

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1944

94. Veteran's Service Act—Controller Authorized to Set Up \$10,000 for Administration.

CARSON CITY, January 14, 1944.

HON. HENRY C. SCHMIDT, *State Controller, Carson City, Nevada.*

DEAR MR. SCHMIDT: This will acknowledge receipt of your letter of January 12, 1944, received in this office on January 13, 1944. This will likewise confirm my telephone conversation of today with your Chief Deputy, Robbins E. Cahill.

It is the opinion of this office that, under the provision of section 7, chapter 189, Statutes of 1943, you are only authorized to set up on your books for the administration of the Veterans' Service Act the sum of \$10,000. It is clear that the Legislature intended that this particular commission have a total of \$10,000 for the biennial period, and since this section is later in point of time in the statute than section 5, it must govern.

In answer to your second inquiry, it is the opinion of this office that it is not necessary for you to distribute the \$10,000 appropriation to any particular individual items mentioned in section 5, for the reason that the items in section 5 total \$12,900 and, obviously, it would be mathematically impossible to divide this \$12,900 out of an appropriation of \$10,000. Although there is an irreconcilable conflict between section 5 and section 7, I believe that, as stated above, you are governed by section 7, and just as long as the amounts in the individual items set forth in section 5 are not exceeded and are within the total appropriation of \$10,000, you will comply with the law.

Very truly yours,

ALAN BIBLE, *Attorney-General.*

95. United Service Organizations—Foreign Corporation Doing Business in State—Property Taxes.

CARSON CITY, January 18, 1944.

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

DEAR MR. McEACHIN: This will acknowledge receipt of your letter dated January 14, 1944, enclosing a letter from the General Counsel of the United Service Organizations, and received in this office on January 15, 1944.

We are of the opinion that section 1 of the Act of the Legislature, approved March 28, 1901, as amended, being section 1844, 1929 Nevada Compiled Laws, 1941 Supp., and the other sections of this Act apply to the United States Service Organizations, Inc. There being no exception provided in the law, we cannot read one into it.

The statement contained in the letter from the United States Service organizations that "we have done no 'business' in Nevada as that is not the purpose of our organization," is a conclusion not sustained in law.

Where a corporation acts within its functions of corporate powers, doing some work, or in the exercise of some function for which the corporation was created, and manifests its presence by

carrying on continuously, it is doing business in the State.

The question of property taxes is one for the assessors of the various counties in which the organization is operating; and it is suggested that the problem of the property taxes, if any, be submitted directly to the assessors of the counties involved.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

96. Taxation—Housing Authority—Central Collection Moneys to Taking Units of State in Lieu of Taxes Proper Method.

CARSON CITY, January 20, 1944.

NEVADA TAX COMMISSION, *Carson City, Nevada*.

Attention: Mr. J.G. Allard.

GENTLEMEN: Reference is hereby made to the letter of the Federal Public Housing Authority, dated October 29, 1943, and referred to this office on January 15, 1944, with respect to the central payment of moneys to the taxing units of the State of Nevada in lieu of taxes of and for the Federal Defense Housing Agency and houses constructed thereunder.

Annexed to your letter was a form entitled, "Authorization to Receive Moneys Disbursed by the United States of America Pursuant to Section 306 of the Lanham Act," which has been submitted to this office for approval. The purpose of the form, when properly executed, is to provide for the central collection of such moneys instead of having the same paid to and collected by the so-called local taxing units, such as school districts, etc.

First, we may say that we think the central collection of such moneys, or rather the payment thereof to the respective County Treasurers of the State, is the logical way to handle the payment of and receipt of such moneys, and will comply with the revenue laws of this State.

We have examined the form submitted and we approve such form with the following suggestion. The reference to "Section 306 of the Lanham Act," while being technically correct, still we think such reference should be made to the proper statutory citation, as the term "Lanham Act" is rather confusing and the county officials endeavoring to find such Act in the Federal statutes, would, no doubt, have some difficulty in so doing.

There is one change that we deem necessary in the form and that is in paragraph four thereof. We have interlined in the submitted form certain language we think is necessary, to wit: In line 7 of such fourth paragraph, there should be inserted immediately after the word "disposition" the following language: "according to the revenue laws of the State of Nevada." We think this change is necessary in order to properly insure that the moneys received in lieu of taxes shall thereafter, by the County Treasurer and the officers of the so-called taxing units, be apportioned and disbursed according to the revenue laws of this State so as to insure the proper disposition thereof.

Otherwise, we approve of the form submitted.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

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

97. Taxation—Red Cross—Property Not in Excess of \$5,000 Exempt.

CARSON CITY, January 22, 1944.

HON. MELVIN E. JEPSON, *District Attorney Washoe County, Reno, Nevada.*

DEAR MR. JEPSON: This will acknowledge receipt of your letter received in this office January 18, 1944, in which you request an opinion relative to taxation of personal property belonging to the Red Cross.

We are of the opinion that the property of the American National Red Cross, as set forth in your letter, not in excess of five thousand dollars, is exempt from taxation.

The Constitution of Nevada provides that property of all corporations shall be subject to taxation, except that corporations formed for municipal, charitable, religious, or educational purposes may be exempt by law. Our Legislature in 1943, Statutes of Nevada 1943, chapter 6, amending the Revenue Act, defining certain exemptions from taxation, provides in the fourth subdivision of section 5, and quoting from that part deemed relevant, reads as follows:

The funds, furniture, paraphernalia, and regalia owned by * * * or of any similar charitable organization, or by any benevolent or charitable society so long as the same shall be used for the legitimate purpose of such * * * society, or for such charitable or benevolent purpose; provided, that such exemption shall in no case exceed the sum of five thousand dollars to any one * * * society or organization.

The American National Red Cross was reincorporated by Act of Congress, January 5, 1905, C23, 33 Stats. 599. The purposes of the corporation are stated in U.S.C.A., title 26, 3, which include the furnishing of volunteer aid to the sick and wounded of armies in time of war, and to continue and carry on a system of national and international relief in time of peace, and in mitigating the suffering caused by pestilence, famine, fire, floods, and other great national calamities, and carry on measures for preventing the same.

The American National Red Cross comes within the provisions of the Constitution and the statutes.

Funds, furniture, and paraphernalia as used in the statute is broad enough to cover all personal property. Webster defines paraphernalia as furnishings or apparatus, personal belongings.

Very truly yours,

ALAN BIBLE, *Attorney-General.*

By GEORGE P. ANNAND, *Deputy Attorney-General.*

98. Water Law—Limited Rights Acquired to the Use of Waste Water.

CARSON CITY, January 22, 1944.

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

Attention: Hugh A. Shamberger, Assistant State Engineer.

DEAR SIR: This will acknowledge receipt of your recent letter. You present the following problem: The Las Vegas Land and Water Co. have by means of application to appropriate water and subsequent permits obtained a legal right to appropriate water by means of wells tapping the

Las Vegas Artesian Basin for municipal purposes in the city of Las Vegas. The water from these wells, together with two springs, is piped to the city of Las Vegas where it is used for municipal purposes, and the residue enters the sewer system constructed and owned by the city of Las Vegas. The sewerage is conveyed by pipe line to a point just outside the city to a newly constructed sewage disposal plant, and the purified water is then discharged out upon the desert.

Your questions are:

First, can the State Engineer, in view of the Gallio v. Ryan case, accept and issue a permit for such water subject to the condition that the permittee could not require the continuance of flow of such water from the disposal plant?

Second, should such water be classed as "waste water" where it leaves the disposal plant?

Third, if a permit should be issued under such application, would it afford the permittee any protection against a third party who might desire to seize the water above the place of use of the permittee?

Fourth, should the application give the source as underground water and the point of diversion be at the reservoir?

Section 7993.10, 1929 Nevada Compiled Laws, 1941 Supp., provides that all underground waters of the State belong to the public, and subject to all existing rights in the use thereof; are subject to appropriation for beneficial use only under the laws of the State relating to the appropriation and use of water and not otherwise.

The State Engineer is empowered to make such rules and regulations within the terms of this Act as may be necessary for the proper execution of the provisions of the Act.

Section 7897 Nevada Compiled Laws 1929, provides that the right to the use of water shall be limited and restricted to so much thereof as may be necessary, when reasonably and economically used for irrigation and other beneficial purposes, and all the balance of the water not so appropriated shall be allowed to flow in the natural stream from which the ditch draws its supply of water, and shall be considered as having been appropriated thereby. This section also provides what shall constitute abandonment of right.

In the case of Gallio v. Ryan, 52 Nev. on page 343, the Supreme Court adopted the definition for waste water given in Kinney on Irrigation (2d ed.), sec. 661, quoting in part as follows: "* * * may be defined to be such water as escapes from the works or appliances of appropriators without being used; or such water as escapes from an appropriator's lands after he has made all the beneficial use thereof that is possible and which cannot be returned into the natural stream from which it was originally taken."

The water flowing from the sewage disposal plant appears to come within this definition. The Las Vegas Land and Water Co., under its permit, supplies the amount of water required for municipal use within the city. Water which comes from the various appliances of the consumers after all beneficial use is made thereof flows into the sewers. It is captured by the city and used for sewerage purposes.

The sewerage water is purified at the disposal plant, and the water therefrom is discharged upon the desert. It cannot be returned to the natural stream or find its way back to its source of supply.

The difference between waste water and surplus water appears to be recognized in the case of Rock Creek Ditch and Flume Co. v. Miller, a Montana case reported in 17 P. (2d) 1074.

One of the definitions of waste water is given to water which after it has served the purpose of the lawful claimant thereto, has been permitted to run to waste or to escape.

Where vagrant, fugitive waters have reached a natural channel, and thus have lost their original character as seepage, percolating, surface or waste waters, they serve to constitute a part of the water course, and are subject to appropriation.

In the case of *Smithfield West Bench Irr. Co. v. Union C. Life Ins. Co.*, 142 P.2(2d) 866, Utah, the court held that once the water has passed beyond these conditions (the owner of the water right as long as the water is under his control) it is no longer the water or property of the prior user or appropriator. Under such conditions an appropriator cannot complain of the use of water by another below his point of diversion or place of use. And for this reason the court held a lower appropriator or user cannot acquire any right under which he can prevent the upper user from making use of such water or compel such user to let such water continue to flow down to him.

It appears, therefore, that the water from the sewage disposal plant is waste water and not surplus water. It does not appear that the Las Vegas Land and Water Co. or the city of Las Vegas has any right to lease or sell this waste water.

This appears to be sustained by the case of *Galiger v. McNulty*, 26 p. 401, Montana, wherein the court decided that the owner of the right to use waters for placer mining purposes assumed to sell them for irrigation. The court said: “* * * that after the owners of the mining rights had used the waters for placer mining purposes and the water had drained below their lands, their control over it ceased. It had subserved the purpose of their appropriation, and as it could not drain back into the stream from which it was taken, it became waste, fugitive, and vagrant water and subject to be treated as such, and the appropriators had no longer any jurisdiction over it or ownership in it.”

Section 7993.10, 1929 Nevada Compiled Laws, 1941 Supp. dealing with underground water, empowers the State Engineer to make such rules and regulations within the terms of the Act for the proper execution of its provisions, one of which is to prevent waste of underground waters.

This water from the sewage disposal plant is being wasted. What are the duties of the State Engineer in relation thereto?

It appears from the decision in the case of *Bidleman v. Short*, [38 Nev. 467](#), that waste waters are not subject to appropriation so as to establish a permanent right therein; the court said:

It may be that under the rule of economical use there should be no surplus or waste waters, nevertheless, so-called surplus or waste waters do at times exist so long as there are such waters.

In order that the State Engineer should prevent waste of underground waters, it may be inferred that he may make such rules and regulations as required to give applicants certain rights to the use of such waste water as long as such waters continue.

There does not appear to be a provision in the statutes of Nevada to protect the rights acquired by a person to the use of waste water.

A court of equity, under certain circumstances, might protect the original user of such water on the basis of beneficial use as to the measure and limit of such use.

As held in *Gallio v. Ryan*, *supra*, in order to make a valid appropriation of water it must be diverted from a natural water course or natural body of water. (Page 346.)

Nevada should have a statute similar to that of Oregon, which provides as follows:

All ditches now constructed, or hereafter to be constructed, for the purpose of utilizing the waste, spring or seepage waters of this state, shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose

of utilizing the waters of running streams; provided the person upon whose lands the seepage or spring waters first arise, shall have the right to the use of such waters. Water Laws of Oregon, compiled by State Engineer, 1941, on page 53.

Answering the question as to what would be the point of diversion in the application; whether at the reservoir or where the water emerges from the disposal plant, referring again to the case of Gallio v. Ryan, we may receive some light on this question, the point of diversion. On page 543, the court said:

The fact that the plaintiff ran the ditches as he did along the easterly and southerly sides of the irrigated area of the defendant's lands is of itself sufficient evidence to show that the ditches were constructed for the purpose of collecting drain or waste waters caused by the defendant's irrigation system.

