of this same section 5715, we find the portion of the law relied upon by the parent of the child who was so insistent upon having his child admitted to the public school of Winnemucca School District almost at the very last of the last term of school, that is to say, on April 21, 1942. Certainly, anyone familiar with school affairs and the progress of pupils in school will concede that teachers are too busy in promoting the general progress of their classes throughout the entire school term, to instruct each separate pupil as if it was a class in itself, and to devote much time in individual instruction of a single pupil. This situation is particularly true so near the end of the school term. Certainly, all will concede that it is the absolute duty of any school and of every grade or class in it. It is also the duty of the teacher of a grade or class in school to promote the general welfare of the entire grade or class under her instruction. Certainly, it will be conceded that when a teacher has to devote her time to the individual instruction of one single pupil in a class of many, the welfare of the entire grade or class suffers, except the one so receiving individual instruction. It was certainly not the intention of the Legislature, which enacted said section 5715 and has kept it in full force and effect without amendment for more than 30 years, and certainly is, not the intention of the school authorities to promote the welfare and instruction of one single pupil at the expense of an entire grade or class in the school. It must be clear to all who seriously consider this situation that to admit a new pupil so near the end of the entire school year as April 21, would result in one of two things, that is to say, in practically ignoring and furnishing no worth-while instruction to the new pupil, or in the neglect of all the other pupils in the grade or class under the instruction of the particular teacher to the extent the teacher devoted her time to the new pupil.

Paragraph 18 of said section 5715, relied upon by the parent of the child who was so insistent upon its admission to school on April 21, 1942, notwithstanding the fact that that was almost the end of the school year, is in the following language, taken in connection with the opening clause of said section 5715:

SEC. 5715. Powers and Duties of Trustees. School Trustees shall have the power and it shall be their duty (among other things):

18. To suspend or expel from any public school within their district, with the advice of the teachers and deputy superintendent of public instruction, any pupil who will not submit to reasonable and ordinary rules of order and discipline therein, and to exclude from school all children under six years of age when the interests of the school requires it to be done; *provided, however*, that under no circumstances shall any school teacher or principal, or board of trustees be authorized to expel any pupil under the age of fourteen years for any cause without first securing the consent of the deputy superintendent of public instruction. Nevada Compiled Laws 1929, section 5715, paragraph 18.

It is stated that the parent relied upon the implication that the Board of School Trustees must admit to school all children as soon as they arrive at the age of six (6) years and are not otherwise unfit for admission. Apparently, the parent relied upon the words "it shall be their (the school board) duty" in the opening clause of said section 5715 as above quoted, taken in connection with this above quoted language: "and to exclude from school all children under six years of age when the interests of the school requires it to be done." It was evidently the idea of the parent that the language making it the duty of the school board to "exclude from school all children under six years of age" implied that it was their mandatory duty to admit all children over six years of age as soon as they are that old. Such a conclusion, however, is not justified by the language used in said paragraph 18.

It must be clear to all who will read and study said paragraph 18, in connection with the other portions of said section 5715, that the sole purpose of said paragraph 18 is to set forth the situations and conditions which empower the Board of School Trustees to "suspend or expel" children from the public schools, or to "exclude" them from such schools. It does not deal in any way with the question of what children are entitled to admission to the public schools. The mere fact that this paragraph empowers school trustees to "exclude" children under six years of age from public schools certainly does not make it their mandatory duty for them to admit all resident children over six years of age the very moment they become of that age, or even within six days after they become six years of age, as was the situation involved in this case.

In closing, we again call attention to the fact that the age at which the law makes it compulsory that children in this State attend school is between the age of seven (7) years and the age of eighteen (18) years.

For the foregoing reasons, we are of the opinion that Boards of Trustees of public schools have ample authority to adopt the rule in question, and to enforce it, and that, under the circumstances, the school board in question could lawfully exclude the child involved from the public school when application was made for its admission so near the end of the school year.

344 M. State Highway Department--Insurance--Highway Equipment and Buildings.

CARSON CITY, July 29, 1942.

MR. ROBERT A. ALLEN, Highway Engineer, Heroes Memorial Building, Carson City, Nevada.

Re: Insurance on Highway Equipment and Buildings.

DEAR ROBERT: Pursuant to our understanding of some days ago, I am writing to say, as I heretofore told you orally, that it is my opinion that the insurance on these buildings and this equipment, like that of all the State property, should actually be “placed” by the Insurance Commissioner of the State, instead of by the State Highway Engineer direct.

My conclusion in this matter is based upon the fact that the 1941 session of the Legislature of this State enacted what is known as the “Nevada Insurance Act,” the same being chapter 189, 1941 Statutes of Nevada, pages 451-529, both inclusive, and the Governor of this State approved that Act on March 31, 1941. This is a very long Act and deals with the matter of insurance under the Insurance Commissioner of this State at great length and in much detail. The public, including all State officers and employees, is certainly warned by the very first words of the title of the Act, as well as by its name as above quoted and as specified in section 1 of the Act, that this chapter is an Act “relating to insurance.”

It is certainly evident from this situation that all persons having in mind the taking out (placing) of insurance on any property of this State are warned that they should examine said chapter 189 to ascertain the provisions of the law relating thereto. Section 135 of said chapter 189 contains the following language and section title:

SEC. 135. Insurance on State Property--Inspection and Safety Appliances. The state controller, acting as ex officio insurance commissioner, shall place all insurance required by the State of Nevada upon its property, dealing only with companies authorized to do business in the state \* \* \*. 1941 Statutes of Nevada, chapter 189, section 135, page 518.

I quoted the title of the section for the reason that I am informed that the section titles were written into the law at the time the bill; *i.e.*, Senate Bill 31 was introduced in and passed by the Legislature of this State. Both the beginning words of the title of the Act and the name of the Act as specified in section 1 thereof, and also the language of the section title “Insurance of State property,” are warnings to all persons and officers concerned that this chapter 186 is the law of this State to which they should look for their guidance in placing insurance.

The only apparent conflict in our entire State law with reference to insuring the property belonging to the Highway Department arises from the language of the “General Highway Act”; *i.e.*, An Act to provide a general highway law for the State of Nevada, approved March 23, 1917, which is compiled as Compiled Laws of Nevada 1929, sections 5320-5355, both inclusive, the apparent conflict being in section 6 of said “General Highway Act,” which is section 5325 Compiled Laws of Nevada 1929, and consists of the following language:

He shall have entire charge (of) insuring all state highway buildings and equipment and shall make all adjustments with insurance companies for losses thereto, and shall collect all moneys due for such losses and deposit them with the state treasurer, who

is hereby instructed to place such moneys in the state highway fund; *provided*, that all moneys now in the state treasury which have been received from insurance companies for the payment of fire losses on state highway equipment and buildings shall be transferred to the state highway fund, and the state controller and the state treasurer are hereby authorized and directed to make such transfer. Nevada Compiled Laws 1929, section 5325.

It will be noted from the last above-quoted language that the General Highway Act of this State provides and makes it mandatory that the State Highway Engineer “shall have entire charge (of) insuring all State highway buildings and equipment.” At first glance, and without giving both Acts careful consideration, it would appear to the casual observer that these two quoted provisions of the “Nevada Insurance Act” (section 135) and of the said “General Highway Act” of the State (said section 5325) are in conflict with each other, each appearing to such casual observer as providing that its own State officer should take out (obtain) insurance on State property, the said quoted provisions of the “General Highway Act” charging the State Highway Engineer with that duty is so far as State highway buildings and equipment are concerned, and the quoted provisions of said “Nevada Insurance Act” (section 135) placing that responsibility solely in the Insurance Commissioner of this State as to all property belonging to the State of Nevada, which would, of course, include said “State Highway Buildings and Equipment”; but this office is not of that opinion.

It is our opinion that there may be considerable difference between the expression “charge (of) insuring” used in the General Highway Act of this State and the expression “place all insurance” as used in the above-quoted language from said section 135 of the Nevada Insurance Act. While, in actual practice, the person who “has charge of” insuring on any particular piece or pieces of property might also “place” that insurance, the person having “charge” of it might very properly and lawfully request or direct some other person to actually contact the insurance company or its agent and place the insurance. In other words, there is not necessarily any conflict in the authority granted and the responsibility imposed by the two expressions. We are of the opinion that both of them may properly and legally stand as written in the law, and that the above-quoted expression from said Highway Act (section 5325) is not necessarily repealed by said later above-quoted provision of the Nevada Insurance Act (section 135), especially when we give to the said expression “in charge of” in the Highway Act the meaning that the State Highway Engineer shall decide the nature of the coverage required by such insurance and request the Insurance Commissioner of this State to “place” (obtain) such insurance and coverage.

In other words, it is our opinion that the two above-quoted provisions of the two laws are not in such irreconcilable conflict that the later law repeals the earlier law even by implication, and that the two apparently conflicting provisions of these laws should be construed as being *in pari materia*, in so far as the State Highway buildings and equipment are concerned, one of them merely supplementing and assisting the other. We are made more positive and certain in this view because of the fact that the quoted language from the highway law (section 5325) contains several other provisions and mandatory requirements which are not contained in said quoted language from the Nevada Insurance Act (section 135), which are absolutely essential to the handling of insurance on property belonging to the State Highway in order to obtain the best

results for the State. In this connection, we call attention to the fact that the language so quoted from said section 5325 (the highway law) contains a mandatory provision for “adjustments” of losses to such insured property of the Highway Department and for the collection of moneys due for such losses, and for the deposit of such moneys, even to the extent of specifying the fund in which such moneys are to be deposited, and for the transfer of moneys which had already been collected for such losses, and authorize and direct the State Controller and State Treasurer to make such transfers. None of these provisions, except the mere placing of the insurance, is contained in the above-quoted language of section 135 of the Nevada Insurance Act. In other words, the Highway Act is much more complete and much more in detail as to the handling of such insurance and the adjustment of losses under such insurance and the disposition to be made of it than are the provisions of the Nevada Insurance Act. In addition to this, the State Highway Engineer is probably more familiar, from long experience in handling such insurance, with the kind of insurance and coverage which will serve the best interests of the State on such highway property than the Insurance Commissioner of this State could possibly be.

For the foregoing reasons, it is the opinion of this office that the matter of insuring the State Highway buildings and equipment should be handled jointly by the Insurance Commissioner and the State Highway Engineer of this State in substantially the following manner:

The State Insurance Commissioner shall actually “place” (obtain) all such insurance, after the State Highway Engineer shall have entire “charge of,” and be charged with the responsibility of, deciding what kind of insurance and insurance coverage shall be had on “State Highway buildings and equipment” for the best interest of the State, and, in addition thereto, (1) “shall make all adjustments with all insurance companies for losses thereto,” and (2) “shall collect all moneys due for such losses,” and (3) “deposit them with the State Treasurer for deposit in the State Highway Fund, and see to it that the State Treasurer and State Controller transfer all moneys heretofore received on such insurance to that fund.”

In this way, and in this way alone, can the above-quoted provisions of both of these two laws stand as constitutional and valid laws of the State. If handled in this way, however, both of them can stand as such valid and constitutional laws.

If not handled in that way, they would be in irreconcilable conflict with each other in so far as obtaining insurance on State Highway buildings and equipment is concerned; and, in that event, said above-quoted provisions of the Nevada Insurance Act would repeal by implication the above-quoted provision of the Nevada Highway Act in so far as actually obtaining insurance on said highway property is concerned, for the very simple reason that it is the last enactment of the Legislature on the subject and is in irreconcilable conflict with said provision of the State highway law.

On the point of repeal by implication by a later irreconcilable law, I call your attention to the case of State v. Reese, 57 Nevada, page 125. This case is about the last expression of the Supreme Court of this State on the point and sustains repeal by implication by later laws which are irreconcilable with prior laws, notwithstanding the fact that the later law may be a general law

and the prior law is a special Act.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

345 M. Elections--Independent Tickets--Party Candidates--Independent Candidates.

CARSON CITY, July 31, 1942.

HONORABLE JOHN W. BONNER, District Attorney, Ely, Nevada.

DEAR JOHN: Reference is hereby made to your letter of July 29, requesting an opinion on three questions pertaining to situations where independent candidates file for nomination to county offices on an Independent ticket.

We may be somewhat confused, but we know of no "Independent ticket" organized in this State. It may be that one has been organized in White Pine County, but unless such party was organized pursuant to sub-section (g) of section 2404, Nevada Compiled Laws 1929, there would be and can be no legally organized Independent Party. If such party is so organized and so named, then any candidates filing for office under such party designation will be governed by the provisions of the primary election law the same as any other party candidates, and would necessarily have to run in the coming primary election. In this connection, if such is the case, then, of course, no one could vote for such candidates at the primary election except those voters who are registered as Independent voters.

On the other hand, if it is simply the filing of independent candidates for office presumably under section 2435 Nevada Compiled Laws 1929, then such independent candidates do not appear on any ballot at the primary election. They are not party candidates. Their names will appear on the general election ballot in November.

Answering your inquiries by number: Number 1. The two independent candidates do not have a primary contest unless the party has been organized as above stated.

Number 2. Unless such party has been so organized, then at the general election the Democratic nominee and the Independent will run at such election.

Number 3. The Democratic nominee surviving the primary election, the one Republican, and the two Independents will be carried over to the general election.

Trusting this will answer your inquiries, I am,

Very truly yours,

GRAY MASHBURN, Attorney-General.



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

346 M. Public Schools--Public School Teachers' Permanent Fund--Investment in City of Yonkers Water Bonds.

CARSON CITY, August 6, 1942.

MISS MILDRED BRAY, Secretary Public School Teachers' Retirement Salary Fund Board, Carson City, Nevada.

DEAR MISS BRAY: In respect to a proposed investment for your board of moneys of the Public School Teachers' Permanent Fund in fifteen thousand (\$15,000) dollars face value of water bonds of the city of Yonkers, State of New York, I have to advise as follows:

The bonds are dated February 1, 1922, maturing five thousand (\$5,000) dollars on February 1 in each of the years 1951, 1952, and 1953. They are numbered 2648 to 2652, 2659 to 2663, and 2670 to 2674, all inclusive. Interest rate 4½% per annum.

I have examined the following papers:

(1) Transcript of proceedings covering the issue of which these bonds are a part, prepared by the firm of Hawkins, Delafield & Longfellow, 67 Wall Street, New York, for Roosevelt & Weigold, Inc., 40 Wall Street, New York, under date of July 14, 1942.

(2) Legal opinion given to Walter M. Taussig, Mayor of the City of Yonkers, New York, by the same firm under date February 10, 1922.

(3) Letter to me under date August 3, 1942, from Leonard McAneny, Corporation Counsel, Yonkers, New York.

(4) Telegram to me from him dated August 5, 1942.

It appears from these documents that the bonds in question were legally issued in full compliance with all pertinent laws of New York and ordinances of the city of Yonkers, New York, and that they constitute legal, binding, and existing obligations and there is no litigation drawing in question their validity.

The proposed investment finds authority in the Act of March 28, 1933, as amended by section 2, chapter 61, Statutes of 1941, page 78 (N. C. L. 1929, section 747.05) and by section 22 (4) Act of March 29, 1937, page 473, as amended by chapter 190, Statutes of 1939, page 314. (Section 6077.42 N. C. L. 1929 and Supplement.)

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By HOMER MOONEY, Acting Deputy Attorney-General.

347 M. Corporations--Nonprofit Corporation Properly Exempt from Taxation.

CARSON CITY, August 14, 1942.

HON. GRANT L. BOWEN, Assistant District Attorney, Reno, Nevada.

DEAR SIR: Answering your inquiry of August 7, 1942, I have to advise:

You inquire whether Reno Little Theater, Inc., a nonprofit corporation may properly be exempt from taxation under authority of section 983-983.01 N. C. L. 1929, being an Act entitled "An Act further defining charitable corporations and exempting from taxation the property of such corporations."

From your letter and the records of the Secretary of State it appears that the charter of the association as a nonprofit corporation was issued September 24, 1936, and the amendments of the articles of association were adopted and filed July 28, 1942.

These documents taken together disclose that the association claims to be a "nonprofit cooperative corporation." It is so regarded by the Secretary of State, who collected no fees for filing the articles.

It appears from the articles as amended that "no member of the corporation shall, by reason of his membership therein, have or own any interests, legal or equitable, in the property acquired and held by the corporation." This is tantamount to a declaration that no dividends to members shall be declared or paid. It is further declared that "title to all property, real and personal, acquired by the corporation shall be held by it in trust for the county of Washoe, State of Nevada." There is the further provision that because of this trust that on the winding up of the corporation such property remaining after debts are paid should vest and remain in Washoe County, Nevada.

It appears from your letter and the records that there are advisory memberships and supporting memberships in the corporation. The latter qualified by purchasing season tickets for the production presented. It is contemplated that tickets be sold to the general public.

In view of the declared nonprofit character of the corporation and its activities, it may be said to be implicit that the tickets shall be sold on a nonprofit basis, that is, for no more profit than to cover costs of production, overhead, and a reasonable fund to insure the continuity of the general plan. They will be sold to the general public, and it is to be assumed that in such a noncommercial enterprise much advantage in the way of education and culture will insure to the people at large, without discrimination and limitation, at a cost calculated to promote that end.

Whether these plans and promises are carried out is a matter of fact which any board empowered to act in the premises will have a right to inquire into and satisfy themselves. It is sufficient to say that the “set up” brings the corporation within the purview of the Act. It may be suggested that the tickets sold to the public might well bear the notation “price covers cost only” or “nonprofit.” The books of the corporation should currently maintain a statement of costs, income, surplus, disposition of surplus, etc.

The declaration of trust embraced in the articles would seem to bind the corporation, but the matter might be made more one of record by filing a formal declaration of trust and continuing trust in the miscellaneous records of Washoe County.

The Act in question finds its background in some one or more of the following provisions:

Constitution of Nevada; article X, section 1 (N. C. L. 1929, sec. 145) authorizing exemption by the legislative Act of property for municipal, educational, literary, sympathetic, or any other charitable purpose.

It will be noted that the “literary” and “educational” purpose and that the phrase “other charitable purposes” indicate that some of the specific purposes named may be embraced under the general heading “charitable.”

Constitution of Nevada, article VIII, section 2 (N. C. L. 1929, sec. 132), providing that the property of corporations formed for municipal, charitable, educational, or religious purposes may be exempt from taxation by law. These two provisions are not self-executing, but confer on the Legislature the power to make the exemption in the general categories mentioned.

Statutes of Nevada, 1933, page 76, an Act of March 15, 1933, “An Act further defining charitable corporations and exempting from taxation the property of such corporations.”

This includes among “charitable corporations” those “whose object and purposes are for public charity, religion, or education, and whose funds are, in whole or in part, derived from public donations, and corporations prohibited by their articles from declaring or paying dividends, and any corporation in which the money received by it is devoted to the general purpose of charity and no portion of the same is permitted to inure to the benefit of any private individual engaged in managing the charity,” etc. This enumeration of indicia is generally in the conjunctive, but in the instant case it appears:

- (1) The objects are “public charity or educational.”
- (2) The funds are derived in whole or in part from public donations.
- (3) The declaration or payment of dividends is prohibited.

(4) The money is devoted to “the general purpose of charity” and no portion of the same is permitted to insure to the benefit of any private individual engaged in managing the charity.

I may say that, in my opinion, the amendment of the articles might have been made more directly in conformity to the statutes, but enough appears to amount, in my opinion, to a compliance with the stated conditions.

The word “charity” and the phrase “charitable purposes” have a much broader scope than the mere relief of poverty and distress. Our own Supreme Court, in considering the Y. M. C. A. in Nevada in the case of Bruce v. Y. M. C. A., [51 Nev. 372](#), a special statute of exemption, discusses the meaning of the word “charity” in connection with the exemption of the Y. M. C. A. from taxation. The reasoning seems helpful in this case.

Section 2 of the Act in question here (N. C. L. 1929, sec. 983.01) provides the exemption from taxation.

Nevada also has statutes more or less specific on the subject (see N. C. L. 1929, sec. 6630, sec. 6418(4)), and there is a disposition to limit the value of property exempt. There is no limitation, however, in the Act relied on in the instant case. In conclusion, it is my opinion that the Reno Little Theater, Inc., comes under the purview of the Act cited (N.C.L. 1929, secs. 983-983.01), but the board is empowered to determine as a fact whether the conditions named have been met. Certainly, should the board grant the exemptions, its action, unless absolutely arbitrary and capricious, would never be in danger of reversal in the courts.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By HOMER MOONEY, Deputy Attorney-General.

348 M. State Highway Department--The Hatch Act.

CARSON CITY, August 14, 1942.

HON. ROBERT A. ALLEN, State Highway Engineer, Carson City, Nevada.

DEAR SIR: Complying with your request of August 10, 1942, I note you desire the advice of this department as follows:

What restrictions this Act (the Hatch Act, as amended) places on the employees of the State Highway Department during a primary election and a general election. What are we permitted to do and what are we enjoined from doing?

It would be impracticable to answer your inquiry by attempting to list a catalogue of

activities permitted or forbidden. That would amount to copying the pertinent laws in full. The Attorney-General of the United States has found it expedient to limit his activities in this respect. Opinion of the Attorney-General, vol. 39, page 446, wherein he states:

Generally, at least, it is the duty of persons who conceivably come within the terms of inhibition in statutes, such as section 61 et seq. of the title (Title 18 U. S. C. A.) so to shape their conduct so as to avoid raising questions of the applicability to them to the statutory penalties.

I would recommend to the employees in your department a studious reading of the Act in question, as amended, and the regulations of the United States Civil Service Commission (which are referred to in the law), and then to resolve any doubt as to contemplated political activity against the political activity planned.

However, I think I can satisfy your requirements by a general statement on the subject.

#### *Scope of the Law.*

The law is embraced in the original Hatch Act of August 2, 1939 (53 Stats. 1147), as amended July 19, 1940 (54 Stats. 767), both of which enactments are embraced in Title 18, Secs. 61 to 61t, U. S. C. A. It is also to be found by reference (Sec. 15 added by Sec. 4, amendatory Act, 18 W. S. C. A., Sec. 61o) in the general prohibitions of the United States Civil Service Commission respecting political activity and political assessments of persons employed by State and local agencies in connection with activities financed in whole or in part by loans or grants made by the United States or by any Federal Agency.

Although the original purview of the law apparently was concerned with the nomination and election of United States officers and the exercise of "official" authority, it now extends to political campaigns, management and activity generally both national and State and both "official" and personal. Some greater latitude is allowed elective officers in matters not pertinent here. By express reference, the law applies to administrative employees in any department of a State or other subdivision receiving financing from the Federal Government. Your department falls into that class.

#### *Activities Forbidden.*

These are in two broad classes:

(1) Influence exerted in a department upon employees and persons dealt with to force or persuade them to support or oppose specific candidates for public office. This would include collecting money for campaigns.

(2) Participating in political affairs and management beyond what might be called a "passive" exercise of the rights of a voter.

The ban on coercion and political “commerce” is easily understood. The limits of the second class can be best understood in the light of the underlying desire of Congress to have persons in the government pay, directly, and indirectly surrender some of their rights so as to break up the prospect of a self-perpetuating administration or a political regime. The theory is that employees entering such services consent by taking the job to the deprivation of privileges that they would otherwise retain.

There are two broad classes affected:

- (1) Heads of departments or persons in authority.
- (2) Employees such as the rank and file of the particular department.

Those in the first class may not use their official authority to interfere with or affect the nomination or election of any President, Vice President, Presidential Elector, or Member of Congress. This includes coercing or persuading employees to make campaign contributions. Nor may such officers take any active part in political management or political campaigns unless, in this latter case, they are elective officers.

Those in the second class during the period of their official employment including all periods of official leave and the whole period of status as paid employees, rather than just the working hours of the day, are subject to a long list of prohibitions. In fact, the things they can do are absolutely and completely harmless. They cannot do by agent or through another what they cannot do directly or openly.

#### *Employee Prohibitions.*

Employees “retain the right to vote as they may choose and to express their opinions on all political subjects and candidates.” But even on this they must be careful as to how, when, and where. Employees may attend a convention as spectators only. They may do no service at a convention and must not make any public commotion. They may attend and vote at a primary or a party mass meeting, but may do nothing more than to vote. No service. No speechmaking. No motions or resolutions. They may not serve on any political committee, but may attend a meeting as spectators and as part of the general public if admitted. They may hold their membership in a political club but may not represent it. They may make campaign contributions, but may not solicit, collect, disburse, or otherwise handle them. They may not “campaign” for any candidate or “organize” voters.

At elections, employees must not do any work ordinarily done by “party workers.” They may not even be judges or clerks of elections. In this connection the restrictions do not apply to elections of mere local significance nor affecting any national party. Questions relating to constitutional amendments, referendum, approval of municipal ordinances and the like are not within the rule. An employee may not take part in a political parade, but may play in a band in a parade for hire. He may sign political petitions, but not take them around or get them up. He may not distribute political literature, badges, buttons, etc., and political supplies or materials for

any candidate.

In general, I would say such an employee may barely make himself known as a member of his party, interested in the success of his ticket or his favorite candidate so as not to lose party standing, but all the rest of the manifold activities of a modern political life and career must be left to others who are free to express that gratitude defined as "a lively sense of favors yet to come."

The rules of the Civil Service Commission having a bearing on this subject also provide that no employee in any department such as your own shall be a candidate for nomination or election in any public office either national, State, county, or city. The same rule applies to any person holding such an office. If the person was a candidate or held office at the time of the amendment of the law, July 19, 1940, he would be permitted to go forward with his candidacy or office holding; provided, that upon election he should resign the employment. The law is now in effect, however, and in the present year no employees may either hold office or seek office of the kind specified.

The law in question was amended in 1940 chiefly to give attention to charges that those on relief were coerced in their voting. The law also embraces provisions respecting corrupt practices such as deals with contractors, material men, and others for a mutual exchange of patronage. As to the things a federally supported State department may do or may not do, the foregoing will, I trust, serve. It will be observed that the civil service rules adopted by reference are the meat of the matter. The advisability of legislation by reference in this way is debatable, but there is no question as to the validity of the law.

It should be remembered that this is a Federal law enforced by Federal officers. When the Attorney-General of the United States feels impelled to discontinue giving opinions on the law in general. I feel that, as an officer of the State, I should confine myself to the work of merely assisting the people here to a general understanding of the more obvious features of the legislation.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By HOMER MOONEY, Deputy Attorney-General.

349 M. Fish and Game--No Provision of Law Prohibiting Officer from Returning Statutory Limit of Birds to Convicted Hunter.

CARSON CITY, August 17, 1942.

E. H. HERMAN, Assistant Secretary, Fish and Game Commission, Post Office Box 678, Reno, Nevada.

We have received the following statement and inquiry from E. H. Herman, Assistant Secretary of the Fish and Game Commission of this State, with reference to the Nevada fish and game laws:

Several men hunt together. The aggregate number of birds exceed by ten the legal number allowed the group. Game Warden checks the limits, finds an overlimit of ten birds, advises the men they are under arrest. One man takes all the blame upon himself, stating he shot the overlimit. The judge returns all the birds to the hunters, except the overlimit of ten; even returning the legal limit to the violator who has confessed shooting an overlimit. The birds were taken during legal open season.

Is the judge allowed to return any birds to the confessed violator?

In the first place, we desire to comment upon the above statement, as it is either not complete in the details of the proceeding indicated, or shows that the arresting officer was too lenient with the men constituting the group of hunters. There is no reason in the world why the arresting officer should take the word of the one man in the group who assumed "the blame" for the overlimit of birds. It seems from your statement that the arresting officer actually found the overlimit of birds on or with the group, not with one single member of the group. The fish and game law makes that fact alone presumptive evidence that all the hunters in the group violated the law. They are all, therefore, subject to arrest and prosecution; and certainly all of them may be used as witnesses against the one who assumes the "blame" or responsibility for the overlimit of birds. The arresting officer should, therefore, arrest all the members of the group, or at least require them to accompany him to the office of the Justice of the Peace in whose jurisdiction the misdemeanor occurred, and require them to testify under oath as to who of the group actually shot or took the overlimit of birds. If they were all hunting together, all of them probably knew who was killing and taking more birds than the law allows at the very time he was doing so. In fact, it is almost certain that they all knew that the law was being violated. With this knowledge, they were all probably guilty of either actual individual violation of the law themselves, or guilty of conspiracy to violate the law. Whenever a member of such a group is held guilty of a violation of the law in this regard, or even required to testify as witnesses against the person or persons who violated it, then such violations of the law will, in large measure, cease.

As to the guilt or innocence of one of the members or of each and all of the members of the group, however, that is a matter for the Justice of the Peace who tries the case, not for this office. We have constantly refrained from even attempting to advise Justices of the Peace or other judicial officers as to what their duties are in matters brought before them. The foregoing comment is, therefore, merely advisory to the Fish and Game Commission, but somewhat directory to such arresting officers. They have a strict and positive duty to perform in these matters of protecting the game of this State for the public. When the law states the maximum number each of such hunters is allowed to kill and take, no one hunter of the group has any right to exceed that limit, and should be held to strict accountability when he does so. There is too much of a disposition to permit such groups of hunters to average up among themselves the game killed and taken, and for the arresting officers to permit them to take the entire amount so killed



and taken if it does not exceed the maximum of the limit multiplied by the number constituting the group of hunters. Such a plan is not the one contemplated by the law. The law states the limit for each hunter, not the average for the entire group. Obedience of the law, as well as the enforcement of it, is an individual and personal matter; and the limit relates to each individual hunter, whether hunting in a group or alone.

Answering the specific inquiry, Nevada Compiled Laws 1929, section 3076, expressly states the duties of such arresting officers, and mandatorily requires them “to enforce” the Fish and Game Act, and “to seize any game \* \* \* taken or held in possession in violation of” that Act, and expressly gives them “full power and authority,” and makes it the mandatory “duty of every such officer, with or without a warrant, to open, enter, or examine all camps, wagons, cars, automobiles, stages, tents, packs, warehouses, stores, outhouses, stables, barns, and other places, boxes, barrels, baskets, and packages *wherever he has reason to believe any \* \* \* game taken or held in violation of any of the provisions of this Act (fish and game law) is or are to be found,*” and makes it his further mandatory duty “to seize the same,” except that as to occupied dwelling houses, such officer must have a warrant before he can enter the same to make such a search and seizure.

The above section, however, relates only to the authority and duty of the arresting officer, not to the duty, jurisdiction, and authority of the Justice of the Peace.

The limit or maximum number of birds any person may kill and have in his or her possession during any one calendar day, in the opening season, is stated in Nevada Compiled Laws 1929, section 3103; and this maximum varies with the kind of birds killed or held. Since the kind of birds involved is not specified in the statement of the inquirer, it is necessary to refer to that section in order to ascertain the limit allowed by law for the particular kind of bird involved.

Nevada Compiled Laws 1929, section 3123, makes it a misdemeanor for any person or persons to violate any of the provisions of the fish and game law; and the punishment upon conviction for misdemeanors, when not fixed in the particular law itself, is specified in Nevada Compiled Laws 1929, section 9969, as “imprisonment in the county jail for not more than six (6) months, or by fine of not more than five hundred (\$500) dollars, or by both.”

Answering your question specifically, however, we are forced to say that there is no provision of the law prohibiting the Justice of the Peace or other judicial officer from returning to the convicted hunter the number of birds within his statutory limit or maximum as specified in said section 3103 if the evidence of the witnesses shows conclusively that that particular hunter actually killed the limit or maximum so specified in the law. In other words, he may legally return to him the birds actually killed by him up to said statutory limit or maximum.

As a further protection to the public under the fish and game laws of this State, the law certainly ought to be amended so as to make it mandatory on such Justice of the Peace or other judicial officer that he not return any of the birds to the hunter after his conviction, or when he has been convicted of the violation of the law at the time involved in the prosecution; and the law

probably should be changed so as to make it more definite and certain that the limit involved relates to the number of birds killed and taken by the individual hunter, and that it does not contemplate averaging the total number of birds taken among the total number of hunters in the group.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

350 M. Grazing Board--Fighting Fires Not Incompatible With Duties Public office--Could Properly Accept Compensation from United States--County Could Hire and Pay Emergency Workers--Justice of Peace and Coroner May Work on 65¢ Per Hour Per Diem Basis.

CARSON CITY, August 19, 1942.

MR. HULING ELESSERY, Acting Regional Grazier, Grazing Service, P. O. Box 751, Reno, Nevada.

DEAR SIR: With reference to your inquiry of August 12, 1942, I have to advise:

You inquire generally if it is proper for State and county and township officers, road crews and employees to receive pay from the Government through the Grazing Service for work in suppressing fires on the public lands in the grazing districts in Nevada.

You also present specific questions touching on the general inquiry as follows:

3. Are county officers, selected by popular vote, or paid on a per annum basis, entitled to additional compensation for services rendered on fire suppression?
2. Are day laborers employed by the county entitled to compensation for fire suppression work for additional hours which might be considered as overtime--that is, above an eight-hour period?
3. What is the rule as to a Justice of the Peace and Coroner paid by your service as guard at a per diem rate of 65 cents per hours actually on duty.

The law of Nevada concerns itself with the duties to and compensation from the State, county, township, and other subdivisions, in respect to officers elected or appointed and employees. In certain cases not pertinent here a State officer cannot hold a Federal office of profit and a Federal officer is not eligible for a State office. Beyond this Nevada is not concerned if the Government employs State local officers or employs and pays them for the service.

Practical considerations require, however, that a local officer or employee should not work for the Government to the neglect of his ordinary duties. He is not paid for that.

The laws of Nevada distinctly encourage service to prevent or suppress fires--whether forest fires or other fires endangering the grazing on the public lands in grazing districts, forest reservations, and elsewhere. Some of the Acts on the subject are:

N. C. L. 1929, sec. 1982-1984. This is an Act for the control of fires (Stats. 1927, page 68). Sheriffs and their deputies are charged with the duties and the commissioners are authorized to employ fire workers. Citizens may be drafted to fight fires.

N. C. L. 1929, secs. 1929.01-1929.12. This is an Act providing for county fire protection districts (Stats. 1937, page 223). This is designed to supplement Government fire fighting work.

N. C. L. 3167-3167.04. This is an Act for cooperation with the Government in forest fire protection. (Stats. 1931, page 41.) Under cooperative agreements County Commissioners are authorized "to appropriate and expend funds for the payment of wages and expenses incurred in fire prevention and fire suppression."

The foregoing illustrates the concern the Nevada law indicates in the work of guarding against a general danger--fire on the public domain. The work of fighting fires, especially in emergency, is not incompatible with the duties of any State, county, township, or other office or public employment. The State or county is not concerned if the United States pays all or a part of the cost of the service.

Notwithstanding provision in laws concerning State and county officers that the compensation provided shall be in full for all services, I find no provision annexing fire fighting work to the duties of officers and employees. By statute in certain laws above noted, Sheriffs and their deputies are expected to assist in organizing fire fighters in emergency as a part of their duties. Fire wardens are to be hired and paid, and the county could hire and pay emergency workers.

Laws concerning office hours and hours of work are not pertinent here. Laws as to wages for skilled and unskilled workers at the going rate and not less than 62½ cents per hour, or \$5 per day of eight hours, are not pertinent here, but illustrate the standards of pay. No statutory provision is made for overtime work. (N. C. L. 6079.14-6079.51-6079½. Statutes 1933, page 34. Stats. 1937, page 305. Stats. 1941, page 390. See N. C. L. 1929, sec. 6170, Stats. 1935, page 37.) It is to be noted, however, that these laws relate to "public works" or "public work," and these terms are closely defined in the law, leaving it to be a matter not necessary to decide here whether fire fighting can be classed as "public work."

Answering the specific inquiry No. 1 foregoing, outside of Sheriffs and their deputies, organizing and supervising fire fighting, the officers referred to would act out of office and be entitled to compensation. They might properly accept compensation from the United States. Their collection of compensation from the county, State, or fire district would not be a matter for the concern of the United States.

Answering the specific inquiry No. 2, although there is no specific provision for overtime payment, the Hours of Labor Act (N. C. L. 1929, sec. 6170) excludes employees of a fire department, and by analogy there would be no prohibition against overtime. The rate would be not less than 62½ cents per hour, if the service could be said to be a “public work,” which is doubtful. It is not part of their regular work. laborers working by the day on ordinary county work and then called out after hours to fight fires would be entitled to the prevailing rate of 62½ cents per hour, provided they were called out at the expense of the county by authority of the County Commissioners. If they were “drafted” by United States Government officers they would look to the Government or a cooperating agency for their pay.

Answering specific question No. 3 we see no objection to a Justice of the Peace and Coroner working on a 65-cent per hour per diem basis covering time actually on the work, payment made by the Government. The duties are not incident to his office.

I would suggest that you continue to make payments in the future as in the past. In the case of the request of the County Commissioners that you refrain from paying those who happen to be public officers, you might well comply if they insist. In that case, however, the officers may stand on their rights (except Sheriffs and deputies) and decline to serve you further. Compensation earned to date of the change should be made as a matter of good faith.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By HOMER MOONEY, Deputy Attorney-General.

351 M. State Board of Health--No Power to Compel Licensing Boards to Revoke Licenses--Food Establishments.

CARSON CITY, August 20, 1942.