Under the provisions of the Act of 1939 for the conservation and distribution of underground waters, section 10 of section 7993.19, 1929 Nevada Compiled Laws, 1941 Supp., the State Engineer is given the authority to require periodical statements of water elevations, water used and acreage on which water was used from all holders of permits and claimants of vested rights. He may conduct pumping tests to determine if overpumping is indicated.

If the State Engineer makes this determination, no appropriator of water from artesian wells could divert more water than could be put to beneficial use, and consequently there would be no surplus from his lands or his appliances. The water that escaped from his appliances could not be classed as "surplus or waste water," synonymous terms used in many decisions; but strictly waste water.

The principle of law expressed in Gallio v. Ryan citing Wiel on Water Rights (3d ed.), sec. 60, in which artificial channels become natural channels, upon a quasi dedication of the artificial condition to the public, and the essence of its growth of a community dependent upon the artificial condition, seems to apply to irrigation ditches and canals, and not to water supplied to municipalities for municipal purposes, as stated in a following section.

Wiel on Water Rights (3d ed.), sec. 62:

Contracts for water in artificial structures must primarily be derivative rights, resting for their continuance upon the contract duty of the owner on the natural resource to keep his contract and furnish the supply (and, where the water is devoted to public use, upon the public right to compel its distribution). Primarily such contracts are for service; so far as they are contracts for water as such, they would be contracts for personal property, since the corpus of the water in the canal or other artificial water works is, so far as it is private property, personalty. Thus a contract with a house-supply company in a city sells the householder so many gallons or cubic feet of liquid measured by a meter and is a contract of sale of personal property; it does not profess to grant a perpetual flow from a natural stream or to give the householder a title in the natural source of supply.

Wiel on Water Rights (3d ed.), sec. 63 (c), states that any specific portion of the water severed from the stream and reduced to possession (as in a barrel, tank, ditch, reservoir, or artificial waterworks or structures generally) is private property as a corpus while so held in possession; but the usufruct in the natural resource, and not the corpus of a specific portion of water, is of most importance; and when the portion that has been reduced to possession escapes or is abandoned, it reenters the "negative community" and its former owner may not recapture it unless he discharged it from his possession with that intent.

Chapter 37, vol. 1, *Wiel on Water Rights*, in speaking of escaped or abandoned water, stated:

There is an abandonment of whatever runs to waste after use. When the owner has made all the water he wants, and lets the waste run off from ditches without intent to recapture, the waste is abandoned, and the owner of the water right no longer has any claim upon it.

What then are the relative rights of the Las Vegas Land and Water Co., the city of Las Vegas and a third party who seeks to capture the waste water from the sewage disposal plant?

The Las Vegas Land Water Co. is the owner of the water right from the artesian wells and subsequent storage.

This water is supplied to a municipality. It is a public utility. The water is distributed to public use and comes under the statutes providing compulsory service. The water escaping or discharged from the appliances of the water users has served its purpose and becomes waste water. When the city of Las Vegas established a sewer system, this water was captured and used in the sewers. After it has served its purpose in the sewers it is discharged upon the desert, it cannot be returned to the natural channel.

If the city purified this water for the purpose of using it for other purposes, its conditional right to such waste water would be the same as the right to the flow in the sewer. If there was no intent to recapture it, a third party might do so, relying on the right to only so much water as was allowed to be abandoned.

Should a third party seek to use this water, the city of Las Vegas could claim a priority, dated from the time the water was first captured and turned into the sewers.

Wiel on Water Right (3d ed.), chap. 56, states in part:

While artificial flow claimants may thus have priorities between themselves, they can have no right of continuance against the owner of the natural supply,
* * *

It seems to follow that a point of diversion in an application to use waste waters could not be made at the reservoir.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

99. Intoxicating Liquors—Dividend Liquor—Individual Stockholder Must Have Importer's License.

CARSON CITY, January 24, 1944.

NEVADA TAX COMMISSION, *Carson City, Nevada*.

Attention: H.S. Coleman, Supervisor Liquor Tax Department.

GENTLEMEN: Can an individual, either as a resident or a nonresident of Nevada, receive shipments of intoxicating liquor in Nevada shipped to such individual as dividend liquor by an out-of-Nevada shipped to such individual as dividend liquor by an out-of-State distilling company, without such individual and/or the distilling company complying with the provisions of the Nevada liquor stamp law with respect to the securing of licenses and payments of license fees and stamp taxes?

We are advised that the above inquiry grows out of the fact that an eastern distillery company

as declared certain dividends and intends to pay the same to its stockholders in kind, *i.e.*, payment in whisky to be shipped and delivered to such stockholder.

An examination of the Nevada liquor stamp law discloses that the Legislature has so legislated as to include in the term “sell” and “sale” practically every situation wherein intoxicating liquor is disposed of to and transferred to any person, firm, corporation, or company.

See section 1 of such law, sec. 3690.01 N.C.L. Supp. 1931-1941, defining the terms “to sell” or “sale.” Among the various and sundry definitions of such terms there set forth is the following: “to procure or allow to be procured for any reason.”

The Nevada law is a revenue measure. Its very purpose is to provide revenue for the support of its government and its political subdivisions and departments. Such law was and is designed to derive such revenue, particularly the revenue derived from the stamp tax, from the consumer through the agency of the retailer, wholesaler, and importer, and to insure that such stamp tax would be levied and collected the Legislature saw fit to and did provide that every transaction whereby intoxicating liquor, including wines and beers, had in this State should be deemed a sale. The above-quoted language of said section 1 certainly brings within the purview of the law the dividend whisky in question.

The shipping of the liquor in question into Nevada constitutes an act of importation. Under the Nevada law such liquor so imported must be received by a licensed importer, and such licensed importer is the only person authorized in the law to be *first* in possession of such liquor immediately upon the completion of the act of importation. Sections 1 and 2 of the law, sec. 3690.01, 3690.02 N.C.L., *supra*. It follows then that the individual stockholder, in order to be the first person legally in possession of the dividend whisky upon the completion of the act of importation, must secure and hold the importer’s license provided for in the law, which said licensee is required to reside in the county in Nevada in which application for the license is made, or in which his principal place of business is maintained. Section 5 of the law, sec. 3690.05 N.C.L., *supra*.

An importer cannot dispose of imported liquor received by him unless and until he has secured either a wholesaler’s or retailer’s license. Section 2 of the law, sec. 3690.02 N.C.L., *supra*. Before such wholesaler or retailer may dispose of the liquor in Nevada such liquor is required to be stamped with the Nevada liquor stamps of the proper denominations and mounts, as is provided in section 16 of the law, sec. 3690.16 N.C.L., *supra*, which reads in part:

No person shall sell or offer to sell any liquor in the State of Nevada unless there be affixed to the original package, * * * State of Nevada adhesive liquor stamps * * *.

As we have seen, the liquor stamp law, among other things, defines “sell” or “sale,” to mean, “to procure or allow to be procured for any reason.” It follows then, we think, that the wholesaler or retailer receiving and/or disposing of dividend liquor, which said liquor and the transaction whereby it is disposed of by the distillery company and the receipt thereof by the stockholder falls within such statutory definition of sell or sale, and the law governing the importation into the State and the subsequent disposal thereof, as above stated, is to be followed.

It might be thought that the declaring of the liquor dividend and the subsequent delivery thereof constitutes a gratuitous act. But such is not the fact. Most certainly the stockholder gave a valuable consideration therefor in the purchase of his stock.

We conclude that the distillery company in question and the stockholders receiving the liquor dividend in Nevada are governed by the Nevada liquor stamp law with respect to the importation

and disposal of such dividend liquor.

If stockholders, nonresidents of Nevada, desire to avail themselves of the Nevada law, the distillery company and such nonresident stockholders must comply with such law, and thereafter, with respect to the transfer of the dividend liquor to another State, they will, no doubt, comply with the liquor laws of that State.

Of course, nothing in this opinion is to be deemed to prevent any such stockholder disposing of his dividend liquor, prior to importation into Nevada, to a Nevada importer. However, such importer thereafter would be required to follow the Nevada law in the same manner as any other liquor transaction.

Respectfully submitted,

ALAN BIBLE, *Attorney-General*.

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

100. Public Schools—Trustees Not Authorized to Expend School Funds for Traveling and Living Expenses Incurred While Engaging Superintendent for District.

CARSON CITY, February 2, 1944.

HON. V. GRAY GUBLER, *District Attorney Clark County Las Vegas, Nevada*.

DEAR MR. GUBLER: This will acknowledge receipt of your letter dated January 22, 1944, received in this office January 26, 1944, requesting an opinion with reference to the expenditure by members of the Board of Educational District No. 1 of school funds for traveling and living expenses incurred for the purpose of engaging a superintendent of schools for the district.

We are of the opinion that there is no provision within the general laws, or the school code, of this State, to authorize such an expenditure.

Clark County, under an Act of the Legislature, being chapter 114, Statutes of 1919, was divided into two educational districts.

Section 5 of the Act, being sec. 6067 N.C.L. 1929, defines the powers and duties of the board, making such powers subject always to the limitations of the general laws of the State.

As stated in the opinion of the Attorney-General, Opinion No. 197, 1934-36 Biennial, "It might be thought because Educational District No. 1 of Clark County was created by a special Act of the Legislature, that the public policy of the State and the law thereof limiting the use of public moneys with respect to school children might have been broadened, but such is not the case. Section 5 of such special Act, *i.e.*, section 6067 Nevada Compiled Laws 1929, specifically provides that the Board of Education of such district shall have certain enumerated powers 'subject always to the limitations of the general laws of the State' * * *."

There is no provision in this special Act to authorize travel and living expenses. The only authority granted school boards for travel allowance is found in section 5823.01, 1929 N.C.L., 1941 Supp., and that is limited to County Boards of Education. This only authorizes traveling and living expenses to members of the boards and then only in going to and from their homes to the place where board meetings are held and actual living expenses necessarily incurred while in attendance at such board meetings at not to exceed four dollars per day.

No authority can be found in the school code for trustees of school districts to expend school funds for traveling expenses in the performance of their duties as such trustees.

Unquestionably the expenditures, in the present situation, were made in good faith and were

for the benefit of the educational district, but until the Legislature has specifically authorized such expenditure, it cannot lawfully be allowed.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

101. Public Schools—Personal Property May Be Sold Without Appraisalment and Without Advertising.

CARSON CITY, February 3, 1944.

HON. MARTIN G. EVANSEN, *District Attorney, Mineral County, Hawthorne, Nevada*.

DEAR SIR: This will acknowledge receipt of your letter of January 28, 1944, received in this office on January 31, 1944. There are insufficient facts in your letter to adequately present your question to us, but since we have likewise received letters from the Clerk of the Mina School Board as well as from Mr. D. Edwin Culbertson, of Mina, Nevada, supplying additional facts in this case, I believe there has been a sufficient presentation in order to enable us to give an opinion.

Of course, as you know, you are the legal advise for your local school trustees and I do not know why you have not given your opinion in this matter. From information which we have received, the opinion was requested many weeks ago, and in the interests of time we are answering your request immediately. It should be understood in the future that questions submitted to you by boards of school trustees, of which you are the legal adviser, should be analyzed and answered by yourself in the first instance. Of course, if you desire us to check your opinion we are only too glad to do so.

The Mina School Board, in August 1942, purchased a station wagon for \$700. In the fall of 1943 the school board, having no further need for the station wagon, sold the same for \$545 to Mr. "X." The school board did not cause an appraisalment to be made of the school bus and sold the same at a private sale without posting notice or advertising the same. You state in your letter that the Blue Book value of this station wagon is in the neighborhood of \$900.

You ask whether or not the sale was legally made under the laws of the State of Nevada governing school trustees.

There is nothing whatever in either the school laws or the general laws of the State of Nevada which require school trustees to cause appraisalment to be made or notice to be given of sales of personal property belonging to the school district. School trustees of school districts of the first-class must cause appraisalment to be made and must give notice by posting and publishing in order to sell real property. There is no statute outlining the procedure for sale of personal property. In the absence of such statutory procedure, school trustees, in our opinion, may legally sell personal property without an appraisalment and without advertising. However, we do not think this is good practice, and it has been the uniform policy of this office to advise school trustees to advertise and call for bids.

In this connection, on November 4, 1943, on a question involving the sale of a school bus belonging to the Goldfield School District, we stated as follows:

Although no method of procedure on the question of how a sale should be

made is found in the statutes, it is our opinion that the School Trustees should sell the school buses to the highest bidder after full opportunity has been given to the public to bid. Reservation should be made in the notice of sale for rejection of any and all bids by the trustees. We likewise suggest that the notice of sale should be published for two full weeks (three publications) and also by posting for the same length of time in three conspicuous places in the district.