EDWARD E. HAMER, M.D., State Health Officer, Carson City, Nevada.

DEAR DR. HAMER: I have your letter of August 18, 1942, enclosing one dated August 17, 1942, from W. W. White, Director, Division of Public Health Engineering, an agency of the State Department.

In the case of food establishments found by inspection to be insanitary and in which the proprietor is unwilling or unable to conform to reasonable standards, you desire information as to the proper procedure.

As to the “legality” of a recommendation to a county or city licensing agency that a license be revoked or not renewed, while such a recommendation would be persuasive and useful, your department has no power to compel such licensing boards to act in the manner suggested; and while you would doubtless receive full cooperation from such licensing boards,

the authority to revoke a license for infraction of general sanitary rules is not clear. Renewal might be refused subject to the right of the proprietor to seek mandamus to test the matter. On such a test the reasonableness of the action would be the determining factor. Naturally, licensing boards do not desire to precipitate legal controversies.

It is my opinion that pressure on licensees is not the appropriate way to handle this matter. The Board of health Act, N. C. L. 1929, 5259-5268.01, and the Food and Drug Act, N. C. L. 1929, 6393, which is not limited by the Health Act, N. C. L. 1929, 5267.07, confer power to correct these abuses by inspection and regulation. (See, also, N. C. L. 1929, 5315.01.)

The regulations promulgated must be reasonable and they must be public. Power delegated for health purposes is generally upheld by the courts. The State Board of Health is declared "supreme in all health matters." (N. C. L. 1929, 5259.) Its regulations "have the face and effect of law," and supersede local ordinances and regulations. (N. C. L. 1929, 5259.)

As to health districts, city and county health boards and officers (N. C. L. 1929, 5268.01-5268.03, etc.), while they may act, they do so under the State board.

Action should be by the head of the appropriate State department, cooperating with the District Attorney of the respective county.

I believe you have power to abate nuisances under appropriate proceedings or to have violators punished as for a misdemeanor (N. C. L. 1929, 5268.05). Prosecution could also be under the Food Act (N. C. L. 1929, 6193) by the Food and Drug Commissioner.

In the event you plan specific action you should first consult the District Attorney in the county affected. He, in turn, will submit any request for opinion to my department if desirable.

This letter is somewhat general, but the details of law enforcement must fall first to the local law officers.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By HOMER MOONEY, Deputy Attorney-General.

352 M. Office of Civilian Defense--County Defense Council No Authority to Designate "Commander" With Excessive and Unauthorized Powers.

CARSON CITY, August 21, 1942.

MR. HUGH A. SHAMBERGER, Director State Council of Defense, Carson City, Nevada.

DEAR MR. SHAMBERGER: In response to your inquiry of August 18, 1942, I have to advise as follows:

You state that the Office of Civilian Defense (a Federal agency) suggests that during an emergency "all of the community protective services should be under the complete direction of the commander of the citizens' defense corps." Such a corps is contemplated to include not only volunteers, but also such established agencies as the police department, fire department, health department, hospitals, and the like.

You ask whether under the existing law the Washoe County Defense Council has authority to designate a commander in that county who shall have authority over, and be superior to, the chiefs of police departments, fire departments, etc. You also ask (assuming the authority to be lacking) whether city and county governments have the power to subordinate their heads of departments to such a commander, in the way described, by ordinance, resolution, or like action, pending the passage of legislation at the 1943 session.

In answer I would say generally that, if the powers to be attributed to such a "commander" are excessive and unauthorized by law, that the situation cannot be cured by passing city ordinances or resolutions of Boards of County Commissioners.

Whether the powers are excessive and unauthorized by any appropriate legislation is a question that calls for an examination of the statutes now in existence. You must find power from some law.

The Act creating the State Council of Defense was approved March 28, 1919 (Stats. 1919, page 302; secs. 6913-6917 N. C. L. 1929). It was passed after the emergency of World War I was met; whereas, we are not attempting to adapt it to the present and future in World War II.

A reading of the Act, including the preamble, will give a fairly accurate idea of the legislative intention.

It is recited that without specific legislation, under stress of emergency, a State Council of Defense was appointed and, through county commissioners, county and community councils were appointed. It is recited that in this way good work was done and that it would be well to continue such organizations during the readjustment period, and to have the activity legalized by Act of the Legislature.

It also appears from the preamble that the work in World War I was largely in the way of carrying out the wishes of the National Government and in passing on the war needs and requests of the Government to the people.

It is a matter of history that, except for some activity in suppressing subversive agencies, the Council of Defense and County and Community Councils did nothing in the way of military defense such as blackouts, protection against bombing, incendiary attacks, invasion by air and the

like. The present emergency is nearer at hand and graver in its immediate consequences.

The Act of 1919 creates, and provides for the continuance of, the State Council of Defense. It provides for an executive committee and the election from the members of the State council of a director “who shall be chief executive officer of the (State) Council.” (Sec. 1 of Act.)

Section 2 of the Act provides that the State council may adopt regulations for its (own) government and for the convenient transaction of its (own) business and to “prescribe the powers and duties of all county and community councils.” “All county and community councils shall be organized under and by virtue of authority of the State Council of Defense and shall be under its control and supervision.” Of course these “regulations” must not conflict with existing law.

Section 3 provides for cooperation with all departments of the national, State, and county government “in the promotion of such plans, programs, and policies as may be made necessary by the readjustment period following the war.” (World War I.)

It appears from this Act that the State council has full control and supervision over county and community councils. While it is a holdover from World War I for the purpose of “carrying out governmental requests” (as it did during the first War period), with an eye to the future “readjustment period.” I believe a court would hold that the work it now does comes within the reasonable estimate of the legislative intent even back in 1919.

The important thing is that the State council can control and supervise the “County and Community Councils.” There is no specific authority to control or supervise or displace county or city administrative officers or departments. Nor, as I think, may it be said that such power is implied. The incumbent in these offices and departments may, like other citizens, join county and community councils, as individuals, out of office. Nor may these officers or department heads control or order about the county or community councils in their organized work. They have authority over the members of the council in the discharge of their duties the same as over any other citizen.

It seems to me that our people in time of war or other great emergency forgot that our framework of government is designed to meet many and diverse perils and strains. Often we feel we must create some civilian superagency to displace the accustomed agencies of government with the idea of greater efficiency and public response.

This situation calls for adjustment and accommodation. The State Defense Council and the county and community councils can do a valuable work without displacing or subordinating the regularly elected, appointed, and acting officers or department heads.

The State council governs the county and community councils--in other words, its own membership and its own activity. The cooperation of county and city officers and department heads must be voluntary and private. It cannot be coerced.

If these officers will become members of county or community councils then they will be “subject to authority” like the centurion. They will go when the commander says “go,” and they will come when the commander says “come,” but only as members. Their experience and access to machinery of transportation, communication, organization, and the like, not to speak of machinery and equipment, would justify, and even demand, that they be made heads or chiefs of their respective field under the commander, but always as individuals and members and not as public officers.

With the foregoing limitations in mind I believe you can work out your problem. When the Legislature convenes certain ex officio duties can be provided to govern Sheriffs, deputies, chiefs of police, and fire departments and the like. City charters would be effectively subordinated by such legislation unless in the exceptional case of “home rule charters” which may exclude contrary legislation. These matters can be worked out by the next legislative session.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By HOMER MOONEY, Deputy Attorney-General.

353 M. Public Schools--Statutory Definition of Word “Widow.”

CARSON CITY, August 24, 1942.

HONORABLE MILDRED BRAY, Superintendent of Public Instruction, Carson City, Nevada.

DEAR MISS BRAY: Pursuant to your request in your letter to me of 22d instant, which reached my office this morning, I am writing to give you the statutory definition, as I understand it, of the word “widow” as used in the last sentence of section 1, chapter 76, 1935 Statutes of Nevada.

Although I know of no reason why it should not be just as harmful to employ the sister of one of the members of a school board after she has been divorced from her husband and has a minor child dependent upon her for support, as it would to employ such a sister after her husband has become deceased, the statutory definition of the word “widow” would seem to make the law on the subject different as to these two situations. The use of the word “widow” in the section of the law referred to by you seems to be the ordinary or general use of that word, and to include only such persons as are generally contemplated under that term.

We see no way, therefore, than to give that word its usual and ordinary meaning as used in this expression referred to you: “Nothing in this Act shall be deemed to disqualify any widow with a dependent or dependents as an employee of any officer or board in this State, or any of its counties, townships, municipalities, or school districts.” Giving this word “widow” its generally accepted meaning as defined in the law and hereinafter set forth, it is apparent that this particular



woman with a dependent child is not a widow on account of the mere fact that she and her husband are divorced. The word “widow” generally means a woman who has lost her husband by death and has not taken another husband.

The following is a definition of the word “widow” as it is generally used in the law and the decisions of the courts of last resort:

A word of Sanskrit derivation, meaning without a husband or lack of a husband, said to be as old as the language itself, and the meaning of which is familiar, well fixed, and certain, and which popularly and legally means a woman who has lost her husband by death and has not taken another; the surviving lawful wife of a decedent. 68 C. J. 263.

To the same effect is the following quoted from one of the leading cases on the subject:

The word “widow” is as old as the language itself. Colloquially as well as among the learned, in courts as well as out of them, it has always meant “a woman who has lost her husband by death,” and never, outside of the slang and then only with a semicontemptuous prefix, has it had any application to divorced persons. Section 3642 provides: “The effect of a judgment of divorce is to restore the parties to the state of unmarried persons.” If this means anything at all, it means just what it says, and its consequence is that she who was a wife ceases, upon the rendition of a decree of divorce, to have any husband. If, then, only a widow is endowed under the statute, and if, to be a widow, a woman must lose a husband by death, and if a divorced woman has no husband to lose, it is quite obvious from the statutes alone that she can assert no dower after a divorce. We see nothing in *Dahlman v. Dahlman*, 28 Mont. 373, 72 Pac. 748, or in section 3623 of the Revised Codes, cited by appellant, that militates with this view, and the fact, if it be a fact, that the innocent wife, driven to court by the sins of her husband, is thus placed at a disadvantage, is a consideration to be addressed to a coordinate department of this state government.” 129 Pac. 502.

You will note that the court in the last above-mentioned case and the language quoted rely largely upon the first quotation from *Corpus Juris*.

To the same effect, we quote the following from the Colorado case of *Parsons et al. v. Parsons*, 198 Pac. 158:

A divorced wife is not, and cannot be, the widow of him from whom she was divorced. 40 Cye. 934; *O’Malley v. O’Malley*, 46 Mont. 549, 129 Pac. 501, Ann. Cas. 1914B, 664.

We must hold, therefore, that it would not be a violation of the antinepotism law of this State, as amended, and as it now exists in said 1935 Statutes of Nevada, chapter 176, section 1, for a school board to employ as a teacher in the school “a sister of one of the members of the school board” who has dependent children and has been divorced by her former husband and

who has not again remarried, as she is not a “widow” in the general and accepted meaning of that word.

In fact, it would not make any difference at all under the law in this particular case whether the divorced sister of a member of the board had any dependent children at all. The woman would simply not be a “widow” under the law and the authorities hereinbefore quoted.

See the following points and authorities on the question of whether a divorced wife is the widow of her former husband upon his death, and showing that such a situation does not result in the divorced woman being the “widow” upon the death of her former husband:

Where husband and wife are divorced a vinculo, the wife, after the husband’s death, is not his “widow.” \* \* \* *Whitsell v. Mills*, 6 Ind. 229.

Where a member of a benefit society designated his wife as the beneficiary, and thereafter the parties were divorced, she could not be considered as his “wife” at the time of his death, nor was she his “widow.” *Farra v. Braman, Ind.*, 82 N. E. 926.

*In re Ensign’s Estate*, 103 N. Y. 284; 57 Am. Rep. 717.

*Tyler v. Odd Fellows’ Mut. Life Ass’n.* 145 Mass. 134; 13 N. E. 360.  
*Fletcher v. Monroe*, 43 N. E. 1053; 145 Ind. 56.

*Wait v. Wait*, 4 N. Y. 95.

*In re McCarthy’s Estate*, 73 Pac. (2) 910; 23 Cal. App. (2), 389.

*New Jersey Title Guarantee & Trust Co. v. Perry*, 115 N. J. Eq. 8; 170 A. 34.

*Rittenhouse v. Hicks*, 10 Ohio Dec. 759.

*In re Application for Support of Minor Children*, 164 Iowa 208; 145 N. W. 467.  
(Strong.)

*Dahlin v. Knights of Modern Maccabees*, 151 Mich. 644; 115 N. W. 975.

Many other cases cited in 45 Words and Phrases, Permanent Edition, pages 141-143, under the title “Widow--Divorced Wife.”

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

Misrepresentation Only Cause for Cancellation.

CARSON CITY, August 25, 1942.

HONORABLE MILDRED BRAY, Superintendent of Public Instruction, Carson City, Nevada.

DEAR MISS BRAY: Without going into the situation referred to in your letter to me of yesterday in detail, I am simply writing you this short letter to say that the State Textbook Commission, like all other parties to contracts, is absolutely bound by any contract it has made with any textbook company, and, in fact, by every other contract it makes and enters into, unless some misrepresentation amounting to fraud was made and entered into by the textbook company with reference to the textbooks covered by the contract. It would have a cause of action for a violation of its contract to the extent of the damages sustained by it if it chose to stand upon its contract and sue for such damages.

The truth of the matter is that the time for the members of the State Textbook Commission to go into the question as to whether or not the books are proper and not subject to the complaint now made against them was before the contract was signed. Certainly, it is too late now to object to a situation which existed at that time. The members of the Textbook Commission all have fairly good eyesight, so far as I know, and certainly had an opportunity, or could have had an opportunity if they had requested it, to examine the books before they entered into the contract. One of the chief functions, and probably the most important function, of the State Textbook Commission, is to examine such textbooks before they ever contract with the publisher or agent for them. Even blind people, who cannot read, are bound by their contracts, upon the theory, even if they cannot read, that they could get someone else in whom they have confidence to read for them.

The only proper cause for cancellation of any such contract is fraud or misrepresentations by which the members of the Textbook Commission were induced to enter into the contract; and that fraud or misrepresentation must be one which was not apparent on the face of the contract, or, in this particular instance, not apparent in the textbooks themselves, including not only the subject matter inside the covers, but also the covers themselves, and the mental incompetency of the person seeking to cancel the contract. I would be perfectly willing to testify that none of the members of the State Textbook Commission is mentally incompetent; and I am sure that none of you would be willing to concede such incompetency. But even if that situation existed, the suit to cancel or rescind would have to be by a competent and qualified guardian or guardians. Of course, this situation is not involved.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

355 M. Bonds--Nevada Industrial Commission--Colorado River Waterworks Refunding Bonds--  
Investment State Insurance Fund.

CARSON CITY, August 27, 1942.

HON. DAN W. FRANKS, State Treasurer, Carson City, Nevada.

DEAR MR. FRANKS: I have received from Mr. Belden S. Gardner of the firm of Hannaford & Talbot, dealers in investment securities, San Francisco, California, a letter stating that the Nevada Industrial Commission would consider investing surplus moneys of the State Insurance Fund in certain securities, and asking that I give my opinion on the questions presented.

The securities are the Metropolitan Water District of Southern California, Colorado River Waterworks Refunding Bonds of the denomination of \$1,000 each, and are included in various issues as follows:

Serial R-1 to R-73556, inclusive (less 40), dated August 1, 1937, payable over 41 years, August 1, 1946-1986, inclusive. Interest 4%. total \$73,516,000.

Serial R-73557 to R-130008, inclusive (less 3), dated February 1, 1938. Payable over 30 years, February 1, 1948-1977. Interest 4¼%. Total \$56,449,000.

Serial R-130009-R-147000, inclusive (less 1), dated February 1, 1938, payable over 10 years, February 1, 1978-1987. Interest 3½%. Total \$16,991.00.

Serial R-147001-R-167008, dated April 1, 1940, payable over 36 years, April 1, 1953-1988. Interest 4%. Total \$20,088,000.

Serial R-167089-R-179184, dated April 1, 1940, payable over 36 years, April 1, 1953-1988. Interest (stated in opinion of Thomson, Wood & Hoffman to be 3%, but appearing from records to be 4% on R-167089-167600 and 3½% on R-167601-179184). Total \$12,096,000. (\$1,512,000 4s, \$10,584,000 3½s.)

It appears from the legal opinions of Thomson, Wood & Hoffman dated August 3, 1940, and December 9, 1940, and O'Melveny & Myers dated January 16, 1941, that these are legal, valid, and existing obligations of The Metropolitan Water District of Southern California.

The district was organized under The Metropolitan Water District Act of California (Stats. 1927, page 694) Deering Gen. Act No. 9129, which Act has been later supplemented and amended.

It appears the district serves and embraces 15 or more cities and other municipal corporations and towns of southern California, which have membership and representation on the Board of Directors. The bonds are the bonds of the district--not of the State, the counties, or the cities.

The Metropolitan Water District Act has been upheld in the courts, the bonds have been validated by legislation and by the courts. The bonds have been declared those of a “separate and independent political corporate entity.” (See sec. 3 Gen. Act 9129; Metropolitan Water District v. Burney, 215 Cal. 582; 11 P. (2) 1095; Metropolitan Water District v. Whitsett, 215 Cal. 400; 10 P. (2) 751; People v. Carter, 12 Cal. Ap. (2) 105; 54 P. (2) 1139. See Validation Act (Stats. 1933, page 610; Act No. 9129a).

In view of the character of the bonds it is my opinion that they are not eligible under the Nevada law for the investment of any of the surplus or reserve funds of the State Insurance Fund as defined by the Nevada Industrial Insurance law. I find no objection to these bonds as presented by the transcript and legal opinions and documents submitted to me. The law simply does not list bonds of this class as eligible for investment of the funds in view.

The Nevada law lists the eligible classes as follows:

1. Bonds and certificates of the United States.
2. Bonds of Federal agencies where underwritten or payment guaranteed by the United States.
3. Bonds of this or other States.
4. Bonds of any county of the State of Nevada.
5. Bonds of incorporated cities, irrigation and drainage districts, and school districts of the State of Nevada.

The Colorado River Waterworks Bonds (\$220,000,000 issue, approved by 1931 election) and the Metropolitan Water District of Southern California Colorado River Waterworks Refunding Bonds issued to take them up in part, are not of any class mentioned or defined in our law. This office has no authority to construe the law in the light of any implied power to invest such funds. The power given in the law is express, and there is no room for implied powers.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By HOMER MOONEY, Deputy Attorney-General.

356 M. Motor Vehicles--"Frangible Stickers"--Registration License Plates.

CARSON CITY, September 2, 1942.

HONORABLE MALCOLM McEACHIN, Secretary of State and Ex Officio Motor Vehicle

Commissioner, Carson City, Nevada.

DEAR MR. McEACHIN: This is in answer to your letter to me of 31st ultimo to which you attached a letter to you from Honorable Thomas G. Deering, Attorney at Law, 2800 Board of Trade, Chicago, Illinois.

Mr. Deering's letter to you is written in behalf of his client, Mr. Henry I. Warden, whom he says "has been granted a patent, U. S. 1955569" on a certain kind of "frangible sticker," which he claims is the same kind, or similar to, the "frangible decalcomania" sticker which you are contemplating using with our 1942 registration license plates, which it has been customary to use in this and other States as registration license plates.

There is nothing in Mr. Deering's letter which would indicate the composition of what he calls the "frangible stickers" on which he claims his client, Mr. Warden, has a patent, other than his mere statement that they are "frangible" and the inference from his letter that his patented stickers, like yours, are "not removable without destruction," and his statement that "only licensees of Mr. Warden have the right or authority to make for, or sell to, the State of Nevada, stickers in accordance with the specifications you have drawn," and his further statement that "if the State (Nevada) should purchase such stickers from an unlicensed manufacturer, it will be an infringement of Mr. Warden's patent."

There is no way under the sun of knowing from Mr. Deering's letter, other than his mere statement, that Mr. Warden or anybody else has a United States patent on any "frangible sticker," or, in fact, any patent of any kind or nature whatsoever on anything; sticker or anything else.

I assume, however, that he has a patent upon something that he calls a "frangible sticker." This, however, is not sufficient evidence upon which you have any right to cancel any contract you have made, if one has already been made, for your "frangible decalcomania" stickers, and is not sufficient evidence to justify you in abandoning your plan of using such decalcomanias. The fact remains that national defense and our war activities, which have resulted in the scarcity of metal with which to make the usual registration license plates, compel us to adopt some similar sticker or other device to take the place of the usual metal registration license plates for the year 1943, and, in turn, compel you in the performance of your official duties as such Motor Vehicle Commissioner, to arrange for such stickers or other device.

The truth of the matter is that there is not sufficient in Mr. Deering's letter to you to indicate that the decalcomanias which you contemplate procuring for that purpose are not being purchased from one of Mr. Warden's licensees. There is nothing in Mr. Deering's letter or anything accompanying it which shows or purports to show the names and addresses of Mr. Warden's licensees. It is entirely probable that your decalcomanias are, in fact, the "frangible stickers" which Mr. Deering says have been patented to Mr. Warden, and also that they are actually being purchased from one of Mr. Warden's "licensees." We have no way of knowing whether the vendor or dealer from whom you purchased your decalcomanias are licensees of Mr. Warden or not. He and his associates are the only people who can possibly know who these licensees are. It is certainly up to him or Mr. Deering to furnish you the names and addresses of

his said “licensees.” That is absolutely the only source from which you can obtain reliable information on that point. It is an easy matter for a person holding or claiming to hold a patent on an article, or for his attorney or attorneys (any number of them) to send out a letter saying that the thing under consideration has been patented to the person claiming to hold the patent for it. Such a statement may be true or untrue; but that makes no difference to persons sending out such information. The thing that they desire to accomplish is to prevent the purchase of the particular article contemplated, and frighten the persons to whom such letters are addressed into purchasing from the person who claims to have patented the article, or to some agent or licensee of his.

The only person who can possibly furnish you the names of the “licensees” of Mr. Warden is Mr. Warden himself, or his attorney or someone associated with him or to whom the records establishing the fact are available. Mr. Deering and Mr. Warden should as well know now as ever that neither you nor any other officer of this State is so easily frightened.

The truth of the matter is that there is nothing in Mr. Deering’s letter or in any information available to you to indicate that there is the slightest similarity between the decalcomanias you contemplate using and the “frangible stickers” which Mr. Deering says have been patented to his client Mr. Warden. Again, it is up to Mr. Deering or Mr. Warden to furnish you a detailed statement of the composition, form, and peculiarities of the method of manufacture of his so-called “frangible stickers” from which you, or any other reasonable person, can determine whether the decalcomanias which you contemplate purchasing are, in fact, a trespass upon or violation of the patent which Mr. Warden, through Mr. Deering, claims to have been granted to him by the United States office, *i.e.*, U. S. 1955569. Without such a detailed statement, it is impossible for you or for any other person to determine whether the decalcomanias which you contemplate purchasing violate the patent rights of Mr. Warden. The most we have in Mr. Deering’s letter is simply an inference that it is a mere possibility that the decalcomanias violate the patent, and a threat that if the State, or you as such Commissioner, purchases these decalcomanias, and if they are a violation of Mr. Warden’s claimed patent, and if they are not purchased from a licensee of Mr. Warden (without anything to indicate who these licensees are), all these “ifs” combined “will be an infringement of Mr. Warden’s patent,” with the apparent hope on the part of Mr. Deering or Mr. Warden, or both, that we may be frightened away from purchasing any such stickers except from Mr. Warden or some licensee of his. In fact, we have no way of knowing who these licensees are, and are absolutely helpless in ascertaining this fact unless and until Mr. Warden or Mr. Deering or some associate of theirs who knows the facts furnishes us the names and addresses of such “licensees.”

You should ask of Mr. Deering the following information:

1. A certified copy of the claimed Patent, U. S. 1955569, with a complete and detailed description of said “frangible sticker.”
2. A detailed statement of the peculiarities of the decalcomanias, and especially of the claimed patented “frangible stickers,” wherein the similarities of the two are pointed out in such detail as will indicate to you the similarities of the two and positively show you that your decalcomanias are a violation of the patent.

3. The names and addresses of all of Mr. Warden's so-called "licensees" and also of their agents, from which you may know whether the person from whom or through whom you are purchasing the contemplated decalcomanias is one of the licensees or agents of Mr. Warden, and such other information as will show that the contemplated decalcomanias do actually violate the patent rights of Mr. Warden.

Without this information there is absolutely no way of knowing whether these or any other patent rights are being violated by the purchase and use of the decalcomanias. I can hardly believe that Mr. Deering wrote his letter to you for the mere purpose of frightening you away from purchasing the decalcomanias contemplated by you, and would dislike very much to believe that he, or any other lawyer, would indulge in such practice. The fact remains, however, that he refrains in his letter, either studiously and intentionally or as a mere coincident, from even committing himself on the point of whether the decalcomanias are a violation of the Warden patent. Other than a possible inference, there is nothing in his letter by which he definitely commits himself or his client Warden to any statement that the decalcomanias are violations of the patent. Again, I can hardly attribute to Mr. Deering a studied intent to avoid such a positive commitment and to frighten you from purchasing decalcomanias which are not a violation of the Warden patent. You are left, however, to a mere inference and a guess based upon such an inference that the decalcomanias may possibly be a violation of the Warden patent. I would dislike very much to attribute the creation of such a situation to a studied intent to frighten you away from the purchase of the decalcomanias and into a purchase of the Warden "frangible stickers," without committing himself to a statement which might be actionable for damages by the manufacturers of the contemplated decalcomanias. I would dislike very much to attribute to any man such a contemptible scheme.

The truth of the matter is that, if the decalcomanias violate the Warden patent rights or any other patent rights, the people with whom you deal would be laying themselves liable to a suit for damages; and there is a possibility that you, as purchaser, and the dealer through whom you purchase the decalcomanias, might also be guilty of a conspiracy to violate such patent rights, or subject to a joint action against all of you for such damages as would be sustained by the violation of the patent. Mr. Deering's letter bears every earmark of either laying the foundation for such court action, or frightening you away from purchasing the decalcomanias.

The fact remains, however, that it is up to Mr. Warden and his attorney, Mr. Deering, to furnish you the above and such other information as will enable you to know (not merely to guess or fear) that the decalcomanias do violate the Warden patent rights. Unless and until one or the other of them furnishes you with such definite information, after you expressly request it from him or them, you should proceed with your plan, after waiting something more than a reasonable time for him or them to furnish you this information, but in time to have proper and lawful stickers available for delivery to and use by the County Assessors by the time they are required by law to begin the issuance of motor vehicle registration certificates and license plates or other indicia therefor.

I am furnishing you an extra copy of this letter, in order that you may send it direct to Mr. Deering by first air mail, in order that he may be as fully advised as possible and have as much



time as possible to furnish you the information herein suggested and indicated.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

357 M. State Board of Health--Venereal Disease--Persons Afflicted With "Potentially Infectious" Disease Subject to All Provisions Relating to Examination, Treatment, Etc.

CARSON CITY, September 22, 1942.

B. H. CAPLES, M.D., Director Division of Venereal Disease Control, Medico-Dental Building, Reno, Nevada.

This office has been asked, by B. H. Caples, M.D., Director of the Division of Venereal Disease Control, for its official opinion on a situation arising under chapter 179, 1937 Statutes of Nevada, pages 387-394, both inclusive, as amended, compiled in the 1931-1941 Supplement to Nevada Compiled Laws 1929, as sections 5317.11 to 5317.28, both inclusive, commonly known as the Act for the "control, prevention, and care of venereal diseases."

Said Act expressly authorizes, particularly in sections 2 and 4 thereof (compiled as Nevada Compiled Laws, sections 5317.12 and 5317.14), the Nevada State Board of Health to promulgate rules and regulations necessary for the proper administration of the provisions of the Act and, in fact, makes it the duty of said State Board of Health to promulgate rules and regulations necessary for the proper administration of the provisions of the Act and, in fact, makes it the duty of State Board of Health to promulgate such rules and regulations. The purpose of the Act is expressly and definitely to control, prevent, and care for venereal diseases. It provides, among other things, for the compulsory examination and treatment of persons afflicted, or suspected of being afflicted, with venereal diseases. It provides a method, by heavy penalties, to compel those afflicted, or suspected of being afflicted, with such diseases to submit to examinations by physicians and in clinics, dispensaries and prophylactic stations to determine whether they are afflicted with venereal diseases and, if so afflicted, to submit to treatment by such physicians and in such clinics, dispensaries, and prophylactic stations until completely cured of such diseases. It also provides for the reporting of cases of venereal disease by every physician, druggist, pharmacist, seller, or dispenser of any proprietary or other medicine, nurse, health officer, director of a laboratory, technician, clinic, dispensary, or any other person making a medical, bacteriological, serological, or other examination, which indicates the existence of any venereal disease, and for such reports from those who treat, or attempt to treat, any person having any such disease, and imposes a heavy penalty upon them for not reporting such venereal diseases when they discover or know that they exist in any person.

It also makes it the duty of any diseased person to comply with the rules and regulations of said State Board of Health and with all of the provisions of the Act, including the reporting of himself or herself as a person so afflicted, and imposes other very strict regulations upon such

diseased persons. It expressly and mandatorily requires any person afflicted with any such disease to give all information required by the law *“and from time to time to submit to approved medical examinations to determine whether such disease is in an infectious state,”* and *“to conduct himself or herself in a manner which will be not likely to spread such disease.”* There are other very strict mandatory provisions of the Act requiring every person afflicted with any such disease to use every reasonable precaution necessary to prevent the spread of the disease. Among such precautions is certainly a proper examination to determine whether the disease is in an “infectious state.”

The medical profession, according to the information of this office, and we are sure the State Board of Health and the Director of the Division of Venereal Disease Control have expressed the opinion that it is difficult to determine when, if at all, a person once afflicted with an infectious venereal disease is completely cured, or cured to the extent that there may not be a recurrence of the “infectious state” of the disease. They also express the view that many people who have venereal diseases and have been under treatment for such diseases, often believe themselves entirely cured of such diseases before they are actually discharged as cured by the physicians and others who have been treating them, and believing themselves cured, or at least hoping that they are cured, fail, neglect, or refuse to return to those treating them for further treatment. The medical profession informs me that in many such instances their action is based solely upon “hopeful thinking.” Certainly, in cases where such venereal diseases are in an “infectious state” and such afflicted persons discontinue treatments before they are entirely cured and discharged by those treating them, there is a recurrence or, in fact, a continuation of the “infectious state.” We are informed that, in many instances, where such diseases seem to have been entirely cured and the “infectious state” apparently ceases to exist in so far as its existence can be readily determined, and such diseased persons are actually discharged by those treating them, there is later a recurrence, not only of the disease itself but also of the “infectious state” thereof. In fact, those skilled in the treatment of such venereal diseases seldom, if ever, definitely and permanently discharge such diseased persons, even after the “infectious state” of the disease seems to have been overcome, but usually require the diseased persons to return periodically, at least, for further examination as a precaution against a recurrence of the “infectious state” of the disease. Certainly, such a precaution is not only advisable and justified, but absolutely essential as a matter of protecting our people from danger of further infection. In view of the prevalence of this disease, especially in recent years, and the injury the disease inflicts upon our people, every possible precaution against further recurrence of the disease in a person once infected with it, and against further spread of the disease is justified. The law is wholesome and remedial in its effects, and certainly should be liberally interpreted and construed in order that the wholesome and beneficial purposes for which it was enacted and approved may be accomplished to the fullest extent possible.

Under the authority granted the Nevada State Board of Health in said chapter 179 to adopt, promulgate, and enforce rules and regulations “to effectuate the control, prevention, and cure of venereal diseases in this State,” said State Board of Health on July 20, 1942, adopted the following resolution, rule, and regulation, having for its purpose the determination of the status of persons who are classed by the medical profession as “potentially infectious,” in relation to said law and as to whether such “potentially infectious” persons may be subjected to the

provisions of said law relating to diseased persons in whom the venereal disease is actually in an “infectious state”:

Any person suffering from a venereal disease who is either infectious or potentially infectious is subject to all the provisions of the Nevada Venereal Disease Act of 1937.

Under the facts hereinbefore stated this office has been asked for its official opinion on the following:

Is it your opinion that the term “infectious” as applied to a venereal disease under the Nevada Venereal Disease Act of 1937 includes those venereal diseases that are in the opinion of any licensed physician of Nevada “potentially infectious”?

The truth of the matter is that the inquiry is one which relates to and can be properly determined only by the medical profession, not by the legal profession. It is a question for the physician, not for the lawyer, to determine. As to whether there is danger of a “potentially infectious” disease turning into one which is actually “infectious” is a matter that requires the skill of a person in the medical profession, rather than a person in the legal profession. It is a medical problem rather than a legal problem.

It is apparent from the language of the inquiry, correspondence, and oral discussions upon which this inquiry is based that the person making the inquiry really desires the official opinion of this office on a question substantially as follows:

May a person afflicted with a “potentially infectious” venereal disease be subjected to all the provisions of chapter 179, 1937 Statutes of Nevada (Nevada Venereal Disease Act of 1937), relating to the examination and, if advisable, treatment, to the same extent as a person afflicted with such venereal disease which is in an “infectious state”?

A short and quite complete answer to said inquiry is merely the one short word, “yes.”

The fact remains, however, that we believe those to whom this office furnishes legal advice and official opinions are entitled to a statement of the reasons upon which we base such legal advice or official opinions; and we, therefore, furnish our reasons for this official opinion.

The State Board of Health has definitely classed a person suffering from a venereal disease in merely a “potentially infectious” state in exactly the same category or classification as one afflicted with such a disease which is in an “infectious state” by the adoption by it of the above-quoted resolution, rule, and regulation. The State Board of Health has determined by said above-quoted resolution, rule, and regulation that both are dangerous to the public in so far as the spreading of said disease is concerned. As both are dangerous to the public health, then both should be subjected to all the provisions of said chapter 179 enacted “to effectuate the control, prevention, and cure of venereal diseases in this State.” The State Board of Health has decided this medical question to the effect that both are dangerous to the public health. They should both,

therefore, submit to the same treatment under the law; and if either fails, neglects, or refuses to do so, then he should be compelled to do so in the method provided by law, or suffer the penalties imposed by the law. In this connection, section 7 of said chapter 179, reads as follows:

*SEC. 7. Duties of Diseased Persons.* In addition to the duties herein elsewhere imposed, it shall be the *duty of any diseased person to comply with all rules and regulations* issued by the board and *all the provisions of this act*, and to *give all the information* required by this act, and from time to time to *submit* to approved *medical examinations to determine whether such disease is in an infectious state*. It shall also be the duty of *any diseased person* to conduct himself or herself, in a manner which will be not likely to spread such disease, *and to submit to approved treatment until the venereal disease with which he or she is infected is no longer in an infectious state*. (Italics ours.)

Said section 7 certainly makes it the duty of any such diseased person to comply with all rules and regulations of the State Board of Health and all the provisions of said Act, and to give all the information required by the law, and, when required to do so, to submit to medical examinations to determine whether such venereal disease is in an “infectious state.” It also makes it compulsory that he submit to the approved treatment prescribed by his physician or other person treating him. That is all the State Board of Health and said Director of the Division of Venereal Disease Control requires. That is a wholesome and beneficial requirement, and is remedial in its purpose. The Act should be liberally construed to accomplish that purpose.

Section 8 of said chapter 179 actually authorizes, however, the local health officer, or board of health, or the State Board of Health, to cause a medical examination to be made of any person suspected of having a venereal disease in an “infectious state” for “the purpose of ascertaining whether or not he or she is in fact infected with such disease,” and makes it the duty of every person “so suspected” to submit to such an examination as may be necessary to establish “the presence or absence of such disease or infection.”

The fact of the matter is that sections 5 and 6 of said chapter 179 make it the mandatory duty “of every physician, druggist, pharmacist, seller, or dispenser of any proprietary or other medicine, nurse, health officer, director of a laboratory, technician, clinic, dispensary, or *any other person* making a medical, bacteriological, serological, or other examination” indicating the existence of any venereal disease, to immediately report such fact to the State Board of Health, and to report any such person who *discontinues* such treatment while the disease is “reasonably likely to be in an infectious state.” Those sections of the law also require, among other things, such diseased persons “to give the information” required by the law with reference to his condition. Certainly, it would be necessary for such a diseased person to submit to an examination in order to furnish dependable information as to whether the venereal disease is actually in an “infectious state” or not.

Section 10 of said chapter 179 also makes it the mandatory duty of all local or state health officers, boards of health, or other health authorities, “to use all reasonable *means* to ascertain the existence of cases of *infectious venereal diseases*” and “to investigate all cases that are not

receiving approved treatment, and to *ascertain* all sources of infection, and to take all measures reasonably necessary to prevent such sources from transmitting such infection.”

It is certainly clear and plain that it is the mandatory “*duty*” of not only the persons afflicted with venereal diseases, but also of the physicians and other health officers to do everything reasonably possible to prevent the spread of such diseases by ascertaining the presence of such diseases in persons afflicted with them and by approved treatment for such diseases until they are completely cured.