The mere fact that this has not been done in the instant problem cannot, as we view it, effect the legality of the sale. There is nothing whatever in the facts presented to us to indicate that members of the school board acted in bad faith. There is likewise nothing before us to show that any of them were peculiarly interested in the sale either directly or indirectly. They apparently believed that they had acted in the best interests of the school district, and since there is no statutory requirement that the sales of school property be advertised, posted, or appraised, it is our opinion that the sale is legal and valid.

The procedure which we have heretofore suggested to school trustees, as well as to all public officials, as to the advisability of either publishing or posting, or both, illustrates the difficulty which would have been avoided in just such a problem as you have presented. The school code should be amended to specifically require such procedure.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

102. State Board of Health—Inspection of Food Establishments.

CARSON CITY, February 5, 1944.

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

DEAR DR. HAMER: This will acknowledge receipt of your letter from Mr. W.W. White, Director of the Division of Public Health Engineering, addressed to you, containing certain questions in connection with the Act relating to inspection of food establishments and requesting the same to be presented to this office for our opinion.

Question No. 1 relates to the Interpretive Code adopted by the State Board of Health as provided for in section 4, chapter 116, Statutes 1943, a copy of which code was submitted.

Answer: We are of the opinion that this code was adopted as required by statute and comes within the authority granted by the Legislature. Section 4 of chapter 116, Statutes of Nevada 1943, provides as follows: "The state board of health shall have the power by affirmative vote of a majority of its members to adopt an interpretive code detailing sanitary requirements of section 16 of this act."

Section 16 relates to standards of sanitation, which includes the grading of food establishments. Sixteen items are included in the section covering food products, utensils, equipment, buildings, and food handlers.

The Interpretive Code is designed to take care of the details within the standards provided. The code adopted by the State Board of Health supplies these details.

Question No. 2. Does the filling out of the inspection report bearing the grade and a statement that the establishment is or is not granted a permit to operate constitute a permit without issuing a permit form?

Answer: We are of the opinion that the statute contemplates the issuance of a form of permit

subsequent to the posting of the inspection report.

Section 8 of the Act provides for an inspection of food establishment at least once a year. "One copy of the inspection report bearing the grade and a statement that the food establishment is or is not granted a permit to operate shall be posted by the health officer in a conspicuous place in the food establishment, and shall not be defaced or removed by any person excepting the health officer."

Section 12 provides it shall be unlawful for any person to operate a food establishment after an inspection by a health officer who does not possess an unrevoked permit from the health officer.

Section 14 provides that no license under any license ordinance shall be issued for a food establishment unless the permit required herein has first been granted.

It would be necessary for the applicant to present his permit to the license bureau in order to secure a license. The law forbids the removal of the posted inspection report by any person excepting the health officer.

Answering your request for a suggestion to consolidate the forms, we submit the following: The permit might be printed in two forms, a form for grade "A" and a form for grade "B" establishments. The lettering appearing on the permit in bold type would meet the requirement calling for a conspicuous notice stating the grade of the establishment. There will be no necessity for grade "C" forms after March 17, 1944, as provided by section 10 of the Act.

Questions 3 and 4. Is it legal and are we within our rights in asking city and county clerks to withhold the issuance of a license for a food establishment until a permit is issued by a health officer? Are city and county officials obliged to revoke a license when the person's permit to operate has been revoked by the health officer?

Answer: Section 14 reads as follows: "No license under any ordinance of a city, county, or other licensing authority shall be issued for the operation of a food establishment to any person owning or operating such food establishment unless the permit herein required has first been granted by the health officer."

Section 15 reads: "A license to operate a food establishment issued by any licensing authority to a person owning or operating such food establishment shall be revoked when such person's permit has been revoked by the health officer, and no new license may be issued until such person again possesses an unrevoked permit from the health officer. Licensing authorities shall be notified by the health officer of the revocation of any permit."

The language in these two sections is plain and the meaning unmistakable; there is no room for interpretation or construction.

Question 5. Can we prosecute, charging a misdemeanor, until an order for the correction of a condition has been issued and the order has not been complied with?

Answer: Sections 12 and 17 of the Act defines that which is unlawful, and section 21 makes the violation of the provisions of the Act a misdemeanor. Section 9 implies a notice from the health officer when he discovers the violation of any item of sanitation required for the grade then held by the operator before the "degrading" of the establishment.

As expressed in your letter, you do not intend to prosecute simply because of a technicality in complying with the Act. Penal statutes will be liberally construed in favor of the accused, and it must appear that he has committed acts which are clearly made an offense by the statute.

Question 6. Should the provisions of this Act be extended to the food handling portions of institutions, as hospitals, circuses, jails, and other institutions?

Answer: We are of the opinion that the Act regulating food establishment has in view the establishment of sanitary conditions in food establishments that serve the general public and to call the attention of its patrons to the grade under which the establishment is operating, and by publicity and force of law promote a higher standard health conditions in such place.

The Act, in our opinion, does not include a class such as hospitals, jails, and circuses. This is a matter which should be submitted to the Legislature for its consideration.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

103. State Board of Health—Burial Certificates—Army Personnel.

CARSON CITY, February 8, 1944.

JOHN J. SULLIVAN, *Director Division of Vital Statistics, Nevada State Department of Health, Carson City, Nevada.*

DEAR MR. SULLIVAN: Reference is hereby made to your letter of February 4, making certain inquiries concerning the powers of the local health officer with respect to the furnishing of death certificates, burial permits, and removal permits in connection with the death of two army lieutenants killed in airplane crashes in the State of Utah whose bodies were removed to Nevada without first securing removal permits from the State of Utah.

It appears from the correspondence annexed to your letter that airplane crashes occurred in the State of Utah resulting in the death of the two lieutenants, where, upon the finding of the bodies, the bodies were removed to Clark County, Nevada, and thereafter shipped to their respective homes for burial. It appears that no coroner's inquest was held in Utah and neither were any burial or removal inquest was held in Utah and neither were any burial or removal permits secured in that State. It further appears that the bodies were shipped by common carrier from Las Vegas, Nevada, to their respective homes upon certificates of death signed by members of the Medical Corps of the United States Army and by the mortician, but not signed by the local health officer of Clark County.

The inquiries propounded are as follows:

- (1) Does the Clark County Health Officer have the authority register these death certificates?
- (2) Did the Army personnel or the mortician in charge of the funeral arrangements have any authority to move these remains into the State of Nevada or to ship them to a point outside of this State without first filing a standard certificate of death in the State where the death occurred, and without securing permission to ship the remains?
- (3) Did the common carrier have any authority to accept these remains for shipment in the absence of the proper shipping permit?

Answering inquiry number (1), we are of the opinion that, under all the circumstances, the Clark County Health Officer would have had the authority to register the death certificates. We are not unmindful of the fact that the laws of Nevada in this respect were intended to deal with all deaths occurring in Nevada and that such laws had and have no extraterritorial effect, and that in ordinary circumstances the health officer would, undoubtedly, be wholly within his rights in refusing to sign the death certificates and register them. However, these are not normal times. This country is at war. It is training the military personnel for the purpose of combating our foes.

Undoubtedly accidents in training will occur resulting in unfortunate deaths. In time of war the civil authorities' jurisdiction is somewhat curtailed, particularly with respect to the armed forces of the nation, and when circumstances arise such as disclosed by your communication, then we think the strict letter of the Nevada law cannot in all cases be reasonably applied.

It may be said that the Army personnel finding the bodies in Utah may have violated Utah law in removing the bodies to Nevada without first securing the necessary permit. But, the fact remains that the bodies were removed to Nevada and undoubtedly these bodies required prompt action for their disposal, and it would seem to be rather unreasonable to await the securing of permits from Utah even if such could then have been had. We think that the instant situation discloses a case where the provisions of section 8 of the State Board of Health Act, the same being section 5242 N.C.L. 1929, as amended at 1937 Statutes, page 162, are applicable and provide the necessary authority for the local health officer to have investigated the case and signed the necessary death certificates. Such section provides the procedure to be followed in cases of death occurring without medical attendants. The local health officer, by such section, is empowered to make the certificate from the statements of relatives *or other persons having adequate knowledge of the facts*. The section further provides that, if the local health officer is not satisfied from his own investigation, he may refer the case to the coroner for investigation and certification and such coroner may hold an inquest on the body and thereafter make the certificate of death. It may be thought that the coroner can act only in cases where death occurs in the State of Nevada, but we think the statute providing the duties of coroner is broad enough to permit him to make investigations and hold an inquest on a body then in Nevada whose death actually occurred in some other State for the very purpose of permitting the speedy disposal of the dead body. Section 11427 N.C.L. 1929, provides, among other things, where a person has been killed, or has suddenly died, under circumstances as to afford reasonable grounds to suspect that the death has been occasioned by unnatural means, the coroner shall go to the place where the body is and conduct his inquiry. If the body is then in Nevada, certainly the statute means that the coroner shall go to the place and make his investigation.

Frankly, we think that the circumstances disclosed by your inquiry really needed no investigation by the coroner as it is common knowledge that airplane crashes usually result fatally for everyone in the plane, and whether or not negligence could or can be imputed to any person in the airplane where such airplane is operated by the armed forces of the United States, would, in every case, be determined by the officers of the United States Government.

Answering inquiry number (2). As stated above, it may be that the Army personnel in the cases in question violated the law of Utah, but that in itself, we think, would not constitute a violation of the Nevada law, and no doubt the carrier carrying the bodies out of the State, while technically violating the law of this State in removing the bodies from the State without signing of the death certificates by the local health officer, still, under the circumstances and in view of the fact that we are at war, it would probably be impossible to convict the carrier of the violation of the law.

Answering inquiry number (3). We think the answer to inquiry number (2) is applicable to inquiry number (3).

We do not wish to be understood as saying that this opinion is applicable to what might be deemed civilian deaths and civil cases. We are giving this opinion upon the facts as presented by your inquiries and in relation to the armed forces of the United States, its personnel, and the war effort.

Respectfully submitted,
ALAN BIBLE, *Attorney-General*.
By W.T. MATHEWS, *Deputy Attorney-General*.

104. Public Schools—County School Tax.

CARSON CITY, February 8, 1944.

MISS MILDRED BRAY, *State Superintendent of Public Instruction, Carson City, Nevada*.

DEAR MISS BRAY: This will acknowledge receipt of your letter received in this office February 2, 1944, in which you submit the following inquiry:

Is it mandatory upon Boards of County Commissioners to levy a county school tax sufficient to provide \$625 per apportionment teacher and not less than \$2 per pupil in average daily attendance when the county tax levy is assessed at the April meeting of the County Commissioners?

In view of the decision of the Supreme Court of this State in the case of *School Trustees v. Bray*, reported in [60 Nev. 345](#), it appears that your inquiry is answered in the negative.

The court, in construing the sections of the statute mentioned in your letter, held that the provisions found in subdivisions 4 (a) and 4 (b) of section 151, and subdivision 2 of section 152, of an Act concerning public schools, being sections 5798 and 5799 N.C.L. 1929, should be administered in conformity with the construction uniformly adopted over a period of at least some nine years by the officials entrusted with the administration of the provisions in question.

The court said, beginning at the bottom of page 355, "A provision requiring a higher levy than 35 cents on the \$100 is not necessarily repugnant to or in conflict with one granting State aid on the basis of a 35-cent levy. Effect can be given to both provisions."

In the foregoing case the county in question made a levy of 50 cents on the \$100 which raised more money than required under the provisions of subsection 2 of section 5799. The court held that the 50-cent levy included the 35-cent levy, and notwithstanding the fact that sufficient money would be raised to meet the funds required for the school year, the county was entitled to an additional amount from the State School Reserve Fund equal to the difference between the amount raised on a basis of a 35-cent levy, and notwithstanding the fact that sufficient money would be raised to meet the funds required for the school year, the county was entitled to an additional amount from the State School Reserve Fund equal to the difference between the amount raised on a basis of a 35-cent levy and the amount required under subdivision 2 of section 152.

The court declared that the meaning of the Legislature was not clear or certain.

It appears, therefore, that application should be made to the Legislature to free these sections of the Act from any present ambiguity.

Very truly yours,
ALAN BIBLE, *Attorney-General*.
By GEORGE P. ANNAND, *Deputy Attorney-General*.

105. Agriculture—Brand Inspections of Animals Shipped Out of State.

CARSON CITY, February 14, 1944.

WARREN B. EARL, *Director Division of Animal Industry, Department of Agriculture,*
118 W. Second Street, P.O. Box 1027, Reno, Nevada.

DEAR MR. EARL: Reference is hereby made to your inquiry of February 10 with respect to brand inspections of animals about to be shipped out of the State. Your inquiry is directed to the point of whether the horse Brand Inspection Act of 1907, the same being sections 3923-3940 N.C.L. 1929 is repealed by the Act creating brand inspection districts by the State Board of Stock Commissioners and the inspection of brands of animals about to be removed from the State or to another district, the same being sections 3849-3864 N.C.L. 1929.