It may be of interest to know that section 13 of said chapter 179 provides for a very severe penalty to anyone violating any of the provisions of that law or failing to perform any duty imposed by it, or any rule or regulation of the State Board of Health, upon conviction thereof. This section of the law makes such violation a misdemeanor and imposes a penalty, upon conviction, of a fine not to exceed \$500, or imprisonment in the county jail for a term of not exceeding six (6) months, or both such fine and imprisonment. This penalty applies as much to physicians as it does to persons actually afflicted with such venereal diseases.

Epitomizing this official opinion, the word “yes” is a complete answer to the inquiry.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

358 M. Elections--Persons in Land or Naval Forces of United States Privileged to Vote Absent Ballot Without Registration--War Ballots May Contain Names of Both State and Federal Candidates--Postcard Applications.

CARSON CITY, September 28, 1942.

HON. MALCOLM McEACHIN, Secretary of State, State Capitol Building, Carson City, Nevada.

DEAR MR. McEACHIN: I duly received your letters of September 24, and 25, 1942, covering questions as to the effect of the Federal and State laws respecting voting by members of the land or naval forces of the United States absent from their residences at election time.

Your letter of September 24, 1942, cited the applicable Federal and State laws and the State constitutional provision, and you make the following inquiries here summarized:

1. Whether the section of the State law relating to voting by absent electors “duly registered” (section 2553, Nevada Compiled Laws, 1929) would take the privilege of voting an absent voter’s ballot away from a member of the land or naval forces of the United States if he were not a registered voter.

2. Whether the “war ballot” authorized by the Federal law (Public Law 712--77th Congress) may lawfully contain the names of candidates for State office in addition to the names of candidates for Federal office.

3. Whether the sending by electors in the military service of the United States to the Secretary of State and the transmission by him to the respective County Clerks of the postcard applications mentioned in the recent Federal law is a sufficient compliance with section 4 of the absent voter law to authorize County Clerks to mail official ballots to applicants therefor in the military service.

Your letter of September 25, 1942, outlines the procedure contemplated by your department, assuming that there is no repugnancy between the Federal and State laws, and asks my opinion of such plans, which are summarized as follows:

1. Upon receiving postcard applications for war ballots the same will be listed and then forwarded to the proper and respective County Clerks.

2. To notify the respective County Clerks to have a sufficient number of ballots printed to serve the need.

3. To cause to be printed on the envelopes prepared to enclose the official ballot certain text on the front and reverse sides, the latter text to embrace the oath of the elector and the certificate of the commissioned officer or other officer as to the fact of voting.

4. You also plan to cause the County Clerk to enclose with the official ballot the additional certificate form provided for in section 5 of the absent voter law (section 2556 Nevada Compiled Laws 1929).

5. You outline further plans, including the following:

(a) The preparation and transmission to County Clerks of instructions for distribution to voters.

(b) The preparation and transmission to County Clerks, for their own guidance, of a letter of advice as to their duties and procedures.

6. You further plan to forward the war ballots, when marked by the voter and received by you, to the proper respective clerks of the counties (who will, in turn, forward them to the proper election officials). The County Clerks are the appropriate officials in this case.

Preliminary to discussion, let me make it clear at the beginning that the Federal law has nothing to do with any person not a member of the land or naval forces of the United States, nor to such members if they are present at the place of residence and vote on election day. The absent voter law as to civilians will be observed this year as before.

Taking up the matter in your two letters in order, I have to advise as follows:

The Nevada Constitution (section 3 of article II, sec. 44 Nevada Compiled Laws 1929) provides that the right to vote shall be enjoyed by all persons otherwise entitled to the same, who may be in the military or naval services of the United States. It is specifically provided that “the payment of a poll tax or a registration of such voters shall not be required as a condition to the right of voting.” The constitutional provision above cited dispenses with the necessity of registration by those in the military service of the United States, notwithstanding anything to the contrary in the registration or absent voter law.

The Federal law (public Law 712--77th Congress, approved September 16, 1942) is substantially similar, consistent, and harmonious with the State Constitution, and laws on the subject. It covers women as well as men.

Section 2 of the Federal law specifically provides (as does the Constitution of Nevada), among other things, that no person in the military service in time of war shall be required, as a condition of voting, to pay any poll tax.

Section 1 grants the privilege to vote “notwithstanding any provision of State law relating to the registration of qualified electors.” Postcards for making such applications are furnished by the Government. The postcards request a “war ballot”; show the applicant to be on active duty in the armed forces; designate his home address and the voting district or precinct.

The Secretary of State is required by section 4 of the Federal law to make a statement or abstract taken from the postcards and transmit it to the appropriate election official of the State. Such official prepares a list and sends a copy to the Secretary of State for the purpose of giving an opportunity of public inspection. The Secretary of State causes to be prepared and distributed an appropriate number of war ballots. These ballots are required to carry the names of candidates for Federal office. Permission is given to add the names of candidates for State, county, or other local offices, or propositions to be voted on “in case the State Legislature of the State shall have authorized it.”

By section 6a envelopes are to be furnished marked “official war ballot for general election” and bearing on the backs an oath of elector. This oath gives the age, citizenship, period, and place of residence of the voter (much the same as the State oath) and it is provided that “such oath shall constitute prima-facie evidence that the voter is qualified to vote unless the statements contained in such oath indicate the contrary.”

Provision is made for instructions to voters and for covering envelopes for the return of war ballots and the envelopes enclosing the same.

In section 7 the Secretary of State shall cause to be transmitted to each voter applying therefore a war ballot, envelopes, and other matter. The voter marks the ballot, encloses it, together with a certificate, seals the envelope, and subscribes and swears to the oath on the

outside of the envelope before a duly commissioned officer, encloses the whole in another envelope and mails it to the Secretary of State. That officer transmits the mail to the appropriate county.

Provision is made for canvassing the vote, but a voter cannot vote a “war ballot” if he has voted otherwise under the laws of the State.

By section 11 the Secretary of State is given wide powers to utilize the services of such State and local officials as he may deem appropriate.

By section 13 the law is applicable to primary elections for Federal office, making the necessary changes in the case of primary elections.

Section 15 provides: “No mere informality in the manner of carrying out or executing the provisions of this Act shall invalidate any election held under it or authorize the rejection of the returns thereof; and the provisions of this Act shall be construed liberally for the purpose of effectuating its purposes.”

The answers to the questions above listed are as follows:

*Question 1.* The answer is “no.” Both the State Constitution and the Federal law grant the privilege of voting by absent voters’ ballot to persons in the land or naval forces of the United States without registration.

*Question 2.* The answer is “yes,” under the liberal provisions of the Federal Act.

*Question 3.* The answer is “yes.” I do not consider the slight variation in the method of forwarding the application or the ballots or other machinery for receiving and recording the voters’ desires to be at all material here. The main object is to get the application to the agency that can accommodate it by forwarding a ballot. The postcard provided for in the Federal law is an application for a ballot, and if it reaches the County Clerk it is sufficient. The fact that it will facilitate the purpose of the Act by clearing the application through the Secretary of State rather than attempting the cumbersome expedient of having such applicants deal with County Clerks direct confirms this view.

Comment on proposed plans:

1. This procedure is in harmony with the law and seems an appropriate method of construing together the two laws.

2. This plan seems proper, and the County Clerks are doubtlessly familiar with the law governing the number of ballots printed.

3. I regard the plan here outlined as sufficient compliance with the law with some slight changes in the oath of elector so that it will read as follows:



OATH OF ELECTOR

I do hereby swear (or affirm) that I am a citizen of the United States and am now of the age of at least twenty-one years, or will be such age on the date of the General Election to be held in the State of Nevada, viz: November 3, 1942; that I will have been a resident of the State of Nevada at least six months next preceding the date of said election, and of the county of ..... in said State wherein I claim such residence at least thirty days preceding said date, and of the precinct wherein I claim such residence at least ten days prior to such date, residing at (street and number if any) ..... in the city (or town) of ....., county and State aforesaid; that because I am in the active military (or naval) service of the United States, I will be absent from the aforesaid place of my residence on the date of holding such election, and that I will have no opportunity to vote in person on that day; that I have not received or offered, do not expect to receive, have not paid, offered, or promised to pay, contributed, offered, or promised to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding of a vote at this election, and have not made any promise to influence the giving or withholding of any such vote; and that I have not been convicted of bribery or any infamous crime, or, if so convicted, that I have bene pardoned or restored to all the rights of a citizen, without restriction as to the rights of suffrage; and I am, therefore, entitled to vote in said State, county, and precinct at the said General Election.

.....  
Voter MUST sign here, and oath MUST  
BE administered and attested.

Subscribed and sworn to before me this ..... day of ....., 1942, and I hereby certify that this affiant exhibited the enclosed ballots to me unmarked; that he then, in my presence and in the presence of no other person, and in such manner that I could not see his vote, marked such ballot, and enclosed and sealed the same in this envelope. That the affiant was not solicited or advised by me to vote for or against any candidate or measure.

.....  
Commissioned Officer, Postmaster,  
Notary Public, Justice of the Peace,  
or other officer authorized to  
administer oaths.

The remainder of the plans seem well designed and proper.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

HOMER MOONEY, Acting Deputy Attorney-General.

359 M. Motor Vehicles--Limitation of Speed on Public Highways--Thirty-five Miles Per Hour--Enforcement.

CARSON CITY, October 6, 1942.

HON. E. P. CARVILLE, Governor of Nevada, Carson City, Nevada.

DEAR GOVERNOR CARVILLE: In answer to your inquiry as to the possibility and mode of enforcing a limitation of the speed of motor vehicles upon the public highways so as to carry out the request of the National Government that such speed be limited to thirty-five (35) miles per hour, I have to advise as follows:

The inquiry may be divided into two departments, viz:

1. Whether, under the existing highway traffic law (chap. 154, Stats. 1931; sec. 4350 N. C. L. 1929, as amended), such a speed limitation can be enforced.
2. Whether such enforcement can be brought about by ordinance of the Boards of Commissioners of the respective counties in this State.

1. As to the first field of inquiry, while a conviction could be had in the case of any person operating a motor vehicle on any street or highway in Nevada, in "a reckless manner" or in any other than "a careful or prudent manner; or at a rate of speed greater than is reasonable and proper, having due regard for the traffic, surface and width of the highway; or at such a rate of speed as to endanger the life, limb or property of any person," the fact that the rate of speed exceeded thirty-five (35) miles per hour would not alone warrant a conviction. The Legislature has carefully abstained from fixing a speed limit in terms of miles per hour. In this particular the Act of 1925 (chap. 166, Stats. 1925, page 254) fixed a limit generally of forty-five (45) miles per hour, and the Act of 1929 (chap. 37, Stats. 1929, page 50) placed it at fifty (50) miles per hour generally.

It is equally evident that the Legislature of Nevada has taken general control of regulation of the speed of motor vehicle traffic throughout the State. The 1925 Act prescribed a maximum of forty-five (45) miles per hour "on any street or highway" in this State." The 1929 Act made the limit fifty (50) miles per hour, but permitted the commissioners of the respective counties to limit the speed of motor vehicles in any unincorporated town or city in their county by ordinance as they might deem proper, but not exceeding twenty (20) miles per hour.

The 1931 Act permitted the commissioners to fix a speed in unincorporated cities and towns not exceeding thirty (30) miles per hour, but abandoned a fixed-speed limit in miles per

hour elsewhere in the State.

It is to be noted that throughout the history of this legislation the words are “any street or highway *in this State.*” The Act for licensing and registration of motor vehicles (N. C. L. 1929 Supplement, sec. 4435 (v), Stats. 1931, page 322) defines “Highway” as “every way or place of whatever nature open to the use of the public as a matter of right for purpose of vehicular travel.” The Act of 1925 (Stats. 1925, page 175; sec. 4374 N. C. L. 1929), since superseded, was even more specific, mentioning the location “in any county, city, or town within the State of Nevada.”

The problem of enforcing a speed limit in unincorporated cities and towns is one for the commissioners of the respective counties as they may deem “proper” provided the rate of speed allowed shall not exceed thirty (30) miles per hour. Even here it may be advisable to pattern the ordinances after the Act of 1929 which prescribed a speed “that is reasonable and proper,” etc., and then prohibited any speed exceeding fifty (50) miles per hour. This would avoid any intentment that driving at a rate up to thirty (30) miles per hour would be lawful if actually hazardous under the circumstances of any case. It would avoid all possible conflict with the State law.

But as to the counties at large in the country districts the commissioners can pass no ordinance permitting what the statute prohibits or prohibiting what the statute permits. Nor can they pass any valid ordinance whatever as to such matters affecting the country districts. By expressing the power of the county over unincorporated cities and towns the highway law excluded all power over other territory.

2. As to the second field of inquiry noted above, the powers of counties and Boards of County Commissioners are limited by law.

Counties possess only such powers as have been expressly delegated them by statute, or which are necessarily or reasonably implied from the powers expressly granted to them. (14 Am Jur. 188.)

Turning to the statutes on the subject, we find among the enumerated powers of Boards of County Commissioners the following:

To lay out, control, and manage public roads, turnpikes, ferries, and bridges, within the county, in all cases where the law does not prohibit such jurisdiction, and to make such orders as may be necessary and requisite to carry its control and management into effect. (County Government Act, sec. 1942 (4th), N. C. L. 1929.)

This section has to do with the roads themselves and not necessarily with the traffic upon or over them.

An Act of 1925 amended by chapter 97, Stats. 1933 (sec. 5439 N. C. L. 1929 Supplement) regulates the use of public roads and highways under certain conditions and the commissioners are authorized to close roads or fix the maximum load limit

under certain emergencies of drought or excessive moisture, by passing an appropriate resolution.

Other than these provisions (and the special permission to prescribe speed limits in unincorporated cities and towns, not exceeding thirty (30) miles per hour, I find no express grant of power to regulate traffic on the highways. Our own Supreme Court has referred to the general principle of law (that counties must find authority from the statutes) in two cases: Schweiss v. District Court, [23 Nev. 226 at 230](#); First National Bank v. Nye County, [38 Nev. 123](#).

The same principle is set out in the notes to the California Case of *Ex parte Daniels* (192 Pac. 442) 21 A. L. R. 1186, supplemented in 64 A. L. r. 993; notes to *Schneiderman v. Sesonstern*, 167 N. E. 158 (Ohio).

In 30 C. J. S. 854 it is said:

Entire police power of state may be exercised by a county board with respect to local matters and subject to general laws under a constitutional provision to that effect. (Citing *Peop. v. Velorde* (Calif.), 188 Pac. 59.)

In Nevada we have no such constitutional provision or law, and even in California the proviso "subject to general laws" has been given such effect as to make the State highway law practically supreme and exclusive.

In the case of *Ex parte Daniels*, 192 Pac. 442, the State law provided a maximum of 20 m.p.h. in cities, and the city ordinance provided 15 m.p.h. The city ordinance was declared void.

Among matters decided in that case were the following here summarized:

A local ordinance cannot prohibit exactly the same thing prohibited by a state law.

A statute prohibiting unreasonable speed in the use of vehicles upon the highway is not void for indefiniteness. (Citing *Standard Oil Anti-trust Case* 221, U. S. 1.)

The question of unreasonable speed (where the law provides only for a reasonable speed) is a matter for the jury. A person has a right to have the question decided by a jury rather than by a local legislative body.

In *Morel v. Railroad Commission*, 81 P.(2d) 144 at 150, speaking of the decisions in the *Daniels* and other cases, the Supreme Court of California said:

The effect of these several decisions is to declare that whenever the State of California sees fit to adopt a general scheme for the regulation and control of motor vehicles upon the public highways of the State, the entire control over whatever phases of the subject are covered by State legislation, ceases, in so far as municipal or local regulation is concerned.

This means, as pointed out in the later case of *Wilton v. Henkin et al.*, 126 P.(2) 425 at 428, decided May 29, 1942, that:

It is merely a succinct declaration of the law as it previously existed--that municipalities shall not enact or enforce any ordinance on matters covered by the State Legislature.

In Nevada, counties not only cannot act where the State has acted, but they cannot act at all except as specifically pointed out in respect of unincorporated cities and towns. There is no problem here so far as incorporated cities or towns are concerned.

If counties had power to pass a traffic ordinance covering the whole county, a "fixed-speed" ordinance would necessarily conflict with the State law and be void, and a "reasonable-speed" ordinance exactly like the State law would be useless. We are thus relegated to the State law as it stands.

It is, of course, highly desirable that the people respect the directions of the Government in Washington and your own official proclamation as Governor. I do not doubt that all patriotic and thinking persons will do so. In the national emergency the matter is one for Federal enforcement in so far as the national defense may be hindered by excessive speeding, but the prospect of Federal prosecution seems remote at this time.

In conclusion, permit me to say that all the facilities of this department are at your disposal and at the call of the State and counties in such matters.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

By HOMER MOONEY, Acting Deputy Attorney-General.

360 M. Water Law--Artesian Wells-Emergency Loan for Repair--Refund to County--Salaries of Supervisor and Assistant--Legislature May Provide Revolving Fund.

CARSON CITY, October 8, 1942.

HONORABLE ALFRED MERRITT SMITH, State Engineer, Carson City, Nevada.

HONORABLE HUGH A. SHAMBERGER, Assistant State Engineer, Carson City, Nevada.

The State Engineer of this State, pursuant to chapter 178, 1939 Statutes of Nevada, pages 274-279, both inclusive, has established what is known and designated as "The Las Vegas Artesian Basin," and established the boundaries of that basin or district. There are several

hundred artesian wells within the basin, all of which are governed by the terms of said chapter 178, and the lawful control, rules, and regulations of the State Engineer relating thereto, as provided for in said chapter 178. Some of said artesian wells have been in existence for a good many years, and the number of artesian wells within the basin or district has progressively increased since the first of such wells was discovered and established many years ago. Generally, the same law and rules for the establishment of water rights prevail as to such artesian waters as prevail with reference to surface waters in this State, except as the former may have been modified by the provisions of said chapter 178, especially with reference to the application of the underground waters tapped by such artesian wells to beneficial use in this semiarid western State, where water is so scarce and so precious, and the waters and the use of the waters of both the surface streams and the underground streams belong to the public, under our State law. The wasting of such underground waters through artesian wells is prohibited to the same extent as is the wasting of surface waters used in irrigation. In so far as the particular area embraced within said Las Vegas Artesian Basin, it is certainly as important to conserve such underground waters in that area as it is to conserve the surface waters for irrigation in the other portions of the State where land is irrigated by surface streams and other waters. The wasting of these underground waters in that area is certainly as injurious to the public and public welfare as is the wasting of surface waters in other portions of the State. It is important, therefore, that these artesian waters be conserved and the use thereof limited to the amount necessary for beneficial use, or the amount which is converted to beneficial use.