A careful examination of the two Acts, in our opinion, fails to disclose that the Brand Inspection Act of 1929 repeals the prior Act of 1907, and it is our opinion that in all cases where the State Board of Stock Commissioners have not created brand inspection districts, then the prior Act of 1907 will govern with respect to the shipping of horses out of the State.

The Act of 1907 was materially amended in the year 1929. The title of the Act was at that time amended and the intent of the Legislature in 1929 was to make such Act effective in all parts of the State where no brand inspection districts had been created under the Brand Inspection Act of 1929. In 1929 the 1907 Act had added to it the following section:

This act shall not be effective many district where brand inspection of horses,
mules and neat cattle is being applied by the state board of stock commissioners.
Section 3940 N.C.L. 1929.

The addition of this section, together with the amendments to the 1907 Act adopted by the Legislature in 1929, being adopted by the Legislature later in the session than the enactment of the 1929 Brand Inspection Act certainly indicates the legislative will, in so far as inspection of brands on horses about to be shipped from the State is concerned and where no brand inspection districts have been established, that the 1907 Act, as amended in 1929, was to be followed and inspection had by the Sheriff as therein provided.

Respectfully submitted,

ALAN BIBLE, *Attorney-General.*

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

106. State Highway Department—Reservation of Rights of Way Over State Lands.

CARSON CITY, February 16, 1944.

HON. WAYNE McLEOD, *Surveyor General, Carson City, Nevada.*

DEAR MR. McLEOD: Reference is hereby made to your letter of January 21, 1944, requesting that we review our opinion to R.A. Allen, State Highway Engineer, under date of February 10, 1943, relating to reservation of rights of way for State Highway purposes over State-owned land prior to the sale thereof.

It is noted you question our construction of the Act of 1935 reserving the State of Nevada rights of way for State Highway purposes over State-owned lands, the same being found at 1935 Statutes, page 35, in that the portion of our opinion suggesting that the Highway Department furnish the State Registrar with sufficient data to locate such right of way on his plats and maps so that he will be enabled, if any such lands are thereafter contracted for sale, to plot out the right

of way, is in conflict with section 5525 Nevada Compiled Laws 1929, wherein it states that “no land shall be sold in tracts less than the smallest legal subdivision.”

We have reexamined the opinion of February 10 and we think nothing therein contained is authority for the proposition that any lands belonging to the State shall be sold in tracts less than the smallest legal subdivision. Our opinion dealt with the reservation of a right of way for State Highway purposes and we therein stated with respect to the contractor therein mentioned that he purchase the land burdened with the reservation of a right of way for highway purposes. There is nothing in the 1935 Act expressly reducing the acreage of the land contracted for sale. What the statute really provides is the reservation of an easement for highway purposes with the right of reverter of such easement to the purchaser of the land if and when the highway shall not be constructed as proposed or such highway after construction is abandoned by the proper State authority. So, in so far as the 1935 Act is concerned it does not reserve the fee of land in the State and neither does it authorize a reduction of the acreage contracted for sale, but what it does, in effect, accomplish is to reserve an easement for right of way purposes for the use of public at large in the State. It may be that a person contracting the land would not contract State land, or any legal subdivision thereof, over which the State had reserved a right of way, but this is a matter, if any such condition is found to exist, that should receive the attention of the Legislature, as it is the Legislature which defines and declares the policy of the State.

It may be thought that by reason of section 3 of article XI of the Constitution that the Legislature had and has no right to reserve a right of way for state highway purposes over State-owned land. However, at the outset, we think the Supreme Court of this State has definitely held that is not the State-owned land itself that is so absolutely pledged to educational purposes as to absolutely prohibit any other use of such land by the State for a purely public purpose, but that on the other hand, the constitutional provision means that it is the proceeds from the sale of such land that is absolutely pledged to educational purposes and not to be used for other purposes. *Heydenfeldt v. Dany G. & S.M. Co.*, [10 Nev. 314](#).

The constitutional provision in question is a restriction upon the use of the proceeds of sales of State-owned lands and there is no question but that if the proceeds of the sales of State-owned lands were devoted to purposes other than educational purposes, any such act of the Legislature so providing would be unconstitutional.

However, it is the solemn prerogative of the sovereign State to provide roads and highways for the use of its people. There is no restriction upon this power contained in the Constitution of Nevada, and, unless there is a constitutional provision restricting the Legislature with respect to the establishment of highways, then such Legislature has full power to so legislate and in addition thereto provide rights of way over the public lands of the State for such purposes.

We have examined the cases dealing with the proposition of States granting rights of way over public lands of the State and school lands, all of which lands in some States and portions thereof in other States were solemnly pledged to the support of the common and other schools of such States in their constitutions. We direct attention to the case of *Imperial Irrigation Company v. Jayne*, 138 S.W. 575; Ann. Cas. 1914B 322.

The Constitution of the State of Texas pledged the alternate sections of land belonging to the State to the maintenance of the Perpetual School Fund and directed that the proceeds of the sale thereof be placed in a Permanent School Fund and to be used for no other purposes than for the support of the schools. The Supreme Court of Texas held that, notwithstanding such constitutional provision, the Legislature had the right to grant, without compensation, areas of

school land for irrigation projects, the construction of reservoirs and rights of way for ditches for irrigation purposes, and held that this was not in violation of the Texas Constitution.

The Supreme Court of Texas in *Texas Central Railway Company v. Bowman*, 79 S.W. 295, construing the same constitutional provision held that the Legislature had the right to grant, without compensation, to railway corporations rights of way over school lands for railway purposes.

A leading case on the question is that of *Ross v. Trustees of the University of Wyoming*, 222 Pac. 3, where rights of way were granted over school lands for highway purposes by the Legislature without compensation. Such school lands being held for the purpose of maintaining the University of Wyoming under a similar constitutional provision as Nevada. The Supreme Court of Wyoming reaffirmed its decision in the matter in 228 Pac. 636.

In the case of *Grossetta v. Choate*, 75 Pac. (2d) 1031, the Supreme Court of Arizona sanctioned the grant of a right of way of public highway over school lands to a county board of supervisors notwithstanding it was thought that by reason of the Enabling Act of Arizona, enacted by congress enabling Arizona to enter the Union, that the State was without power to grant a right of way over school lands which were pledged to the support of schools of that State.

And in the case of *State v. Central Nebraska Public Power and Irrigation District*, 8 N.W. (2d) 841, the Supreme Court of Nebraska admitted that the State has power to grant an easement across public lands for roads or other public improvement even though such lands may be deemed as school lands.

Such being the status of the question as presented to other states having most similar constitutional provisions as Nevada, we are constrained to hold that the Legislature had the power to reserve right of way over State-owned lands for State highway purposes, particularly so where nothing but an easement was and is reserved.

It may be stated that the reasoning of the cases above cited is placed upon the ground that in western States where there are large areas of land still unsettled, it is the duty and the right of the State to provide means of ingress and egress by means of railways and highways and promote settlement by means of irrigation projects so that in the final analysis the construction of such facilities has the effect of promoting the settlement of the country and enhancement of the value of the lands purchased from the state, and in so doing, that in the end there is a greater chance of enhancement of the Permanent School Fund rather than a reduction.

Entertaining the afore-mentioned views we reaffirm the opinion of February 10, 1943. The contract of purchase of State land and/or the patent therefor should, in our opinion, contain a provision relative to the reservation of a right of way for State highway purposes, provided of course, such highway has heretofore been surveyed and definitely designated over any such land at the time of the contract of purchase.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

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

107. Agriculture—Transfer of Brands May Be Recorded.

CARSON CITY, February 16, 1944.

EDWARD RECORDS, *Executive Officer Department of Agriculture, 118 W. Second*

Street, P.O. Box 1027, Reno, Nevada.

DEAR DR. RECORDS: This will acknowledge receipt of your letter received in this office February 4, 1944, in which you ask our opinion relative to your authority to record a transfer of brands where title to one of the brands was secured subsequent to the date shown in the bill of sale making the first transfer.

We are of the opinion that the transfer of the brands may be record. The owner of the brand in question is, by his subsequent bill of sale, estopped from denying the seller's authority to sell.

The Uniform Sales Act to regulate the sale of personal property, section 6757 N.C.L. 1929, provide as follows:

Subject to the provision of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

The principle stated in 46 Am. Jur., Sales, page 221, reads as follows in respect to the sale of after-acquired title to personal property

Moreover the seller is estopped as against the buyer to deny that he had title at the time of the pretended sale or to deny that the title passed at the time of the buyer.

As you have suggested, it would be a very simple matter for the Handley Bros., Walter Handley and Isaac T. Handley, to draw a new bill of sale dated subsequent to the December 7, 1943, bill of sale conveying the 7HL brand.

However, as noted above, the Uniform Sales Act of our State would preclude Robert D. Handley from denying the seller's authority to sell, even if he were now questioning the sale. There does not appear to be any controversy between the parties to the transactions and, as recording agent, it appears that you can very properly make the record transfer as requested.

Very truly yours,

ALAN BIBLE, *Attorney-General.*

By GEORGE P. ANNAND, *Deputy Attorney-General.*

108. State Highway Department—Authority of Bell Telephone Company to Maintain Facility Across Land Acquired by Highway Department.

CARSON CITY, February 17, 1944.

MR. F.W. WHITNEY, *Right-of-Way Supervisor, Bell Telephone Company of Nevada, 1400 K Street, Sacramento, California.*

DEAR MR. WHITNEY: This is in answer to your recent inquiry concerning the authority of the Bell Telephone Company of Nevada to maintain a facility across land acquired by the State Highway Department.

You contend that the authority for the continued maintenance of your facility is found in sections 7666, 7667, 7668, and 7680 of the Nevada Compiled Laws 1929. I recall very definitely on the meeting with representatives of your company held in Carson City on May 12, 1942, but it does not seem to me that the decision made there is applicable to the present problem.

The first three sections on which you rely are a part of the legislative Act of 1866, page 61,

and have never been amended. Section 7680 is section 1 of the legislative Act of 1897, page 28, which was amended once in 1905 at page 151.

The Highway Department is governed by the General Highway Law of 1917, page 309. (Sections 5320-5355 Nevada Compiled Laws 1929, as amended.) Section 21 of the law authorizes the department to acquire rights of way, and section 19 of the law, which seems to apply to your problem, reads in part as follows:

No state highway shall be dug up, crossed or otherwise used for laying or relaying pipe lines, ditches, flumes, sewers, poles, wires or railways, or for other purposes, without the written permit of the state highway engineer, and then only in accordance with the regulations prescribed by said engineer; and all such work shall be done under the supervision and to the satisfaction of said engineer, and all the cost of replacing the highway in as good condition as previous to its being disturbed shall be paid by the persons to whom or in whose behalf such permit was given or by the person by whom the work was done.

It is my opinion that the Acts which you cite must be read in connection with the General Highway Law, which law being a much later expression of the legislative will, governs. In accordance with this interpretation I believe that Mr. Allen is correct in his position and that in stating that he will grant you a revocable permit he is simply following the statutory requirements. I am informed that the deed of December 11, 1943, from the Southern Pacific Land Company to the State of Nevada contains no reservations in favor of the utility, and accordingly it appears that the Highway Department has complete control of the acquired right of way.

It occurs to me that the former opinion of this office covering a conflict of rights between utilities companies holding pursuant to a franchise and the State of Nevada operating to acquire a right of way might be of interest. The facts, of course, are not similar to those in the instant case, but some of the general propositions of law which are developed in the opinion are important. I am enclosing a copy of that opinion for your information.

Very truly yours,
ALAN BIBLE, *Attorney-General*.

109. Public Schools—Apportionment of County Aid to District High Schools.

CARSON CITY, February 18, 1944.

HON. MILDRED BRAY, *Superintendent of Public Instruction, Carson City, Nevada.*

DEAR MISS BRAY: This will acknowledge receipt of your letter submitted to this office on February 9, 1944. Your inquiry relates to the apportioning of the county aid to district high schools under the provisions of chapter 183, 1939 Statutes of Nevada, as amended, and if such apportionment should be made upon the original budget or a revised budget filed by one of the districts after the tax levy had been made by the County Commissioners.

The apportionment to the school districts is made upon the ratio that the amount required by each district bears to the total amount of taxes for this purpose.

In the present case this situation arises. If the money is apportioned according to the amount designated in the revised budget of the one district it will reduce the amount required by, and to which the other district is entitled.

We are of the opinion that the school district has no authority under the law to revise its budget after the tax levy is made by the county Commissioners, and that the apportionment of the money should be made on the basis of the original budgets.

Section 3018, 1929 Nevada Compiled Laws, 1941 Supp., providing budgets for cities, towns, and school districts, makes it the duty of every “* * * school district, county high school, or high school district or educational district in this state, between the first Monday of January and the first Monday of March of each year to prepare a budget of the amount of money estimated to be necessary to pay the expenses of conducting the public business of such * * * school district, county high school, or high school district or educational district for the then current year and for the next following year * * *.”

The section provides further “* * * and the several sums set forth in said budget under expenditures for the then current year shall be thereby appropriated for the several purposes therein named for the said then current year, and the sums set forth in said budget for the next following year shall be subject to revision upon the preparation and completion of the next succeeding budget required under this Act; * * *.”

It appears, therefore, that the distribution shall be made in the amount and for the purposes named in the budget filed for the current year. No provision is made for the revision of such budget.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

110. Counties—Mines—Filing Fees for Notices of Intention to Hold Mining Claims.

CARSON CITY, February 19, 1944.

MR. HAROLD O. TABER, *Assistant District Attorney, Washoe County, Reno, Nevada*.

DEAR MR. TABER: This will acknowledge receipt of your letter received in this office February 8, 1944, in which you inquire if we have ever given an opinion on the question of the filing fees that can be charged by the various County Recorders for filing notices of intention to hold mining claims.

We are enclosing a copy of a letter to Mr. Sanford A. Bunce, District Attorney of Pershing County, concerning the question.

Although, as stated in letter, no formal opinion was given at the time, we have since considered the question and are of the opinion that chapter 83, Statutes of Nevada 1911, section 2977 N.C.L. 1929, should be construed to include the recording the notice of intention to hold mining claims and the fee charged should be the same as provided in the above-mentioned Act.

It appears to us that a liberal rather than a strict construction of the statute should be made, otherwise the Federal Act for the special benefit of mining would nullify the State Act, also enacted for the benefit of mining.

The court in the case of *State v. Martin*, 31 Nev., on page 499, said that courts will construe the language of a statute as to give effect to rather than nullify it.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General.*

111. Motor Vehicles—Deduction Allowed by Motor Vehicle Fuel Tax Act to Cover Dealer's Cost Collection of Tax and Handling Losses.

CARSON CITY, February 23, 1944.

NEVADA TAX COMMISSION, *Carson City, Nevada.*

Attention: J.G. Allard, Chief Clerk.

GENTLEMEN: Reference is hereby made to your letter of February 11 requesting an opinion of this office as to the amount of the deduction allowed to the dealer by section 2 of the Motor Vehicle Fuel Tax Act of 1935, that is the gasoline tax statute of 1935, to cover the dealer's cost of collection of the tax and of compliance with the Act and handling losses occasioned by evaporation, spillage, etc.

The deduction allowed for the foregoing purposes is provided in a proviso found in section 2 of the Act, which proviso reads as follows:

Provided, however, that from the tax found to be due upon any such statement duly and punctually rendered, the dealer shall be allowed to deduct two percent thereof to cover the dealer's costs of collection of the tax and of compliance with this Act and the dealer's handling losses occasioned by evaporation, spillage or other similar causes.

We think the above-quoted language is clear and express and that it just means what it says. Such meaning is that the dealer shall be allowed to deduct not more than two percent of the amount of excise tax on all motor vehicle fuel sold, distributed, or used by such dealer in accordance with the law for the preceding calendar month, and that such two percent deduction must cover the dealer's costs of collection of the tax and of compliance with the law, including his handling losses occasioned by evaporation, spillage, or other similar causes.

Respectfully submitted,

ALAN BIBLE, *Attorney-General.*

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

112. Counties—Bona Fide Emergency Loan for Immediate Use—Clark County.

CARSON CITY, February 23, 1944.

HON. V. GRAY GUBLER, *District Attorney Clark County, Las Vegas, Nevada.*

DEAR MR. GUBLER: This will acknowledge receipt of your letter of February 16, 1944, received in this office on February 18, 1944.

In view of your explanation as to Emergency Loan by which \$200,000 was secured from the State Board of Finance, and after thoroughly checking its minutes and approval thereon, I agree with you that the fund was not set aside for postwar building, but was made as a bona fide emergency loan for immediate use. This immediate use was made impossible only by virtue of the fact that we were at war. Accordingly, it seems to me that the State Board of Finance was proper and that your county was prevented from complying with the full requirements of the emergency loan only by an extraordinary condition beyond its control. Because of this condition,

it seems that the strict requirement that all county business must be kept on a cash basis is still complied with. I do believe, however, that the money secured through the emergency loan must be expended for that emergency just as soon as materials and labor are available.

In answer to your second question, I still am very doubtful of the authority of the County commissioners to purchase U.S. bonds. As I indicated to you on the phone and confirmed by wire, there is absolutely no statutory provision authorizing counties or other political subdivisions to purchase bonds. It is true that the State of Nevada and many of its departments do purchase U.S. bonds, but this is by virtue of specific statutory authorization.

Since there is no statutory authority none can be read into the powers and duties of the County Commissioners, which, as you know, are boards of limited authority, depending entirely upon statutory authorization for their powers.

See: *State v. Central Pacific Railway Co.*, [9 Nev. 79](#); *Sadler v. Eureka County*, [15 Nev. 39](#); *State v. Washoe County*, [22 Nev. 15](#); and *Lyon County v. Ross*, [24 Nev. 102](#).

My kindest regards.

Very truly yours,
ALAN BIBLE, *Attorney-General*.

113. Fish and Game—Commissions for Sale of Hunting Licenses and Deer Tags Cannot Legally Be Paid.

CARSON CITY, February 23, 1944.

STATE FISH AND GAME COMMISSION, *P.O. Box 678, Reno, Nevada.*

Attention: E.H. Herman, Assistant Secretary.

GENTLEMEN: Reference is hereby made to your letter of February 21 inquiring whether there is any legal reason prohibiting commissions being paid to agents of the State Fish and Game commission for the selling of hunting licenses and buck and doe deer tags, such agents being private individuals or mercantile establishments which sell the foregoing licenses and tags each year for the benefit of the State and counties.

Please be advised that we have examined the Fish and Game Law very carefully with respect to this question and it is our unqualified opinion that such law does not provide for the payment of commissions to any officer, person, or firm for the sale of hunting licenses and deer tags. Unless provision is made in the law for the payment or retention of commissions for the sales of licenses, it is our opinion that such commissions cannot legally be paid or retained.

If commissions are desirable for the purpose of furthering the sale of hunting licenses and deer tags, we suggest that this is a matter for the consideration of the Legislature.

Very truly yours,
ALAN BIBLE, *Attorney-General*.
By W.T. MATHEWS, *Deputy Attorney-General*.

114. State Board of health—Inspection City and County Hospitals, Jails and Industrial Plants.

CARSON CITY, February 25, 1944.

EDWARD E. HAMER, M.D., *State Health Officer, Nevada State Department of Health,*

Carson City, Nevada.

DEAR DR. HAMER: This will acknowledge receipt of your letter, received in this office February 15, 1944, in which you ask for further information relative to the question of full legal authority for the inspection of city and county jails, county hospitals, private hospitals industrial plants, State, or other institutions.

In our opinion forwarded to you under date of February 5, 1944, we concluded that the Act requiring the State Board of health to inspect food establishments, being chapter 116, Statutes of Nevada 1943, did not include in its provisions the inspection of hospitals, jails, and circuses.

Furthermore, we are of the opinion that there is not sufficient statutory authority for the general inspection and the establishment of standards for all phases of sanitation of city or county hospitals, jails, and industrial plants.

Desired sanitary standards and direct authority for inspection, without complaint alleging a violation of the health laws, should be submitted to the Legislature through the biennial report to the Governor.

Section 5259, 1929 N.C.L., 1941 Supp., defining the powers of the State Board of Health, gives the board the authority to regulate sanitation and sanitary practices in the interest of public health and to protect and promote the public health generally. It also provides that the board, with the assistance of the State Health Officer, make a biennial report to the Governor, setting for the conditions of public health in the State and making such recommendations for legislation, appropriations, and other matters as are deemed necessary or desirable.

The policy of the Legislature appears to be that health matters requiring of the delegation of special authority should be brought to its attention by the State Board. This is indicated in the adoption of such Acts as those giving authority and directing the inspection of dairies, swimming pools, construction camps, and food establishments.

The general principle applied in Public Administrative Law is stated in 42 Am. Jur., at page 359, as follows:

The administrative officer's power must be exercised within the framework of the provision bestowing regulatory powers on him and the policy of the statute which he administers. He cannot initiate policy in the sense, but must fundamentally pursue a policy predetermined by the same power from which he derives his authority.

In the case of *Rock v. Carney*, reported in 22 A.L.R. at page 1178, the court, speaking of the powers of a board of health said:

The board of health has no legislative power; it may, under delegated power, enact rules and regulations for the protection and preservation of the public health, but must steer clear of combining legislative with executive power; in other words, such board cannot give itself power and then execute the power.

As there is no authority under the statute for the inspection of the institutions mentioned, it appears that, unless the Board of Health is invited to do so or has reason to suspect that the health laws and regulations are being violated, such inspection should not be made.

Your problem should be presented to the Legislature for specific authorization clearly defining the limits within which your board can act.

Very truly yours,

ALAN BIBLE, *Attorney-General.*

By GEORGE P. ANNAND, *Deputy Attorney-General.*

115. Taxation—Books and Records of Mining Companies May Be Examined for Adjustment or Reassessment—Statute of Limitations.

CARSON CITY, March 1, 1944.

NEVADA TAX COMMISSION, *Carson City, Nevada.*

Attention: J.G. Allard, Chief Clerk.

GENTLEMEN: You inquire whether there is any statute of limitation prohibiting the tax Commission from the reexamination of the books and records of mining companies and operators of mines for the purpose of adjusting and reassessing net proceeds of mines, that is to say whether there is any specific statutory period of time within which such examination, adjustment, and reassessment can legally be made.

Section 9 of the Tax Commission Act, being section 6586 N.C.L. 1929, provides that the Nevada Tax Commission shall have the right and power at any time to examine the records of any person, etc., operating any mine and hold hearings with respect thereto. It may be that, if this section of the law stood alone and the Nevada Tax Commission being an agency of the State government without any qualifications upon its powers, then there would be no limitation upon the time in which the Tax commission could examine the books and records of any mining company for the purpose of adjustment of net proceeds tax and reassessment thereof. And we may add that in so far as examination of the books and records above mentioned may be thought necessary by the commission, we think no limitation as to time in which such may be done appears in the law.

But, an examination of the statutory law of this State with respect to the collection and enforcement of taxes discloses that even if the Tax Commission finds from proper examination into the matter that a reassessment of the net proceeds tax is or will be necessary, there is a limitation on the time in which such reassessment can be enforced and the taxes thereon collected, and if the enforcement and collection of such reassessed taxes cannot be had after a certain period of time, then, of course, any such reassessment would be, in effect, an idle gesture.

Section 8524 N.C.L. 1929 provides, inter alia, that actions other than those for the recovery of real property can only be commenced within three years upon an action upon a liability created by statute, other than a penalty or forfeiture. Section 8528 N.C.L. 1929 provides that the limitations prescribed in this Act shall apply to actions brought in the name of the State, or for the benefit of the State, in the same manner as to actions by private parties. And this section relates to the limitations contained in said section 8524.

In the case of *The State of Nevada v. The Yellow Jacket Silver Mining Company*, [14 Nev. 220](#), a case dealing with the assessment and collection of the net proceeds of mines tax and the limitations with respect to the collection thereof, held first that taxes (net proceeds tax) are not debts in the sense that they are obligations or liabilities arising out of contracts expressed or implied. That they are the enforced proportional contribution of each citizen and of his estate, levied by the authority of the state for the support of the government. That they owe their existence to the action of the Legislature and do not depend on their validity or enforcement upon the individual asset of the taxpayer. This holding of the Supreme Court brought the collection of net proceeds tax squarely within the provisions of said section 8524 for the reason that an action for the collection of the tax was an action upon a liability created by statute.

In the Yellow Jacket case the question of the limitation of time in which an action for the

collection of the net proceeds tax could be brought was directly presented to the Supreme Court. The statute of limitation in existence at that time was identical with the statute of limitation hereinabove cited and also contained the provision making the statute of limitation applicable to actions brought in the name of the State. The Supreme Court held that the statute remains such lien until paid, nevertheless, the limitation upon the time in which an action could be brought to enforce the collection of the tax applied, and while it did not destroy the lien, it did destroy the remedy for the collection of the tax after the three-year period of limitation had expired. In brief, the law of the State as determined by the Supreme Court in the Yellow Jacket case, was that the general statute of limitation governed in the enforcement of the collection of net proceeds of mines tax.

An examination of the law of this State since the decision in the Yellow Jacket case discloses that there has been no change either in the statutory law or in the rule established by the Supreme Court from that day to this.

It is, therefore, the opinion of this office that while the Nevada Tax Commission may examine, or cause to be examined, the books and records of mining companies and operators of mines for the purpose of adjustment or reassessment of net proceeds tax at any time, still, any such reassessment so made cannot be enforced by suits in the courts of this State after the expiration of three years from the original assessment. We suggest, therefore, that any examination of the books of mining companies and operators of mines for the purpose of reassessment of the net proceeds tax for any particular year should be so made as to permit the reassessment being made within such time as would admit of the bringing of a suit for the collection thereof within three years from the date of the original assessment.