The wasting of such artesian waters is prohibited by the provisions of said chapter 178, and section 8 thereof, among other things, authorizes the State Engineer, when the owner of an artesian well from which water is being unnecessarily wasted fails to take such steps as may be necessary to abate or prevent such waste, upon fifteen (15) days written notice by registered mail to such owner, and makes the costs and expenses of such abatement by the State Engineer, including the labor and material used in such abatement or prevention by the State Engineer, a lien on the land on which any such well is located, and also any other land owned by him (the owner) to which the water from said well is appurtenant. Said section 8 also makes it a misdemeanor for the owner of any such artesian well to unnecessarily waste the waters thereof. The State Engineer of this State and his assistant report that there are two wells on a particular piece of property within said basin, as so established, and belonging to one person, from which water is being and has been for some time unnecessarily wasted; that this waste of water constitutes one of the major losses in said Las Vegas basin; that such wasted waters are not being converted to beneficial use; that said two artesian wells have only a few feet of casing in them and no valves for the control of said artesian waters; that it is necessary to have said wells properly cased and proper valves provided therefor in order to control the artesian waters escaping through them, and to prevent said waters from being unnecessarily wasted; that the owner of said wells has been notified by the State Engineer of this State on several occasions, as provided for in said chapter 178, to immediately have each of said artesian wells properly cased and provided with proper and effective valves to prevent the wasting of said artesian waters, but said owner has continuously and consistently failed, neglected, and refused to provide said wells with proper casings and valves; and that the owner of said two artesian wells is the owner of not only the land on which said artesian wells are situated, but also of a considerable area of upper lands in the vicinity thereof.

The State Engineer and his assistant also report that the cost and expense of providing and installing proper casings and valves for said wells, including the cost and expense of the labor and materials incident thereof, will amount to approximately five hundred (\$500) dollars.

The fact of the matter, however, is that, although said section 8 of said chapter 178 authorizes the State Engineer to have such repairs made and casings and valves installed, and makes the expense thereof a lien on the property of the owner of the wells, said chapter 178 does not provide any appropriation for the initial payment of the costs and expenses thereof pending the time between the completion of such repairs and installation and the time of enforcing payment therefor as a lien against the property of the owner of such artesian wells. In the meantime, the State Engineer is reluctant to incur such obligations without having money available with which to pay and discharge them. Clark County, Nevada, in which said artesian basin is wholly situated, is willing to cooperate with the State Engineer to the extent of providing the money with which this work may be done, with the understanding that the money advanced therefor by that county shall become a lien on the lands in that basin of the owner of said wells and be thereby collected from such owner and be refunded to that county.

Section 5 of said chapter 178, unlike the water law of the State relating to the distribution of surface streams and water for irrigation, potable, domestic, and other purposes, expressly provides that the County Commissioners, not the State Engineer, but with the consent of the State Engineer, may employ an "artesian well supervisor and his assistants," and that their salaries shall be fixed by the Board of County Commissioners of the particular county or counties in which such artesian basin is situated, and that said Board of County Commissioners shall levy a special tax on all taxable property situated within the confines of the basin designated by the State Engineer to come under the provisions of said chapter 178, *but places a limitation on such taxation of not to exceed \$2,000 in any one year*. As to this limitation of \$2,000 to be raised by such taxation in any one year, however, the State Engineer and his assistant claim that this sum of money would not be sufficient to pay such salaries for a year, but that it will require \$4,000 per year to pay such salaries. In addition to this, the fact remains that no taxes at all have been levied against the lands within said basin for the year 1942 for the purpose of raising even said sum of \$2,000 for that purpose. It is not possible, under the Nevada law, to levy such taxes until the spring and summer of 1943. Even if so levied in 1943, the first payment of the taxes under such a levy would not be made delinquent until the first Monday in December 1943, and it is not customary for taxes to be paid in this State until about the time they become delinquent. In other words, none of the \$2,000 which it would be lawful to levy and collect by taxation on said lands for the year 1943 would be available before December 1943, or probably January 1944. In the meantime, the necessity and emergency for this money exists at the present time and will continue to exist until some provision is made for obtaining the money with which to pay such salaries. It is necessary, therefore, that some other method than that of taxation above indicated be devised for the raising of the money with which to pay such salaries, and that the money so raised be made immediately available for said purposes in order that said artesian water be put to the greatest feasible beneficial use.

Said section 5, like the general water law of the State, makes it also the duty of the tax

collecting officers of the county in which such established basin is situated not only to levy but also to collect such special taxes as other special taxes are levied and collected, and makes such tax a lien upon all the taxable property within the basin. It also provides that, when such tax is collected, it shall be deposited in the State Treasury in a fund bearing the name of the particular "artesian well fund." It also provides that claims against said fund shall be certified by the State Engineer and, when so certified, approved by the State Board of Examiners, and paid on State Controller's warrants by the State Treasurer. It will be noted, however, that this fund may not be used for the purpose of temporarily refunding the moneys expended by the State Engineer for casings and valves to be used in and about such artesian wells for the purpose of controlling the artesian waters flowing from them and of preventing a waste of such waters. The use of the funds so raised through taxes so levied by the Board of County Commissioners on all the taxable property within the artesian basin and collected by the proper county officers and deposited in the State Treasury in the particular artesian well fund and so drawn out on Controller's warrants is expressly limited to the payment of the "artesian well supervisor and his assistants" so appointed by said Board of County Commissioners. For this reason, the money so raised by such taxation cannot lawfully be used to provide and install such casings and valves in the two wells in the basin from which such artesian water is being unnecessarily wasted.

Because of the scarcity of water within said artesian basin and in and about Las Vegas, Nevada, and the great increase of population there and in that vicinity, and the scarcity of water there, it is exceedingly important that all of said artesian water be conserved and applied to the greatest feasible beneficial use. For the same reasons, it is necessary that money be provided with which to pay the salary or salaries of such "artesian well supervisor and/or his assistants." In fact, the law provides for the raising of such funds, but the difficulty is that there is not now any money immediately available for either of the above-mentioned purposes, and the fact remains that there is a pressing and immediate need of both the repair and equipment of said two artesian wells and for the immediate employment of and supervision by said supervisor and probably one or more assistants. Because of the above-mentioned increase of population and scarcity of water within said basin and/or its vicinity, there is not only a necessity for the conservation and supervision of the use of all of said artesian waters, but there also exists a pressing emergency for the same.

From the foregoing facts, this office has been asked by the State Engineer and his assistants for an official opinion on the following:

1. Is it lawful for Clark County, Nevada, to obtain an emergency loan for the purpose of advancing money to the State Engineer for the repair of said two wells so wasting such artesian water by obtaining and installing therein the necessary casings and valves and other equipment required to prevent the wasting of such water and to pay for the labor and materials incident thereto, the money so advanced by said Clark County to become a lien on the land belonging to the owner of said wells and on which said wells are located, and also any other land belonging to him to which the water from said wells is appurtenant, and to levy a tax on said lands so belonging to the owner of said wells to raise money to refund to Clark County the money so obtained by it by such an emergency loan and advanced to the State Engineer for that purpose?



2. Is it lawful for the County Commissioners of Clark County to take out of the General Fund of that county sufficient money to pay the salaries of an “artesian well supervisor and his assistants” from the present time up until moneys are received from said method of taxation to pay the same?

3. Is it lawful for said Board of County Commissioners of Clark County to levy sufficient taxes in the one year 1943 against the taxable property within said artesian basin as so established to pay such salaries for two years 1943 and 1944, assuming that the total amount of such salaries would exceed \$2,000?

4. Would it be lawful for said Board of County Commissioners to levy in any one year a sufficient tax against all of said property to raise the sum of \$4,000 estimated to be necessary to pay such salaries for two years?

5. Would it be lawful for said Board of County Commissioners to obtain an emergency loan immediately, sufficient to pay such salaries for either one year or two years, assuming that said salaries for one year would amount to approximately the sum of \$2,000, or for two years approximately the sum of \$4,000?

6. May the Legislature of this State constitutionally provide a revolving fund similar to the revolving fund the State Engineer already has for the purposes of paying the salaries and expenses of the distribution of waters on our present adjudicated stream systems, including so-called “permit rights”?

Inquiry No. 1 relates solely to the suggested emergency loan of \$500 to Clark County with which to purchase and install casings and valves in said two wells to prevent the wasting of the waters therefrom, and thereby conserve the artesian water within said Las Vegas Artesian Basin for the purpose of obtaining the best feasible beneficial use of such waters.

Inquiries Nos. 2, 3, 4, 5, and 6 relate to an entirely different matter, that is to say, the obtaining of money with which to pay the salaries of the “artesian well supervisor and his assistants” for the purpose of providing such supervision as is necessary in said basin to accomplish proper distribution of such artesian water flowing from or produced by the several hundred wells within said artesian basin, and thereby conserving said artesian water and converting it to the best and most economical beneficial use reasonably possible within the basin.

We shall discuss the inquiries in the order in which they are hereinbefore set forth, numbering our opinion as to each of them to correspond with the number of the particular inquiry to which our answer or opinion relates, and as follows:

1. The provisions of said chapter 178 under which the State Engineer has authority to obtain and install the necessary casings and valves to repair the two wells complained of herein as wasting artesian water, including the necessary labor and materials, after the owner thereof has failed, neglected, and refused, upon proper notice and order to desist by the State Engineer, and his authority to abate or stop the wasting of said waters, are found in section 8 of said chapter

178, which is in the following language:

SEC. 8. No person controlling an artesian well shall suffer the waters therefrom to flow to waste, unless, and as far as reasonably necessary in the judgment of the state engineer, to prevent the obstruction thereof, or to flow or be taken therefrom any water except for beneficial purposes. The owner of any artesian well from which water is being unnecessarily wasted shall be deemed guilty of a misdemeanor, and, if upon fifteen days written notice by registered mail, return receipt requested, the owner fails to abate or refuses to abate such waste, the state engineer or his assistants or authorized agents, may without further notice, take such steps as may be necessary to abate such waste, such as fitting the well with proper valves or other necessary devices to the end that such waste is prevented. The cost thereof, including labor and material, shall be a lien on the land on which said well is located and also any other land owned by him to which the water from said well is appurtenant; *provided*, that the state engineer, his assistants or authorized agents, as the case may be, shall file an itemized and sworn statement, setting forth the date when such work was done and the nature of the labor so performed, with the county recorder of the county wherein said well is situated, within thirty days from the time of completion of such work, and when so filed it shall constitute a valid lien against the interest of such owner or owners in default, and which said lien may be enforced in the same manner as provided by law for the enforcement of mechanics' liens. The county recorder shall make no charge for filing the claim of lien, and no costs shall be taxed against the state engineer, his assistants or authorized agents, in any suit or proceeding on account of such lien.

It will be observed from the above-quoted section that expenditures made by the State Engineer in accomplishing these purposes is expressly made *a lien on the land belonging to the owner of said wells and on which they are located, and also on any other land owned by him to which the water from said wells is appurtenant*. It is clear, therefore, that any money necessarily or properly expended by the State Engineer in abating or stopping the waste of such waters is a lien against said lands belonging to the owner of the wells, upon the giving of the owner of said wells the notice and order to desist or stop the waste mentioned in the above-quoted section 8 and in section 9 of said chapter 178, and upon the filing by the State Engineer or his assistant or agent of the itemized and sworn statement mentioned in section 8. The language above quoted establishes beyond doubt the fact that such reasonable expenditures made by the State Engineer in abating or stopping said waste of water would constitute a lien on such lands when expended and evidenced under the conditions and in accordance with said sections 8 and 9.

The first portion of said inquiry No. 1, however, relates to the right of Clark County, through its Board of County Commissioners, to obtain the proper authorization for an emergency loan of \$500 to provide the money required to obtain and install the necessary casings and valves and other equipment, including the labor and materials incident thereto, with which to prevent the wasting of such waters. It is our unqualified opinion that, since it is for the best interests of the people in the entire basin and in that portion of Clark County benefited by conserving the waters so now being unnecessarily wasted from said two wells, and great necessity or emergency

exists therefore, the Board of County Commissioners of Clark County, Nevada, may, by unanimous vote, lawfully apply to the State Board of Finance for a temporary emergency loan of \$500, or whatever sum is reasonably necessary, for the purpose of obtaining and paying for the necessary labor and materials for obtaining and installing casings and valves and other equipment to abate the wasting of waters from said wells, upon resolution properly and clearly reciting and showing that there is a necessity or emergency for said temporary loan, and the character and nature thereof, and complying with the other provisions of Nevada Compiled Laws 1929, section 3014, as amended by chapter 132, 1935 Statutes of Nevada, pages 281-282, both inclusive. (1935 Statutes of Nevada, chapter 132, pages 281-282.)

It is necessary, however, that the resolution of said Board of County Commissioners clearly show that this is such a necessity or emergency as is contemplated by said amended section 3014.

The latter portion of said inquiry No. 1 relates, however, to the method of the repayment or refunding to Clark County of the emergency loan so obtained; and we are there asked whether it is lawful for Clark County, or the proper taxing officers thereof, "to levy a tax on said lands so belonging to the owner of said wells to raise money to refund to Clark county the money so obtained by it by such an emergency loan and advanced to the State Engineer" for the purpose of so abating or stopping the unnecessary wasting of said artesian waters.

It is our opinion on this point, that the laws of this State do not provide for the raising of money to refund to Clark County, or to anyone else, the money so expended by the State Engineer for the purpose of procuring and installing casings, valves, and other necessary equipment incident thereto, or for the labor and materials for such repairs and improvements to said wells for the purpose of abating or stopping the unnecessary waste of water from such wells. While section 5 of said chapter 178 provides for the levying of "a special tax upon all taxable property situated within the confines of the area designated by the State Engineer to come under the provisions of this Act" (all the property within the basin), the express purpose for the levying of this tax and the purpose for which the money raised hereby may be used is expressly limited to the payment of the "*salary* of said artesian well supervisor and his assistants." There is no provision at all in said chapter 178 whereby the moneys so raised by such special tax may be used for any kind of repairs and improvements to or installations in any such artesian wells, or for any other purpose except the payment of such "*salary*." Said section 5 is in the following language:

SEC. 5. Upon the initiation of the administrator of this act in any particular artesian basin, and where the investigations of the state engineer have shown the necessity for the supervision over the waters in such basin, and upon recommendation of the state engineer, the county commissioners of the county within which such artesian basin is situated may employ, with the consent and approval of the state engineer, an artesian well supervisor and whatever other assistants deemed necessary, who shall execute the duties as provided in this act under the direction of the state engineer. The salary of such artesian well supervisor and his assistants shall be fixed by the board of county commissioners, who shall levy a special tax upon all taxable property situated

within the confines of the area designated by the state engineer to come under the provisions of this act; *provided, however*, that at no time shall such tax levy produce a revenue in any one year of more than two thousand dollars (\$2,000). It shall be the duty of the proper officers of the county to levy and collect such special tax as other special taxes are levied and collected, and such tax shall be a lien upon the said property. The tax herein provided for, when collected, shall be deposited with the state treasurer of Nevada in a fund in the state treasury which shall be designated as the ..... basin, ..... County artesian well fund. All claims against said fund in the state treasury shall be certified by the state engineer and approved by the state board of examiners; the state controller is authorized to draw his warrant therefor against such artesian well fund and the state treasurer shall pay the same. 1939 Statutes of Nevada, chapter 178, section 5, page 275.

It is unfortunate indeed that provision is not made in said chapter 178 for the levy of a tax to refund moneys advanced by the State Engineer or Clark County for such repairs, improvements, and installations, especially in view of the fact that the amount of artesian water within the basin seems to be somewhat limited and there is, therefore, great need of the prevention of waste of such artesian waters and the conservation of all of such artesian waters for beneficial use. For this reason, the prevention of unnecessary waste and the conservation of said artesian waters would apparently be for the benefit of the entire basin and of all the water users in it. The truth of the matter is that one of the chief purposes of having an artesian well supervisor, or assistants, is the supervision of the wells in the basin for the purpose of conserving said artesian waters. If there is not an unlimited quantity of such artesian waters within the basin, the conservation of the limited supply thereof is certainly as important as the proper distribution of the limited supply of such artesian waters among the owners of the artesian wells within the basin.

Upon this theory, there seems to be sufficient reason for the spreading of the expense of such repairs, improvements, and installations over all the property of the owners of all the wells within the basin and raising the funds to pay for such repairs, improvements, and installations by taxation of all such property within the basin, extending proper credit to the owners of such artesian wells which are properly equipped for the improvements and equipment which they have already installed in their wells.

If some such arrangement be not made, then provision should certainly be made by law creating a revolving fund for the State Engineer for the purpose of enabling him to procure the labor and materials reasonably necessary to make such repairs, improvements, and installations and authorizing him to make and install the same immediately in order to abate and prevent the unnecessary waste of such artesian waters and thereby to conserve the same, and authorizing a sufficient tax against the property of the owner or owners of the well or wells so repaired and improved by or under the direction of the State Engineer, to replenish such revolving fund and refund to it the money so expended in the making of such repairs, improvements, and installations.

While the above-quoted section 8 authorizes the State Engineer "to take such steps as

may be necessary to abate such waste, such as fitting the well with the proper valves *or other necessary devices* to the end that such waste is prevented,” this section of the law does not authorize the levying of any tax or any other method by which the State Engineer may obtain the money with which to procure the necessary labor, materials, valves, casings, etc., to abate such waste, but simply provides that the failure or refusal of the owner of the well so wasting water to abate or prevent such waste when directed to do so by the State Engineer, shall constitute a misdemeanor, and that the expenditures so initially made by the State Engineer shall constitute a lien against the land of the owner on which the particular well so wasting water is located or land of his which is appurtenant thereto. The State Engineer can certainly not be expected to advance the money for these purposes out of his own pocket, and it seems that there is not any money appropriated or any revolving fund created out of which he may initially pay the expenses of abating such unnecessary waste of water.

Regardless of the above suggestions as to future legislation, the fact remains that there is in the law as it now exists absolutely no provision or method by which money may be raised by taxation of the land or other property of the owner or owners of such wells to pay the expenses of the repairs, improvements, or installments necessary to prevent such unnecessary waste of water from such wells, or even to defray the expenses of the installation of headgates, flumes, measuring devices, and other irrigation works which may be necessary for the diversion and application to beneficial use of the waters of surface streams and their tributaries. Nevada Compiled Laws 1929, section 7937, as amended by chapter 209, 1931 Statutes of Nevada, pages 357-359, and 1931 Statutes of Nevada, chapter 19, pages 20-23, and 1931 Statutes of Nevada, chapter 231, pages 442-443, all relate to and provide for money with which to pay the salaries and expenses of water commissioners or distributors, not to repairs, improvements, and installations of irrigation works for either surface or underground waters. The only other provision of the law of this State which provides for the raising of money by a levy of taxes on the property belonging to water users is that found in said above-quoted section 5 of said chapter 178; and, as above noted, the levying of taxes provided for in said section 5 is solely for the purpose of raising money to pay salaries, not for the purpose of raising money to pay for repairs, improvements, and installations incident to the use of such water.