Respectfully submitted,

ALAN BIBLE, *Attorney-General*.

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

116. Corporations—Amendment to Meet Agreement of Merger—Banking.

CARSON CITY, March, 2, 1944.

MR. D.G. LaRUE, *Superintendent of Banks, Carson City, Nevada*.

DEAR MR. LaRUE: This will acknowledge receipt of your request March 1, 1944, for an opinion upon the question relative to an amendment of the articles of incorporation of a Nevada banking corporation as contained in a certain merger agreement.

Correspondence between the Federal Reserve Bank of San Francisco and the banking corporation was submitted to us on February 19, 1944, with the request that we withhold our opinion until the matter was finally submitted to us by you.

We base our conclusion on the principle that an amendment is intended for a substitute for the original section; it continues in force that which is reenacted and repeals what is omitted.

The controversy concerns the amendment to "Article Fourth" specified that the total capital stock was the amount of \$60,000 divided into 2,400 shares of the par value of \$25 per share.

In the original Articles of Incorporation "Article Fourth" specified that the total capital stock was the amount of \$60,000 divided into that the total capital stock was the amount of \$60,000 divided into 2,400 shares of the par value of \$25 per share.

On February 10, 1943, a certificate of amendment was filed with the Secretary of State,

which recited the corporation had adopted a resolution that Article Fourth of the Articles of Incorporation of the banking company be amended to read as follows:

1. Amount, Classes and Shares of Capital Stock.

The amount of capital stock of the corporation shall be Ninety Thousand Dollars (\$90,000) divided into classes and shares as follows:

(a) Thirty Thousand Dollars (\$30,000) par value of preferred stock divided into three hundred (300) shares of the par value of One Hundred Dollars (\$100) each; and

(b) Sixty Thousand Dollars (\$60,000) par value of common stock divided into twenty-four hundred (2400) shares of the par value of Twenty-five Dollars (\$25) each,

Section 2 defined the assessability of the stock and the responsibility of the holders of preferred stock.

Then followed eleven paragraphs with subdivisions containing details relative to dividends and voting rights.

The Bank Act, section 1, being section 747, 1929 Nevada Compiled Laws, 1941 Supp., under subdivision Eleventh, provides as follows:

Said articles of incorporation may also provide for the issuance and sale of preferred stock in such amount as shall be fixed by the articles or by amendments thereto, and the amount and number of shares thereof, and the terms of and conditions thereof not inconsistent with the later provisions of this act.

The foregoing amendment fully complied with the statute.

“Article Fourth” of the original Articles of Incorporation, by this amendment, was removed altogether and the amendment then was substituted and became “Article Fourth” of the Articles of Incorporation.

The aforesaid corporation, on July 2, 1943, entered into a merger agreement with another banking corporation in Nevada, under the provisions of section 1638, 1929 Nevada Compiled Laws, 1941 Supp.

The agreement in relation to amendment, set forth that Article Second of the Articles of Incorporation was “amended to read as follows.” The amendment then incorporated the entire Article Second, inserting therein a provision that the corporation establish a branch bank in a certain county in the State. This amendment was a substitute for the original “Article Second” in the first Articles of Incorporation, and was complete in itself without reference to the original section.

The agreement of merger further provided that Article Fourth be amended in the following words:

(B) That Article Fourth of said Articles of Incorporation of the surviving corporation be amended to read as follows:

ARTICLE FOURTH

(a) That the amount of the total authorized common capital stock of this corporation is \$120,000 divided into 4800 shares with the par value of \$25 per share; that the full amount of the authorized capital of this bank has been paid in full, exclusive of all organizational expenses prior to date on which these Articles of Incorporation and the amendments thereto were signed and executed, and that

the original common capital stock of this corporation was paid in cash, and that the increase in said common capital stock, to wit, an increase of 2400 shares having eh par value of \$25 per share, has been paid from surplus and individual profits;

(b) That the common capital stock of this corporation shall be assessable to the extent and in the manner provided by the laws of the State of Nevada.

Under said section 1638, the first subdivision under paragraph 1, defining what the agreement shall state is found the following:

If the agreement be for a merger, it shall state any matters with respect to which the certificate or articles of incorporation of the surviving corporation are to be amended, and the certificate or articles of incorporation shall be deemed to be amended accordingly, upon the filing of the agreement in the office of the Secretary of State.

The amendment in this agreement of merger had the same effect as the certificate of amendment filed in February 1943. "Article Fourth" as set forth in the agreement of merger was therefore substituted for Article Fourth in the certificate of amendment in February 1943.

The amendment in the agreement of merger does not state the amount of capital stock. It states that the authorized common capital stock is \$120,000. From this it must be determined by inference that the capital stock is \$150,000 divided into \$120,000 common and \$30,000 preferred.

Therefore, the amendment does not meet the requirement as set forth in the statute.

There does not appear to be an attempt on the part of the corporation to repudiate or exclude the preferred stock, and the amendment of "Article Fourth" should be worded to state plainly that which was continued in force and that which was substituted.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

117. Employment Security—Action to Recover Claim Paid Member Board of Review in Violation of Law Barred by Statute of Limitations.

CARSON CITY, March 10, 1944.

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

DEAR MR. MCGINTY: This will acknowledge receipt of your inquiry relative to the possibility of securing reimbursement out of the State Bond Trust Fund to the Unemployment compensation Administration Fund for salary and expenses paid to a member of the Board of Review, such payment being in violation of law.

We are of the opinion that an action to recover the claim is barred by the statute of limitations.

The payments in question, according to our information, were made as follows: November 1937, \$58; January, 1938, \$10; and August, 1938, \$55, making a total of \$123.

Section 8524 N.C.L. 1929, defining limitations of various actions, quoting that part we deem

relevant, provides as follows:

There seems to be no dissent from the proposition that an action against a public officer and the sureties on his bond for breach of an official duty is not an action on the bond so as to be governed by the statute of limitations relating to actions for an indebtedness evidenced by or founded upon a contract in writing.

The principle of law expressed in *Hatch v. State*, reported in 98 A.L.R., page 1218, is that an official bond is simply a collateral security for performing the officer's duty and when suit is barred for breach of his duty, action is also barred on the bond.

The officer is bound under his oath of office and the statutes, in the faithful performance of his official duty, to expend moneys under his control according to the law.

In the present situation the officer was appointed without authority of law, but he performed the services and received a reasonable compensation. It may be presumed that such services were necessary for administrative purposes. The payment of the money, however, was in violation of the laws of Nevada. The officer responsible for the payment failed in the faithful performance of his duty and was responsible for the return of the money, if such restitution was demanded.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

118. Nevada School of Industry—Boulder City Boys Legally Committed—No Federal Reservation Created—Juvenile Court Laws Apply.

CARSON CITY, March 17, 1944.

MR. WILLIAM SETTLEMEYER, *Secretary, Board of Governors, Nevada School of Industry, Elko, Nevada*.

DEAR MR. SETTLEMEYER: Reference is hereby made to your letter of March 15, 1944, requesting an opinion as to the jurisdiction of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, to commit to the Nevada School of Industry three boys committed to such school for acts committed within Boulder City, Nevada. It is noted that it is thought Boulder City is within a Federal controlled property or reservation and that crimes committed within such area are outside of the jurisdiction of such court or judge.

The State of Nevada recognizes no Federal reservation at Boulder City. It has been definitely decided by the United States District Court for the District of Nevada that no Federal reservation has been created in and about the area occupied by Boulder City and vicinity. *Six Companies v. DeVinney*, 2 Federal Supplement 693.

It has been the consistent opinion and holding of this office since 1931 that no Federal reservation has been created in the Boulder Dam and Boulder City area and that all State laws apply therein. Boulder City is within the jurisdiction of the above-mentioned State court and unquestionably the juvenile court laws apply in such city. We conclude that no question of jurisdiction arises in the matter mentioned in your inquiry and that in so far as the jurisdiction of that Court is concerned, the three boys mentioned were legally committed to the Nevada School of Industry.

Respectfully submitted,

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

119. Elections—Supplementary Federal Ballots Not Authorized by Laws of Nevada.

CARSON CITY, March 17, 1944.

DEAR GOVERNOR CARVILLE: Reference is hereby made to the telegram of President Roosevelt to you dated March 15, 1944, with respect to the recent so-called Federal Soldiers' Vote Law enacted by Congress and submitted to the President for approval. The telegram in question being submitted to this office on March 17, 1944, for the purpose of ascertaining, by examination of the Nevada Election Laws, whether the use of the supplementary Federal ballots provided in said Act of Congress is now authorized by the laws of this State. In brief, whether under the election laws of Nevada such supplementary Federal ballots, which provide for the election only of Presidential, Senatorial, and Congressional elections, are or would be valid if voted by citizens of Nevada and cast in this State pursuant to the Federal Law.

In connection with the telegram so submitted, we have examined the report of the conference committee of the Senate and the House of Representatives entitled "Wartime Method of Voting by Members of the Armed Forces," which said report apparently was returned by such committee on March 9, 1944, and contains a draft of the bill proposed by such committee and which said draft of bill, as we understand it, was enacted by the Congress and is now the bill before the President for his approval.

Without going into a detailed analysis of the Federal bill, it is sufficient, we think, to point out that under the election laws of this State no ballots, other than those printed as provided in the election laws of Nevada shall be cast or counted in any election held in this State. Section 2472 Nevada Compiled Laws 1929. The Absent Voters' Law of this State requires the furnishing of the ballots printed according to the detailed requirements of the Nevada law. Again, the Nevada law requires the voting of the ballot to be done by a stamp marking a cross in the proper place, and the Nevada law does not countenance the writing in of names of candidates, which is the requirement of the Federal Act and leaves it to the voter to identify his or her ballot by writing in the names of the candidates.

Many other differences between the two Acts appear, but we think that it is not necessary to point them out at this time. Suffice it to say that in order to make the Federal supplementary ballot a legal ballot in this State it would require the Act of the Legislature, otherwise there is no statutory authority contained in the laws of Nevada which would empower any State or county officer to make use of such supplementary Federal ballot.

The question propounded by the President in his telegram is, in effect, as follows: Whether the use of supplementary Federal ballots provided for by this bill is, in your judgment, now authorized by the laws of Nevada. From our examination of the Nevada law and the Federal bill in question, we are constrained to answer such inquiry in the negative.

Respectfully submitted,
ALAN BIBLE, *Attorney-General*.
By W.T. MATHEWS, *Deputy Attorney-General*.

120. Public Schools—Government Bond Deposited as Collateral Does Not Meet

Requirements Statutes of Nevada—Publishers Contracting to Furnish Textbooks.

CARSON CITY, March 20, 1944.

MISS MILDRED BRAY, *State Superintendent of Public Instruction, Carson City, Nevada.*

DEAR MISS BRAY: This will acknowledge receipt of your letter dated March 16, 1944, containing the inquiry as to whether or not a government bond payable to the State of Nevada meets the requirement of section 5811 N.C.L. 1929, which provides for the furnishing of a bond by all publishers contracting to furnish textbooks adopted by the Textbook Commission for use in public schools.

Although the giving of a bond commonly implies security, the language of section 5812 N.C.L. 1929 is plain and the meaning is unmistakable. There is no room for construction; the intent is expressed and there is nothing that can be implied.

Section 5812 N.C.L. 1929 reads as follows:

Such contract with the publishers of textbooks shall not take effect until such publishers shall have filed with the secretary of State, their bond, with at least two sufficient sureties, or a bond from a bonding company authorized to do business in this State, to be approved by the governor, and in such sum as shall be determined by the textbook commission.

Therefore, we are of the opinion that a government bond deposited as collateral or security does not meet the requirements of the statutes of Nevada.

Very truly yours,

ALAN BIBLE, *Attorney-General.*

By GEORGE P. ANNAND, *Deputy Attorney-General.*

121. Colorado River Commission—Bonds Must Be Furnished by Power Contractors.

CARSON CITY, March 20, 1944.

HON. ALFRED MERRITT SMITH, *Secretary Colorado River Commission of Nevada, and State Engineer, Carson City, Nevada.*

DEAR MR. SMITH: Reference is made to the minutes of the meeting of the Colorado River Commission of Nevada held on January 19, 1944. Paragraph two, page three of such minutes states as follows: "Mr. Caton moved that Alan Bible submit a legal opinion to the members at the next meeting as to the adequacy of the bonds now posted and as to what amount the bonds should be raised if it is necessary." It is not my understanding that these were the questions asked at the last Colorado River Commission meeting. If it was the intent of the commission to ask this office to pass upon the adequacy of the bonds you are referred to Attorney-General's opinion dated September 28, 1940, in which the then Attorney-General, Gray Mashburn, said, in part:

The law of this State requiring that powers district furnish bonds or other collateral, in so far as applicable, is contained in chapter 71, 1935 Statutes of Nevada, page 150, section 7 and reads as follows:

“Said commission shall hold and administer all rights and benefits pertaining to the distribution of the power in this Act mentioned for the State of Nevada, and is hereby empowered to lease, sublease, let, sublet, contract or sell the same on such terms as such commission shall determine; and provided further, that every applicant for power to be used within the State of Nevada shall, before said application is approved, provide an indemnifying bond by a corporation qualified under the laws of this state, or other collateral, approved by the State Board of Examiners, payable to the State of Nevada in such sum and in such manner as the commission may require, conditioned for the full and faithful performance of such lease, sublease, contract, or other agreement.”