Nevada Compiled Laws 1929, section 7941, although authorizing the State Engineer to require owners of ditches, canals, and other irrigation works to install proper headgates, flumes, and measuring devices satisfactory to the State Engineer upon his notice and direction to do so, does not provide for the levying of any tax against the property of such owners to provide money for that purpose; and the fact remains that all of these provisions and the other provisions of said water code relate to surface waters and to the enforcement of the provisions of sections 52-58 of said water code, which are compiled as Nevada Compiled Laws 1929, sections 7939-7943, both inclusive, as amended.

It is clear from the foregoing that there is absolutely no provision of the law under which a tax may be levied against any of the land of the owner of said two wells with which to raise money to refund to Clark County or the State Engineer, or anyone else for that matter, the moneys furnished and expended in preventing and installing proper valves, casings, or other equipment necessary to abate or stop the unnecessary waste of such artesian waters from said

wells. In fact, said section 8 of said chapter 178 expressly provides that the moneys so expended for that purpose shall constitute “a *lien*” on the lands of the owner on which such wells are located and his other land to which said artesian water is appurtenant. In other words, such expenditures constitute a lien against the land itself, not indebtedness which may be discharged and satisfied by the levying of a tax against the lands involved.

The enforcement of a lien is an entirely different matter from the levying of a tax. A lien attaches to the property itself; and the only method provided by law for the enforcement of the lien, or the raising of money to satisfy the lien, is a suit in court to foreclose the lien, and involves the sale of the property itself at a foreclosure sale to satisfy the judgment of the court for the foreclosure of the lien, unless the owner of the property involved pays and satisfies the indebtedness from some other source prior to such foreclosure sale. In other words, the only method by which the person or agency that advances or furnishes money for such repairs, improvements, and installations in and to such wells could lawfully enforce the refunding or repayment of the moneys so advanced or furnished for that purpose would be by such foreclosure suit and foreclosure sale.

For the foregoing reasons, it is our unqualified opinion that a tax could not be lawfully levied against the lands of such owner to provide money to refund or repay the money so advanced for the above-mentioned purposes.

2. As to the payment of the salaries of the “artesian well supervisor and his assistants” mentioned in said section 5 of said chapter 178, pending the collection of the “special tax” levied for that purpose, as provided for in that section, the only method provided by law by which this money can be lawfully obtained in advance of the collection of such taxes is by an emergency loan as provided for in the “fiscal management law” of the State, particularly section 3014 Nevada Compiled Laws 1929, as amended by chapter 132, 1935 Statutes of Nevada, pages 281-282, upon the adoption of a resolution of the Board of County Commissioners of Clark County, by unanimous vote, showing “great necessity or emergency” for such a loan, and applying to the State Board of Finance for permission to make such a loan. Such section 3014, as so amended, provides for a levy of taxes on all the taxable property within the artesian basin to repay such an emergency loan within two and one-half (2½) years after the making of such an emergency loan; but that section also provides that, after obtaining permission from said State Board of Finance for such an emergency loan, the money so provided for may be borrowed for that purpose from the General Fund of the county if there be sufficient money in that fund to permit the same, and a sufficient tax levied against all of the taxable property within the artesian basin to repay said loan within two and one-half (2½) years. It also provides that, if in the judgment of the State Board of Finance at the time of authorizing such emergency loan, there is a sufficient surplus in such General Fund to satisfy the purposes of that emergency loan which will not be needed for General Fund purposes in the course of ordinary events in that county, then the emergency tax for the repayment of such loan to such General Fund need not be levied, collected, and placed in the General Fund for the purpose of repaying such emergency loan to said General Fund, but such transfer and loan shall be deemed refunded to said General Fund without such a tax. In other words, the Board of County Commissioners of Clark County may, with approval of said State Board of Finance, take the moneys necessary to pay such salaries up to but not exceeding \$2,000,

directly out of the General Fund of Clark County without levying a tax for the repayment thereof to said General Fund; provided there be at that time a sufficient surplus in such general fund in the judgment of the State Board of Finance to satisfy the General Fund purposes of that county in the course of ordinary events and also to furnish the money necessary for such an emergency loan. However, if there be not sufficient money in said General Fund in that county at that time to supply both of said purposes, then a tax would have to be levied on all the taxable property within the artesian basin to repay such an emergency loan within two and one-half (2½) years thereafter. It should be kept in mind, however, that, in any event, the permission of the State Board of Finance for such an emergency loan must first be had before moneys can be taken from the General Fund of Clark County to pay for said repairs, improvements, and installations in any way whatsoever.

3. A short answer to this inquiry is “no.” The total amount which may lawfully be raised by the County Commissioners by the taxation provided for in said section 5 is not to exceed \$2,000.

4. A short answer to this inquiry is again “no.” The extent of the moneys to be raised in any one year by such taxation is not more than \$2,000.

5. Yes, it would be lawful for the Board of County Commissioners to make an emergency loan in the sum of not to exceed \$2,000 with which to pay the salaries contemplated for one year only; provided the application for such emergency loan shows clearly the existence of the “great necessity or emergency” as specified in said amended section 3014. It would not be lawful for the Board of County Commissioners to levy a tax on the property involved sufficient to raise more than \$2,000 in any one year, no matter how much money was needed for such salaries.

6. Yes, the Legislature of this State may constitutionally provide a revolving fund similar to the revolving fund the State Engineer already has for the purposes of paying the salaries and expenses of the distribution of surface waters on our present adjudicated stream systems, including so-called “permit rights.” In fact, the general water law of this State included in our so-called “water code” and as above cited, could be very easily and constitutionally amended so as to make the State Engineer’s present revolving fund cover the salaries and expenses of water commissioners or distributors required by our 1939 artesian water law as included in said chapter 178, 1939 Statutes of Nevada; and the necessary amendment be made also to said section 5 of said chapter 178 to so provide. There can certainly not be any good reason, or even sufficient excuse, for the setting up of another revolving fund to provide for the requirements of said chapter 178. Another revolving fund out of which the requirements of said chapter 178 could be satisfied would simply complicate matters and involve additional bookkeeping and the work incident thereto, and enlarge the danger of errors in entering expenditures in the proper revolving fund. It is apparent, therefore, that the one revolving fund already set up is sufficient, if the general water code and said chapter 178 be properly amended so as to provide for the payment of all such expenditures out of that one revolving fund.

As to the raising of funds for such purposes for the year 1944, that can be very easily

provided for by the 1943 Legislature by amendment providing for the revolving fund out of which said expenditures may be paid, or by provision for the levying of a sufficient tax to raise moneys for the payment thereof.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

361 M. Taxation--Personal Property Taxes--Ely Gold and Manganese Company--Perpetual Lien.

CARSON CITY, October 9, 1942.

HON. JOHN W. BONNER, District Attorney, Ely, Nevada.

Re Personal Property Taxes--Ely Gold and Manganese Company.

DEAR MR. BONNER: Reference is hereby made to your letter of October 7 relative to the delinquent personal property taxes of the above-named company. It is noted that the personal property, or a portion thereof, has been attached by creditors of such company and as we understand have secured a judgment upon which an execution sale is to be had. We understand also that in the year 1941 a tax levy was made against the personal property of such company which has not been paid and that the question is whether the lien of the personal property tax against the personal property of the company is prior to the lien of attachment and execution sale, it appearing that the judgment against the company was secured after the levy of the tax.

We have given due consideration to your inquiry and beg to advise that we are of the opinion that the tax levied against the personal property of such company in 1941 became a perpetual lien against such personal property and remained such lien until the taxes and penalties have been paid. Such is the language of section 6416 N. C. L. 1929. Such lien attached at the time of the levying of the tax by the Board of County Commissioners to section 6415 N. C. L. 1929, and consequently must have been prior in time to the attachment of the lien of the Columbia Powder Company. We think section 6416 provides a statutory lien which is paramount to any other lien, particularly when such lien is subsequent in time. Such is the general rule and we find no authority to the contrary in this State. See 61 Cor. Jur. 933 and 934, sections 1194, 1195.

We think some of the trouble was caused by the combining of the real property owned by the Cuba Consolidated Company and the personal property owned by the Ely Gold and Manganese Company in one assessment. This probably was inadvertently done by the Assessor. There should have been two assessments in fact. One against the Cuba people and the other against the Manganese Company. Inasmuch as the personal property tax of the Manganese Company could not become a lien against the real property owned by the Cuba people. However, we think that the tax can be segregated and the tax against the real property collected from the Cuba people and that the personal property tax of the Manganese Company paid by that



company or derived from property owned by it and now attached and subject to execution sale.

Very truly yours,

GRAY MASHBURN, Attorney-General.

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

362 M. Bonds--City of Las Vegas, Nevada Highway Bonds--Gymnasium Building Bonds,  
Pioche School District--Investment State Permanent School Fund.

CARSON CITY, October 16, 1942.

HON. DAN FRANKS, State Treasurer, Carson City, Nevada.

DEAR MR. FRANKS: You have referred to me for answer the letter of Harold N. Brown, Professor of Education, University of Nevada, Reno, dated October 13, 1942, propounding the following problem:

As of June 30, 1942, the State Treasurer's office was custodian of the following bonds:

City of Las Vegas, Nevada Highway Bonds, Series of 1925, \$4,000. Interest 6%.

Gymnasium Building Bonds, Pioche School District, Lincoln County, Nevada, \$8,750. Interest 6%.

These bonds are held as an investment of funds of the State Permanent School Fund.

The Constitution of Nevada, as amended (sec. 3 of art. XI; sec. 148 N. C. L. 1929), requires the Legislature to provide for the investment of the funds of the State Permanent School Fund "in United States bonds, or in the bonds of this State, or the bonds of other States of the Union, or the bonds of any county in the State of Nevada, or in loans \* \* \* on agricultural lands in the State," etc.

The amendments to this section were made by vote of the people in 1912 and in 1916 before the above investments were made.

The Legislature obeying the mandate of the Constitution provided for a State Board of Investments later called the State Board of Finance (Stats. 1917, page 339; Stats. 1919, page 284; sections 6956, 6962-63 N. C. L. 1929). That board has charge "of all the investments of moneys and the sale of all securities of the State Permanent School Fund." Investments are authorized in "United States bonds, or in bonds issued under the authority of the United States, or in the bonds of this State, or of other States, or in the bonds of any county of the State of Nevada, or in loans \* \* \* on agricultural lands in this State," etc. The Attorney-General's legal opinion is required in

each case.

Professor Brown asks you to say in which of the categories enumerated in the Constitution and statutes of Nevada as eligible for the investment of the State Permanent School Fund the above investments belong.

The answer is that neither of the investments belongs in any of the eligible categories. One is an issue of city bonds and the other is an issue of school district bonds. The Las Vegas bonds were purchased 16 years ago, in 1925, and have been retired at the rate of \$4,000 a year. The \$4,000 in these bonds now held probably will be paid in 1943. The gymnasium bonds of the Pioche School District were purchased 14 years ago, in 1928, and are being retired at the rate of \$2,500 a year. Probably they will be retired in three years. Commanding an interest rate of 6%, both issues could probably be sold at a liberal premium today, if necessary. Hon. M. A. Diskin was Attorney-General of this State at the time both of such purchases and our records do not disclose whether Mr. Diskin was asked for an opinion in the matter.

The Las Vegas bond issue was specifically authorized by chapter 74, Statutes of 1923. The gymnasium bonds of Pioche School District purport to be issued pursuant to the school law of Nevada, chapter 133, Statutes 1911, pages 238-241 (secs. 5836-5846 N. C. L. 1929).

Nothing in the foregoing is to be construed as casting any doubt upon the value of the bonds in question. However valuable they may be, they remain ineligible for purchase with money of the State Permanent School Fund.

I enclose a copy of this opinion for the information of Professor Brown.

Yours truly,

GRAY MASHBURN, Attorney-General.

By HOMER MOONEY, Acting Deputy Attorney-General.

363 M. County Commissioners--Authority to Fill Vacancies Occasioned by Induction of Officers into Armed Services--Appointment of Wife as Deputy.

CARSON CITY, December 4, 1942.

HON. PETER BREEN, District Attorney, Goldfield, Nevada.

DEAR MR. BREEN: Reference is hereby made to your letter of November 23, 1942, concerning the induction of Mr. Michael Chiatovich into the armed forces of the United States. You advise that Mr. Chiatovich has been elected to the office of Recorder and Auditor and that he will leave for induction on or about December 28, 1942, and that he expects to return on a week's furlough after reporting and that he expects to be in Goldfield on or about January 4,

1943, for the purpose of qualifying for the office to which he was elected. You propound two queries upon which you desire an opinion. You also advise that Mr. Chiatovich desires to appoint his wife Deputy Recorder and Auditor during his absence, and that he expects to pay her from the salary he receives for this office.

Your first inquiry reads as follows: "1. Have the commissioners authority to appoint an Acting Recorder and Auditor in this case?"

We have examined into the law concerning your problem and we are of the opinion that chapter 34, Statutes of Nevada 1941, applies in the Chiatovich case, and that under such statute, he being inducted into the armed forces of the United States under the selective draft law cannot be said to be contemplating a voluntary absence from his office, and that upon his return to Esmeralda County at the end of the war, or upon being previously honorably discharged from the armed forces, he would be entitled to assume the duties of the office to which he has been elected. In such a case we are of the opinion that there will be no absolute legal vacancy in the office, but that there is at most only a temporary vacancy brought about by forces over which the incumbent officer can have no control. Therefore, we think it follows that the Board of County Commissioners does have the power and authority under section 4805 Nevada Compiled Laws 1929 to appoint, temporarily, a suitable person to perform the duties of the office of County Recorder and Auditor of Esmeralda County. Such appointment to be temporary in character only, subject to the return of Mr. Chiatovich at some future time within the term of his office.

Your second inquiry reads as follows: "2. Can Mr. Chiatovich appoint his wife as deputy, provided he pays her from his own salary received as recorder and auditor?"

It is our opinion that Mr. Chiatovich, provided he qualifies for the office, and in fact takes over the duties thereof, even for a very short time, can legally appoint his wife as Deputy County Recorder and Auditor, provided that he pays her from his own personal funds which may be derived from his salary as such Recorder and Auditor.

In the appointment of his wife as deputy there will be no violation of the Nepotism Act so long as Mr. Chiatovich is responsible for her salary. See section 4851 Nevada Compiled Laws 1929, as amended at 1935 Statutes, page 172.

We think the law is quite clear that the County Auditor and Recorder of Esmeralda county, under the circumstances, may appoint a deputy, notwithstanding the provisions of the Esmeralda County salary statute found in the 1929 Statutes at pages 15 and 16. Sections 4848 to 4850 Nevada Compiled Laws 1929 certainly provide that county recorders may appoint deputies so long as they are responsible for the deputies' salaries, and that such County Recorder has been duly inducted into office and filed his bond.

Trusting that this letter will answer your inquires, and with kind personal regards, I am

Yours very truly,

GRAY MASHBURN, Attorney-General.

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

364 M. Public Schools--Elections--Nonresident of School District Eligible to Office of Trustee.

CARSON CITY, December 10, 1942.

MISS MILDRED BRAY, State Superintendent of Public Instruction, Carson City, Nevada.

DEAR MISS BRAY: Reference is hereby made to your letter of December 8, 1942, wherein you state that you have been asked to secure an opinion from the Attorney-General with respect to the qualifications of a nonresident of a school district who aspires to the office of School Trustee made vacant by reason of the death of an incumbent. You further state that by reason of the fact that in the county where the election is to be held to fill the said vacancy, there is at present no District Attorney and, therefore, you are requesting this office to give the opinion.

We think the question involved is one of local concern and of right should be handled by the District Attorney of the county. However, in view of the circumstances, we herein give you our views on the matter.

As we understand the question, it is that there is a purported union of three districts, each of which possesses a Board of School Trustees. However, for many years two of such districts have entered into a contract with the third district for the purpose of having the children of each of the districts receive their schooling in the school of the third district, and that all money of the first two districts has been turned over each year to the third district, with the result that no schools were held in the first two districts mentioned.

We also understand that one of the candidates for the office of School Trustee in the district operating the school is a resident of one of the first districts purportedly in union with the third district, and that, while he is a resident of the county in which all three of the districts are situated, still he is not a resident of the district in which the school election is to be held for the purpose of filling the vacancy. The question is, is such candidate a qualified candidate for such office?

We have examined the law of this State very carefully and we find no law that requires a candidate for the office of School Trustee to be a resident of the school district in which the election is held and in which the duties of the office are to be performed. Our examination of the law compels us to the view that the only qualification such candidate need possess is that he be a qualified elector under section 1 of article II of the Constitution of Nevada and, further, that in order to hold public office and to be eligible to public office, the Constitution only requires that he be a qualified elector under the Constitution as stated above. See section 3 of article XIV of the Constitution of Nevada. We find no statute placing any other qualifications on a candidate for the office of school trustee.

While we think the better policy would be that a candidate for the office of School Trustee should be a resident of the particular school district in which he is to function as school trustee, still we cannot read into or write into the Constitution and laws of this State any qualifications other than above stated. We have in mind a most pertinent statement by the Supreme Court of the State of Nevada dealing with this very question, Schur ex rel. v. Payne, 57 Nev. 286, where the Supreme Court said at page 291:

All persons are equally eligible to office who are not excluded by some constitutional or legal disqualification; and in the absence of a constitutional or statutory provision, residence within the district over which the jurisdiction of the office extends is unnecessary to eligibility.

Such being the situation as surrounds the law at this time, we are inclined to the view that the candidate mentioned in your letter has the right to be such candidate. If other parties feel that he should not be a candidate under the circumstances, we advise that the courts are open for the purpose of proper proceedings against the Clerk of the Board of School Trustees or County Clerk to prohibit the placing of the candidate's name on the ballot. It may be further stated that even if the election be held and such candidate elected to the office, interested parties would still have the right to contest his selection, and thus bring this question before the courts.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

365 M. Public Schools--Trustees Can Legally Increase Rate of Teacher's Compensation During School Term--Not Retroactive--Additional Compensation Must Be Part of Contract.

CARSON CITY, December 14, 1942.

MISS MILDRED BRAY, Superintendent of Public Instruction, Carson City, Nevada.

DEAR MISS BRAY: This will acknowledge receipt of your letter of December 1, 1942, in which you ask four questions concerning the legality of boards of education increasing the salaries of public school teachers after legal contracts have been signed. We shall answer the questions in the order in which they have been asked, although our answer to your first question largely answers the remaining three questions.