It is not for the Attorney-General to determine what the amount of the bond which the commission should require the district to give should be. That is a matter of policy for the commission itself to determine. The Attorney-General can only advise the commission as to what the law is on the subject. On this point, it is my unqualified opinion that the bond required should be good and sufficient and ample to protect the State against any loss it might possibly sustain.

What is good and sufficient and ample is a matter of policy to be determined by the commission upon a careful consideration of the above-mentioned conditions (surrounding the operation of the power facility.)

It was my understanding that your commission desired to learn whether or not the contract for electrical energy between the State of Nevada and Southern Nevada Power Company dated October 9, 1941, created a lien upon the property of that company.

As I advised you at the last meeting, it is my opinion that such contract does not create a lien. It should be noted, among other things, that paragraph 18 on page 9 of the contract provides for an indemnifying bond pursuant to the statute, and if there was an intent to create a lien by the provisions of the contract the plain language of paragraph 18 refutes such inference. There is no particular property mentioned anywhere in the contract upon which an equitable lien could be enforced. Paragraph 18 specifies a particular property mentioned anywhere in the contract upon which an equitable lien could be enforced. Paragraph 18 specifies a particular fund as security.

No doubt it is thought that paragraph 24, entitled “Covenant Against Encumbrances,” might create a lien. This paragraph reads as follows:

24. The Company hereby covenants and agrees that it will not mortgage, place a lien upon or in any wise encumber any part or portion of the transmission lines, transformers, or other real or personal property, title to which it has acquired or may hereafter acquire, without giving to the State sixty (60) days’ written notice of its intention so to do and without first having provided the State with such additional indemnifying bond or other collateral as the Commission may deem necessary.

In my opinion, this paragraph does not create a lien. If the sixty (60) days’ notice has been given by the company to the commission, the company would not be able to furnish an additional indemnifying bond or collateral until notified by the commission as to what additional security was required. This covenant does not prohibit the company from encumbering its property if the notice is given to the State, but it simply provides that additional security for default in payments may be determined and secured.

In this connection, see the case of *Kuppenheimer v. Mornin*, 78 Fed. (2d) 261, in which case

the instrument in question contained the following language, after alleging the interest and a consideration:

The undersigned does hereby promise and agree not to convey or mortgage the real estate now owned by him wherever situated, until said promissory note and interest thereon has been fully paid.

It should be noted that the language construed in this decision is much more positive, direct and unconditional than the language in paragraph 24 of the Southern Nevada Power Company contract. Nevertheless, the court, in holding that such language did not create a lien, held that there must be an unequivocal statement of the lien sought to be created and the property on which the lien is sought to be fastened, and further said:

In order that a lien may arise in pursuance of the doctrine of equitable liens, the agreement must deal with some particular property, either by identifying it or by so describing it that it can be identified and it must indicate with sufficient clearness an intent that the property so described, or rendered capable of identification, is to be held, given, or transferred as security for the obligation.

Also, see 33 American Jurisprudence, page 435, paragraph 31.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

122. Public Schools—Taxable Real Property Within Territory Embracing Two Districts Subject to Special Tax Levy for Payment of Principal and Interest of Bonds in One District.

CARSON CITY, March 22, 1944.

MISS MILDRED BRAY, *State Superintendent of Public Instruction, Carson City, Nevada*.

DEAR MISS BRAY: We reply herewith to your letter received in this office March 15, 1944, in which you embody an inquiry from Mr. George F. Wright, District Attorney of Elko County.

The inquiry, as we determine it, is whether or not the entire territory of a district which may be established by adding an organized school territory to the area of an existing school district will be subject to the special tax now levied in the one district for the redemption of a bond issue existent in such district.

We are of the opinion that the taxable real property within the boundaries of school districts. Section 5844 N.C.L. 1929 relates to school district bond and provides as follows:

No change in the boundary lines of any school district shall release the taxable real property of the district from assessment and levy of the taxes to pay the interest and principal of such bonds, and if there shall be any change in the boundary of such school district so as to leave any portion of the taxable real property of the district which was subject to taxation in the district at the time of the issue of such bonds, the assessment and levy of taxes for the payment of the principal and interest of such bonds shall be made on such property as if it were still within the district, and if there shall be any change of the boundary lines of such school district so as to annex or include any taxable or real property, after the

issue of such bonds, the real property so included or annexed shall thereafter be subject to the assessment and levy of a tax for the payment of the principal and interest of such bonds.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

123. Public Schools—Payment of Teacher’s Salaries While Absent From Teaching Due to Illness.

CARSON CITY, March 22, 1944.

HON. MERWYN H. BROWN, *District Attorney Humboldt County, Winnemucca, Nevada*.

DEAR MR. BROWN: This will acknowledge receipt of your letter received in this office March 11, 1944, in which you present a question relevant to the interpretation of a provision in section 5753 Nevada Compiled Laws 1929, respecting the payment of salaries to school teachers while absent from teaching due to illness.

Your inquiry is directed particularly to the following provision in said section.

Provided, such salary shall not be paid for more than ten school days in the aggregate in any one school year, or for more than twenty school days in the aggregate for any two consecutive years, or for more than thirty school days in the aggregate for any three consecutive years in the same school district, subject to the approval of the board of trustees; * * *.

We are of the opinion that the periods of times mentioned should be construed to be cumulative, otherwise the amendment added to this section by chapter 65, Statutes of Nevada 1929, would be a nullity.

From the year 1911 and until 1927 there was no provision in the Act concerning public schools authorizing trustees to pay salaries to teachers during their absence from teaching, due to illness.

Chapter 58, Statutes of Nevada 1927, amended section 104 of the Act by adding the following:

* * * *and provided*, that all boards of school trustees are hereby authorized in their discretion to pay the salary of any teacher unavoidably absent from personal illness or from death in the immediate family; *provided*, such salary shall not be paid for more than ten school days in the aggregate in any one school year; * * *.

That amendment limited the payment to a period of not more than ten school days in any school year, without regard to situation where no such allowance had been made to a teacher during consecutive years of employment in the same school district.

Chapter 65, Statutes of Nevada 1929, being section 5753 Nevada Compiled Laws 1929, again amended section 104 of the Act by changing the semicolon after the word “year” to a comma and adding the following:

* * * or for more than twenty school days in the aggregate for any two consecutive years, or for more than thirty school days in the aggregate for any three consecutive years in the same school district, subject to the approval of the

board of trustees;

There would be no purpose in the amendment if interpreted to contain the same limitation as before enactment.

The policy adopted by our Supreme Court in the construction of a statute is that the language of a statute should be so construed so as to give it effect rather than nullify it.

In the case of *Las Vegas Ex. Rel. v. Clark County*, 58 Nevada, on page 481, the court said:

Every word and clause in an act must be given effect if possible and non rendered meaningless by overnice construction.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

124. Public School—Aid to Rural Schools.

CARSON CITY, March 23, 1944.

MISS MILDRED BRAY, *State Superintendent of Public Instruction, Carson City, Nevada*.

DEAR MISS BRAY: Pursuant to your request for our written opinion upon the subject of apportionment for the current year to a rural school of money out of the fund for "Aid to Rural Schools," we submit the following opinion:

The purpose of the Act was to equalize educational opportunities in rural schools by providing aid under certain circumstances.

The intent of the Legislature was that aid should be granted without the delay occasioned by the levy, collection, and apportionment of taxes, and therefore established a fund by appropriation.

The Act established a fund in the State Treasurer's office and the State Controller's office to be known as the fund for "Aid to Rural Schools," which fund will be made up of all moneys received from the sources named in the Act, one of which was an appropriation made by the Legislature in the sum of \$5,000. The Act was declared to be in full force and effect from and after its passage and approval.

Provision was made for the levy of a State tax commencing January, 1, 1943, and also provided that all donations and the like, as well as any money received from any Federal agencies for assistance to rural schools, should comprise the fund.

The appropriation was made for the levy of a State tax commencing January 1, 1943, and also provided that all donations and the like, as well as any money received from any Federal agencies for assistance to rural schools, should comprise the fund.

Section 3 of the Act defined the procedure to be followed by any school district in order to be eligible to aid.

The request for aid is to be initiated by the filing on or before March 1944, and each year thereafter when needed, such request which shall be accompanied by a copy of the budget for the current school year and a statement from the County Assessor showing the assessed valuation of the school district and that a 25¢ district school tax has been approved for the year. It must be shown that the district will, with the aid from the State fund, be able to maintain school in the district for a period of nine months during the school year for which aid is requested.

The superintendent, upon receipt of the request for aid, accompanied by the budget and statement required, will determine the amount available from all sources for the support and maintenance of the rural school for the year in which the request is made. After the amount available for the support of the school is determined from any balance in the district school fund or money apportioned from taxes or other sources, the Superintendent of Public Instruction shall determine the amount to be paid as aid according to the terms of subdivision 3 of section 5 of the Act and authorize payment of the same to the County Treasurer for the account of the rural school as soon as practical after the 15th of March of that year.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

125. Taxation—Assessment Net Proceeds of Mines Tax v. Lucky Four Tungsten Mining Company—Lease Agreement.

CARSON CITY, March 23, 1944.

NEVADA TAX COMMISSION, *Carson City, Nevada*.

Re: Assessment Net Proceeds of Mines Tax v. Lucky Four Tungsten Mining Company.

GENTLEMEN: Pursuant to the request of your commission subsequent to the hearing of the above-entitled matter by your commission on February 29, 1944, concerning a certain item, or items, of deduction claimed by the Lucky Four Mining Company against the net proceeds of its mining property accruing during the first six months' period of 1943 and the second six months' period of the same year, which said deductions were so claimed by said company for the expenses of superintendency and the marketing of ore during said period in the amount of, to wit, \$350, I beg to advise that we have examined the record in said matter, together with the transcript of the testimony taken at the hearing before your commission on February 29, 1944, and advise as follows.

It appears from the record that on March 27, 1943, the Lucky Four Mining Company entered into a lease agreement with one Lowell Thompson for the purpose of mining a circular piece of mining ground, 400 feet in diameter, with apparently no limit to the depth of mining. The lease agreement submitted to this office for consideration clearly made Lowell Thompson a lessee of such company and required him to enter upon the premises and perform the work of mining, transporting and shipping ore from the leased property. It clearly appears from the agreement that the lessee was to perform all the work necessary of getting the ore into the hands of the U.S. Vanadium Corporation, agent for the Metals Reserve Company, at Salt Lake City, Utah, except where the lessor will advise the lessee to consign the ore to some other buyer. An examination of such agreement, we think, discloses that the lessee was to perform each and every act necessary for the production of the ore together with the shipping thereof and, after the payment of all the charges and expenses specifically set forth in said agreement, to receive a net payment for his work and labor in accordance with the terms of the agreement. It appears from the agreement that the lessee was to enter upon the mining premises and required to work the same in a manner necessary for good, economical, safe mining, take out the ore with due regard to immediate and future safety, development, and preservation of the premises as a workable mine and to keep, at all times, the passageways, tunnels, etc., free and clear of loose rock and rubbish of all kinds, to

properly timber the mine and repair all old timbering and, in fact, to do all things necessary for the production of ore.

It further appears that the lessor, aside from the receipt of the money for the sale of the product of the mine, was only entitled to enter upon the premises for the purpose of inspection of the mine. It further appears from the agreement that the lessee was to fulfill all requirements of the Nevada law with respect to social security, unemployment, taxes, and all other taxes and claims with respect to his employees, including the securing of Nevada industrial insurance, and, further, to save harmless the lessor from any claims whatsoever accruing on, of, or concerning the premises incurred by the lessee.

It further appears from the agreement that no reservation was made therein whereby the lessor reserve to themselves the right to superintend the mining operations and/or the shipping and consignment of the ores and, so far as the agreement is concerned, no provision was made therein whereby the lessor agreed to, or was to, take care of the marketing of the ore other than it appears the lessee was directed to consign the ore produced in carload lots to the U.S. Vanadium Corporation aforesaid.

Neither does it appear in the general agreement that the lessor was to provide living quarters for the lessee and his employees and/or to provide the necessary accommodations for feeding and furnishing the food therefor, it clearly being the contemplation of the parties that the lessee would be bound to provide such facilities.