In our opinion, a board of education can legally cancel existing contracts as of January 1, 1943, and write new contracts providing a monthly increase in salary for the remainder of the school term, under the conditions and within the limitations hereinafter set forth.

The contract used by the State Board of Education and the various County Boards of Education and School Trustees in part states as follows: "This contract may be abrogated only for the good and sufficient cause by either party hereto upon thirty (30) days' notice in writing to

the other party; or at any time by mutual consent.”

Except in so far as controlled by statute, the making, requisites, and validity of a contract of employment of a teacher in public schools is governed by the rule relating to contracts generally. See 56 C. J. sec. 315, page 388.

The contract used in the public school system of the State of Nevada does give the teacher for good and sufficient cause the right to abrogate the contract upon thirty (30) days' notice. In the case of *State v. Lum*, 111A. 190, and in the case of *Wiley v. Detroit School Board*, 196 N. S. 417, it was held that where a teacher's contract gave him the right to resign within the term on notice, the School Board could legally increase the pay within the term of the contract in consideration of the teacher's forbearance to exercise his right to resign. These two cases seem to be directly in point, and since the contracts used in the Nevada public school system give the teacher the right to resign on good and sufficient cause and after notice, it is our opinion that the teacher's forbearance to exercise this right is sufficient consideration to support a new contract at increased compensation.

There are no constitutional prohibitions in the Nevada Constitution against this holding, nor do we find anything in the statutory law of the State that prohibits the School Trustees or County Boards of Education from entering into a new contract based upon good and valid consideration. Section 5768, Nevada Compiled Laws 1929, does provide a penalty against any teacher legally employed who leaves school before the expiration of such time without the consent of the trustees in writing. This statutory penalty cannot be construed as a prohibition against the increase of a teacher's compensation within the term. It is included, undoubtedly, to secure faithful, loyal performance on the part of the teaching profession; to impress upon them the fact that they are charged with a position of public trust.

In holding that the School Trustees can legally increase the rate of compensation during the term we do so under the following express limitations.

Section 3019 Nevada Compiled Laws 1929, in so far as pertinent to this inquiry, reads as follows: “It shall be unlawful for any governing board or any member thereof or any officer of any city, town, municipality, school district, county high school, high school district, or educational district to authorize, allow or contract for any expenditure unless the money for the payment thereof has been specially set aside for such payment by the budget.” This provision is clear and explicit and unless the governing boards of school districts and county high schools have available money for the increase of teachers' salaries, which money has been specially set aside to provide for the payment of teachers' salaries and is in excess of the amount now under contract, the governing boards would be entering into contracts which they could not fulfill unless the money was available.

We recognize that governing boards of the various school districts and county high schools will shortly be preparing new budgets and in connection therewith your attention is called to our official opinion No. 310, dated June 10, 1941, concerning the authority of such boards to revise their budgets. This opinion should be helpful in pointing out the methods by

which the various governing boards may be able to set aside sufficient money for the payment of increased salaries.

Your second question is answered in the negative, as it is our opinion that no provision can be made in the contract to provide that the increase in salary be made retroactive.

Our answer to your first inquiry seems a complete answer to your third inquiry, since the increased compensation should be considered as being paid for services regularly rendered each month during the balance of the contract.

Your fourth question is answered in the negative, as we know of no way of paying additional compensation other than by making it a part of the teacher's contract and subject to the limitations brought about by our budget law.

Very truly yours,

GRAY MASHBURN, Attorney-General.

ALAN BIBLE, Deputy Attorney-General.

366 M. County Commissioners--No Authority to Require Conveyance of Property from Person Making Application for Assistance--Old-Age Assistance.

CARSON CITY, December 16, 1942.

HON. HAROLD O. TABLE, District Attorney, Washoe County, Reno, Nevada.

DEAR MR. TABER: Reference is hereby made to your letter of December 14, wherein you request an opinion upon the following question:

You advise that recently the County Commissioners of Washoe County entered into a written contract with a lady, the terms of which provide that the lady convey her real property to the county of Washoe, and in consideration of such conveyance the county has agreed to pay the lady the sum of \$40 per month and also pay the taxes on her property. You also advise that this lady applied for old-age assistance but could not qualify under the law for such assistance. Your inquiry is "has the Board of County Commissioners the authority to enter into such a contract?"

Boards of County Commissioners are boards of limited jurisdiction. Their powers are limited by the statute or statutes granting powers to such boards, or such necessary implied powers flowing from the powers expressly given by statute.

We have examined the law of this State with respect to the power of a Board of County Commissioners to receive a conveyance of real property for the consideration of paying to the owner of such property a sum of money per month, presumably in lieu of old-age assistance, or

in lieu of such assistance as might be granted by the Board of County Commissioners under the poor laws of the State. We fail to find any statutory authority for such procedure on the part of a Board of County Commissioners either in the Old-Age Assistance Act, the poor laws, or any other statute relating to such project.

In the Old-Age Pension Act of 1925, the same being sections 5109-5136 Nevada Compiled Laws 1929, a provision was incorporated in section 5116, which did authorize Boards of County Commissioners to accept the conveyance of real property from an applicant for the old-age pension and thereafter manage such property with the authority granted to sell, lease, or transfer such property and, further, to pay the net income from such property to the applicant for the pension. Under such section a Board of County Commissioners, no doubt, could have entered into the contract mentioned in your letter. However, the Old-Age Pension Act of 1925 was expressly repealed by the Old-Age Assistance Act of 1937. The 1937 Act is found in 1937 Statutes, page 129, and also in sections 5154.01 to 5154.28 Nevada Compiled Laws, Supplement of 1941. We fail to find in the 1937 Act any authority granting Boards of County Commissioners to enter into contracts such as mentioned in your letter. Apparently, Boards of County Commissioners, or rather the state department administering the Old-Age Assistance Act, were only granted power to recover from the estate of a deceased pensioner under the 1937 Act. The power so granted does not include the right to require a conveyance of the property from an applicant at the time of making application for assistance, or any time thereafter prior to death.

We must conclude that the contract mentioned in your letter, under the law of this State, could not be legally entered into by a Board of County Commissioners.

Respectfully submitted,

GRAY MASHBURN, Attorney-General.

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

367 M. State Officers--Federal Employment at Total Compensation of \$1 Per year Not Violation Constitution.

CARSON CITY, December 17, 1942.

HON. JOHN E. ROBBINS, Attorney at Law, Elko, Nevada.

DEAR SENATOR ROBBINS: This will confirm my telegram of yesterday to you reading as follows:

Convinced acceptance Federal attorneyship at salary offered you not lucrative office and not disqualification as State Senator, but court decisions conflicting and some against our view. Am making careful and thorough research, as anxious to safeguard against even possibility of claim of disqualification. Hope to have opinion out and mailed to you tomorrow. However, am mailing today copy Thatcher's opinion two eleven, July thirty-first, nineteen eighteen, holding office of United States



Commissioner carrying small fees a lucrative office preventing Judge Averill from serving as such and also as judge, and commenting upon State versus McMillan, twenty-five Nevada one thirty-two, and upon McCarran's declination to accept one dollar a year Federal appointment fearing it would disqualify him as Justice of Nevada Supreme Court.

It is apparent from your letter to the Attorney-General of the United States, as well as your reference of this question to us, that you fully realize the danger of acceptance of a Federal position in view of the case of State v. Sadler, 25 Nev. 173, in which it was held that a State Senator, by accepting appointment as paymaster in the Army, became incapable of legally holding the office of State Senator, and such acceptance operated as a resignation of the State office and created a vacancy therein. Under this decision, should some court hold that the Federal office which has been tendered to you is a lucrative office after you had accepted the same, it would appear that you had no choice as to whether you desired to hold the State office or the Federal office, but that in accordance with this case your acceptance of the Federal job would automatically make you incapable of holding the State office. This potential danger has caused us to spend considerable time in a most thorough examination of all the authorities in order to properly present our views to you.

Our own Constitution, which was largely taken from the California Constitution, differs in two material points from the California constitutional provision on this particular question. The California constitutional provision on this particular question. The California constitutional provision is identical with our own section 9 of article IV, down to the proviso at which point the California Constitution reads "*provided*, that officers in the militia who receive no annual salary, local officers, or postmasters whose compensation does not exceed \$500 per annum shall not be deemed to hold lucrative offices." The Nevada provision eliminates officers in the militia and local officers from the proviso, and includes Commissioners of Deeds.

This exclusion from the Nevada constitutional provision may well have been done intentionally in order to constitute all Federal officers receiving compensation lucrative, with the exception of postmasters under \$500 and Commissioners of Deeds. The purpose of this constitutional provision is best expressed in the case of *People v. Leonard*, 14 Pac. 853, which reads in part as follows:

The main object, then, must have been to prevent a conjunction of a federal and state office of profit in the same person, without any condition whatever; then the inconvenience of so arbitrary a rule was thought of, and thence came the determination to exempt from the terms "civil office of profit," or "lucrative office," officers in the militia to whose positions no salary is attached, and local officers and postmasters who did not receive by way of compensation more than \$500 per annum. If the section in controversy can be so construed as to permit the holder of a civil office of profit under the state to be appointed to and hold, at the same time, a lucrative office under the United States, then the prime object of the members of the constitutional convention, which made such section a part of the law of the land, viz.: The prevention of dual office-holding by one person under two separate and distinct

governments, and the separation of the allegiance justly due one by its officers from that due to another power would be defeated, and the earnest intentions of that body rendered utterly abortive.

The purpose of the provision is very plain, that is, to prevent the dual office holding by one person under two separate and distinct governments with the resulting separation of allegiance.

Does a salary of \$1 per year constitute the Federal office a lucrative office? As stated in my wire, it certainly does not seem to us on the basis of the definition contained in Webster and as we commonly understand the word "lucrative," that a \$1 per year salary is lucrative. Unfortunately, we have been unable to find a single case directly in point in which a compensation of \$1 per year was involved. The test of what is lucrative has been stated in a great number of cases, and particularly in a long line of Indiana authorities beginning with the case of *Dailey v. State*, 8 Blackford, 329, in which it was stated that the offices of County Recorder and County Commissioner are lucrative offices, and the court therein applied this test:

Pay, supposed to be an adequate compensation, is affixed to the performance of their duties. We know of no other test for determining a "lucrative office" within the meaning of the constitution. The lucrateness of an office--its net profits--does not depend upon the amount of compensation affixed to it. The expenses incident to an office with a high salary may render it less lucrative, in this latter sense, than other offices having a much lower rate of compensation.

This same test "pay supposed to be an adequate compensation is affixed to the performance of the duties both of trustee and supervisor," is applied in the case of *Creighton v. Piper*, 14 Indiana 182.

In that case the School Trustee received 75 cents per day while engaged as Trustee and the court held this to be a lucrative office.

The Supreme Court of Indiana against applied the tests mentioned above in the case of *State v. Kirk*, 44 Indiana 401; 15 Am. Reports, 239, adding that "an office to which there is attached a compensation for services is a lucrative office," and then going on to cite the test set forth in *Dailey v. State*, supra.

*Chambers v. State*, 26 N. E. 893, again held a School Trustee to be a lucrative office since duties were imposed upon such office by statute, and compensation was fixed by a common council.

The nearest case which we have been able to find in point is likewise another case from the State of Indiana. In the case of *Wells v. State*, 94 N. E. 321, the court held that the office of School Trustee, for which a salary of \$60 per year is paid, is a lucrative office, and in so holding applied the test that any office to which a compensation was attached was a lucrative office.

Mechem on Public Offices, section 13, relies almost entirely for his text statement on the line of Indiana authorities cited above. His text statement reads as follows:

An office to which salary, compensation, or fees are attached is a lucrative office, or as it is frequently called, an office of profit. The amount of the salary or compensation attached is not material. The amount attached is supposed to be an adequate compensation and fixes the character of the office as a lucrative one, or an office of profit.

All of these authorities cited above seem to indicate that it does not matter how much compensation is paid, but that just as long as some compensation is attached to the office it must be deemed lucrative. Undoubtedly, the courts have adopted this rather arbitrary test in order to avoid a question of fact on each case as to whether the compensation attached was or was not adequate. They have clearly done this in the cases which we have examined, and particularly those named above by holding that an office to which any compensation is attached is deemed to be adequate.

This same finding is expressed in a little different language in the case of *Baker v. Board of Commissioners*, a Wyoming case found at 59 Pac. 797, holding that the office of Coroner is a lucrative office under the statute and stating “the fact the compensation may not ordinarily be large does affect its character in this respect.” To the same effect see *Foltz v. Kerlin*, 55 Am. Reports, 197, in which the court held “in all the decisions upon constitutional provisions similar to ours that we have been able to find, it is laid down for law that one who holds a Federal office, *great or small*, to which compensation is attached, cannot lawfully be incumbent of lucrative State office.” (*Italics ours.*)

An examination of the text material in 46 C. J., section 52, page 945, and 40 American Jurisprudence, section 64, page 930, sustains these general propositions set forth above.

Thus far it would seem that the weight of authorities which we have cited would be against your acceptance of the Federal position. We believe that such acceptance could be predicated, in view of the decisions and statements above noted, only upon the fact that it was in aid of the war, was an emergency position, and although possibly lucrative under the decisions above, could in no way be held profitable to you. In addition, under the test laid down in the California case of *People v. Leonard*, we can see no incapacity or division of allegiance to the two powers which would bring you within the rule expressed in that case.

It is clear to us that the Nevada Supreme Court would not consider \$1 a year as gainful or profitable compensation. They so express themselves in unmistakable language in the case of *Moore v. Humboldt County*, [46 Nev. 220 at page 226](#). This case involved the construction of a legislative Act which attempted to reduce the Constable of Humboldt County from a salary of \$1,800 per year to a purported salary of \$5 per year. The court, in commenting upon this legislative Act, stated “under the statute in question it is provided that he shall receive a salary of \$5 per year, or 41 8/12 cents per month. This is a princely salary. *It is surprising that the legislature did not make plaintiff a dollar-a-year man.* Whatever may have been the reason

prompting the legislative action, can it be doubted what the purpose was? It was evident that it was an attempt to abolish the office of Constable for Union township.” (*Italics ours.*)

From this statement it is certainly clear that the Supreme Court does not consider a dollar-a-year man as a profitable or gainful occupation, nor do we think that the Supreme Court would hold it a lucrative office as we generally and commonly understand the term. However, there is the danger that the arbitrary rule applied in the court cases mentioned above might be used. The only manner in which we believe that this arbitrary test may be taken out of the general rule is as noted above, because of the war emergency and the temporary and transitory nature of the position. For example, in the case of *Johnston v. Chambers*, 98 S. E. at 263, it was held that membership on a local board created under the provisions of the Selective Service Act of 1917 did not disqualify the member from holding the position of Police Commissioner of the city of Atlanta under the provisions of the city charter, which made it unlawful for any person holding an office or position of trust or emolument under appointment by the President of the United States or any department of the Federal Government to hold a city position. It was charged that Chambers, at the time he was elected as Police Commissioner, held an office and position of trust and emolument under the United States Government, since he was a member of the Board of Exemption from Military Service created under the laws of the United States. The court, in deciding against this contention, said that the Police Commissioner’s membership on the board was in its nature temporary and transitory and purely for an emergency. The court further stated:

The duties which those thus called upon were expected to fulfill were of a patriotic nature, from which a citizen could not escape without evading his patriotic duty to aid in a temporary emergency his country and his government, in selecting and organizing an army fit for the high and imperious duty confronting it. The duties which these boards were called upon to perform were of the most exalted character, but they were as transitory and ephemeral as they were exalted; and it was the duty of any citizen called to membership upon one of these boards, whether a private citizen or the holder of any office, to lay aside all other duties for the hour and respond to the call.

To same effect see *State v. Joseph*, 78 Southern 662, in which the court held that the constitutional provision of the State of Louisiana forbidding any person holding an office of trust or profit under the United States from being eligible for an office of trust or profit under the State did not prevent a State officer from accepting an appointment as a member of a local board under the Selective Service Act. The court stated that to declare a forfeiture of office by reason of the State officer’s acceptance of that which would be unlawful and unpatriotic for him to decline “would be an unwarranted reflection alike upon the intelligence and patriotism by those upon which the article in question was incorporated in the constitution.”

The latest expression which we have been able to find construing the constitutional provision in question is found at 114 P.(2) 569, in the California case of *McCoy v. Board of Supervisors*, which was decided June 30, 1941. The case is not in complete point with the problem presented by you since the California State officer applied for a leave of absence from his duties as Chief Engineer of the county of Los Angeles in order to enter the armed services as

a Major in the Marine Corps. After entering the service, the Major performed no duties and received no pay; however, a writ of mandate was brought attempting to declare his office as engineer vacant on the ground that he was violating the California constitutional provision which, as heretofore noted, is similar to our own with two exceptions, neither of which is pertinent to this question. The court held that it was never the intent or purpose of the constitutional provision "to discourage public employees from rendering military or naval service, to deter them from answering, to induce them to evade such a call, or to tend to impede the Federal Government in its efforts to mobilize the citizenry or interfere with efforts to meet a major emergency." The court then went on to outline the object of the constitutional provision and quoted from the case of *People v. Leonard*, cited by us above. Of course, it should be realized in the *McCoy* case that the holder of the State office was on a leave of absence, and the duties and compensation ordinarily received were suspended. Notwithstanding, the reasoning behind the case is important in your problem.

We have written to you at considerable length and have to the best of our belief exhausted all of the authorities on the question which you presented, keeping in mind the seriousness of the problem involved. To summarize, it must be admitted that the weight of authority indicates that a lucrative office is any office to which pay, whether great or small, is attached. This is, it seems to us, a very arbitrary rule, but undoubtedly adopted for the sake of judicial expediency in order to eliminate the necessity of testing what and what did not constitute adequate compensation. As opposed to this danger, it seems to us that the last three cases which we have cited indicate the provision is inapplicable in cases of war emergency where it would be unpatriotic and possibly even unlawful to refuse the appointment. In view of the prominence and the ability of the men selected to assist the Federal Government at a dollar per year, it is folly to assume that such compensation was adequate, lucrative, or profitable to these men. It seems to us that the sole purpose of such compensation was to furnish a consideration for their employment to render service as a patriotic duty. The dollar could never have been even considered adequate compensation.

In accordance with this conclusion, it is our opinion that your acceptance as a Special Assistant to the Attorney-General to act as Hearing Officer for the District of Nevada in connection with the Selective Service Act at a total compensation of \$1 per year is not in violation of section 9 of article IV.

Very truly yours,

GRAY MASHBURN, Attorney-General.

By ALAN BIBLE, Attorney-General Elect.