The agreement itself contains a very pertinent provision, necessarily brought to the fore by reason of the hearing, in that according to the transcript of testimony a different interpretation was placed upon the agreement than the wording of the agreement itself will support. The agreement was interpreted by interested members of the Lucky Four Company to mean, in effect, that other oral agreements were made or inferred. We call attention to subparagraph D, page 7, of the agreement, reading as follows:

That all of the agreements made and understandings had by and between the parties hereto respecting the subject-matter of this instrument are fully set forth in this instrument, and the same is not entered into upon or by reason of any oral representations, statements, agreements between the parties hereto respecting said subject-matter, excepting those which are expressly set forth in this instrument.

So then, in so far as the instant matter is concerned, we are inclined to the view that we must interpret the agreement in accordance with the intention of the parties.

Briefly, the controversy before the commission in this matter is the Lucky Four Company now claims for the six months' period ending June 30, 1943, a deductible item of \$250 to cover management superintendency, clerical and operating expenses and, as we understand the matter, a similar item of \$100 for the six months' period ending December 31, 1943.

The item of \$250 aforesaid is claimed to cover certain superintendency acts of Mr. S.G. Baker, plus certain charges for the marketing of the ore which includes letters, telegrams, etc., handled by the Lucky Four Company. It is our understanding that it is claimed Mr. Baker performed services during the six months' period as a member of the Lucky Four company in connection with the mining and shipping of the ore by Mr. Thompson to the extent, as we understand it, of something like \$160 and the balance of the \$250 was a claim for costs incurred as above stated.

We are not unmindful of the fact that subparagraph 10 of section 3 of the Nevada Net Proceeds of Mines Tax Law permits royalties received by a lessor to be treated as a gross yield of

the mine and that, in a proper case where the lessor owner of the mine actually incurs deductible expenses in the production of ore from the mine, he would be entitled to deduct such expenses, as followed by statute, from the royalties so received and as a part of the gross yield of the mine. But, under the agreement in question, it may logically be said that Mr. Thompson, by reason of the broad powers given him in the agreement to mine, ship, and consign the ore was acting as his own superintendent and that whatever costs he might have been put to were covered in the percentage or royalty received by him for his work, and in view of the fact that the agreement of the parties reserved no right to the Lucky Four Company to exercise supervisory powers of the actual mining, shipping, and consigning of the ore over the lessee and the agreement specifically setting forth on page 4 thereof how the returns from the sale of the ores should be treated, we are inclined to the view that in the instant matter the Lucky Four Company, in so far as the agreement was and is concerned, have, in fact, allowed the superintendency charge to Mr. Thompson and have not reserved such right in themselves.

In this connection we desire to point out that prior to the entering into the agreement of March 27, 1943, there was in effect from and after March 19, 1943, a different agreement between the Lucky Four Company and Mr. Thompson and which said agreement was specifically abrogated and set aside on March 27, 1943, by a provision in the agreement of that date abrogating and setting aside such prior agreement, save and excepting that the moneys earned by Mr. Thompson under the prior agreement were to be paid according to the terms of such prior agreement, the prior agreement being dated March 19, 1943, and a copy of which agreement is contained in the petition letter to the Nevada Tax Commission from the Lucky Four Company dated November 22, 1943.

The agreement of March 19, 1943, did contain a provision whereby Mr. Baker was to perform labor and give assistance to Mr. Thompson in the sorting, shipping, and consigning of ore from the same premises. Here, no doubt, the parties contemplated superintendency by Mr. Baker. Turning to the transcript of the hearing, page 10, before the commission on February 29, 1944, we find that Mr. Baker testified that the most of his work was done on the first two cars of ore shipped, which certainly included the first care of ore shipped from the premises and referred to in subparagraph 21, page 6, of the later agreement. And again on page 14 of such transcript we find that the agreement of March 27, 1943, was not actually in existence at the time the first two cars were taken out. As to the operations conducted under the agreement of March 19, 1943, we are of the opinion that the Lucky Four Company would be and is entitled to a deduction should be allowed for this service is a question of fact upon which we express no opinion.

Now with respect to the marking of the ore under the agreement of March 27, 1943. As stated above, no reservation is contained in such agreement concerning such item. From the agreement itself we may deduce that at the time of the entering into the agreement in all probability the marketing of the ore had been provided for, possibly under the agreement of March 19, 1943, in view of the fact that the lessee was told in no uncertain terms in the agreement to whom to ship the ore. Whether additional transactions were had by the Lucky Four Company with respect to the marketing of the ore thereafter is a question of fact to be determined by the commission, which, taken together with what may have transpired prior to March 27, 1943, may lead to a proper adjustment of such item of cost, if any such cost was actually incurred by the Lucky Four Company.

B & C TUNGSTEN MINING COMPANY

There was submitted to this office in connection with the foregoing matter the assessment of the net proceeds of mines tax against the B & C Tungsten Mining Company, arising under a lease agreement with H.I. Cope and Willie L. Byrd which concerns a similar item of deduction claimed by the mining company under a lease agreement practically identical with the one hereinbefore discussed, the assessment covering the six months' period ending December 31, 1943.

A perusal of the agreement in this matter discloses that no reservation of superintendency was reserved by the lessor and that the lessees, in so far as a lease agreement was and is concerned, entered upon the mining property for the purpose of doing a workmanlike job of mining, shipping, and consignment of the ore. We think the foregoing opinion is applicable here.

However, the agreement here contains an additional paragraph not incorporated in the Lucky Four agreement. On page 6 of the B & C Tungsten agreement appears a paragraph lettered "B," which, in effect, by inference reserves to the lessors the prerogative of carrying on the correspondence and other work necessary for the marketing of the ore and relieving the lessees of this work, thus bringing it within the deduction provided in section 3 of the Nevada Tax Commission Act for the actual cost of marketing and delivering the product and the conversion of the same into money.

From the foregoing we submit that in the final analysis the deductions claimed and discussed above certainly require additional evidence to be taken by the commission in order to determine the exact status of the conditions precedent to the claiming of the deductions.

Respectfully submitted,

ALAN BIBLE, *Attorney-General*.

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

126. Bonds—"Blanket Schedule Bond"—Nevada Livestock Show Board—Not Authorized.

CARSON CITY, March 27, 1944.

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

DEAR MR. McEACHIN: This will acknowledge receipt of the letter from Mr. Hayden Henderson, Sr., which was received by you and submitted to this office on March 20, 1944, for an opinion respecting your authority to entertain an application for a "Blanket Schedule Bond" for the employees of the Nevada Livestock Show Board.

We are of the opinion that the Bond Trust Fund Act of 1937 does not provide for the issuance of a blanket bond covering all the officers and employees who handle money in connection with the Elko County Fair and Nevada Livestock Show, as requested in the letter from Mr. Henderson.

Section 4915.23, 1929 N.C.L. 1941 Supp., provides in part as follows: "Every state, county and township official, and his or her deputy, and officials of incorporated cities and irrigation districts and their deputies in the State of Nevada, required by law in his or their official capacity to furnish surety bond, or bonds, shall apply to the state board of examiners for surety."

Chapter 191, Statutes of Nevada 1929, page 347, is an Act creating the Nevada State Livestock Show Board. Members of the board are appointed by the Governor and are directed to qualify as required by the Constitution, but they are not required to furnish a surety bond or bonds. Power is given the board to appoint employees, define their duties, fix their compensation and bonds, if any.

Persons employed by the board for a period of four or five days each year would not come within the class of officials and deputies as defined in the Bond Act.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

127. Elections—Section 6405 N.C.L. 1929 Defining Residence Should Be Printed in Compiled Election Laws.

CARSON CITY, March 30, 1944.

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

DEAR MR. McEACHIN: Reference is hereby made to your written inquiry of March 29, 1944, with respect to the publication in the pamphlet containing the election laws the section of the Nevada laws defining legal residence, the same being section 6405 N.C.L. 1929. The specific inquiry being whether the section defining residence as appears in chapter 284, Statutes of 1913, is the section defining such residence or whether section 6405 N.C.L. 1929 is the proper section. The inquiry arises by reason of the fact that said section 6405 was enacted in 1911 and the section in chapter 284, Statutes of 1913, was enacted in 1913, and, therefore, being the later section.

It is our opinion that section 6405 N.C.L. 1929 is now in full force and effect. Section 1 of chapter 284, Statutes of 1913, was impliedly repealed by the reenactment of the registration law in the year 1915. See chapter 285, Statutes of 1915. The registration law of 1915 was again reenacted in 1917, which said Act is now sections 2360-2393 N.C.L. 1929. Section 1 of this later Act is identical with section 1 of the 1915 Act, which, in turn as stated before, impliedly repealed the earlier Act of 1913.

There is no repugnancy between section 2360 N.C.L. 1929 and section 6405 N.C.L. 1929, and such sections of the law are to be construed in *pari materia*, and effect given to both. Section 6405 really amplifies section 2360 in that it does provide that the person who absents himself from the jurisdiction of his residence with the good faith to return without delay is considered to be a resident of his established place of residence.

We see no reason why section 6405 should not be printed in your pamphlet of the compiled election laws. Neither do we see any point to not printing such section as it does, in fact, enable the person reading the election laws to really determine how his residence is maintained after once established.

Respectfully submitted,

ALAN BIBLE, *Attorney-General*.

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

128. Nevada School of Industry—Payments from Federal Government for Care of Indian Girls Should Be Credit to “Girls’ Care” Fund.

CARSON CITY, March 31, 1944.

HON. HENRY C. SCHMIDT, *State Controller, Carson City, Nevada*.

Attention: Robbins E. Cahill, Deputy.

DEAR SIR: This will acknowledge receipt of your letter dated March 29, 1944, and received in this office March 30, 1944, in which you request our opinion upon the following question:

The Nevada School of Industry at Elko, Nevada, has received checks from the United States Government in payment for care of Indian girls at the institution. These checks have been turned over to the State Treasurer. Should this money be credited back to the Nevada School of Industry appropriation, to be expended by them, or should it be credited as a receipt to the General Fund?

We are of the opinion that this money should be credited to the "Girls' Care" fund of the Nevada School of Industry. As a general proposition of law all moneys coming into the state Treasury constitute a part of the General Fund, unless by the constitution or some statutory enactment they are placed in some special fund. *State v. McMillan*, [34 Nev. 268](#).

Section 452, under Title 25, U.S.C.A., contains a provision whereby the Secretary of the Interior is authorized to enter into contracts with any appropriate State institution for the education and social welfare of Indians.

The checks in question were sent to the Nevada School of Industry to reimburse the school for the money advanced by the school for the transportation and maintenance of the Indian girls at an institution for delinquent girls.

The Legislature, in 1943, under the appropriation for the Nevada School of Industry, set aside a certain sum designated "Girls' Care." This money is expended to pay transportation and maintenance of female delinquents to other institutions of like kind for females, as provided in section 6831 N.C.L. 1929. The money appropriated to this fund is ear-marked for girls' care and any refund for expenditure therefrom should be returned to the fund, without the necessity of statutory enactment.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

129. Motor Vehicles—Provisions Motor Vehicle Operator's and Chauffeur's License Act Suspended—Persons in Military Service.

CARSON CITY, April 10, 1944.

MR. R.A. ALLEN, *State Highway Engineer, Carson City, Nevada*.

Attention: R.J. Newton, Assistant to the Administrator, Driver's License Division.

DEAR SIR: This will acknowledge receipt of your letter of April 1, 1944, received in this office April 3, 1944, in which you request our opinion as to the application of the provisions of the Uniform Motor Vehicle Operator's and Chauffeur's License Act to persons in the military service of the United States.

We are of the opinion that the provisions of the Motor Vehicle Operator's and Chauffeur's License Act, with respect to persons in the military service of the United States, are suspended during the period that such person is in the service.

Sections 9-1 of the Act, being section 4442.08, 1929 N.C.L., 1941 Supp., defining persons exempt, provides in part as follows: "any person while operating a motor vehicle in the service of the army, navy or marine corps of the United States." The qualifying statement "in the

service” may apply directly to the person as well as to the motor vehicle.

The Act as adopted by the State of Utah followed the identical wording of this section as found in the Uniform Act which reads as follows: “Every person in the service of the army, navy or marine corps of the United States and when furnished with a driver’s permit and when operating an official motor vehicle in such service shall be exempt from license under this Act.” Our Legislature saw fit to change the wording of this section of the Uniform Act expressing it in broader terms.

Any doubt as to the application of this section in our law to persons in the military service of the United States being exempt appears to be dispelled by the action of the Legislature in 1943. Chapter 48, Statutes of Nevada 1943, provides as follows: “Notwithstanding the provisions of section 23 of the ‘The Uniform Motor Vehicle Operator’s and Chauffeur’s License Act,’ being chapter 190, 1941 Statutes of Nevada, or any other law, an operator’s or chauffeur’s license, or renewal license for the operation of motor vehicles within the State of Nevada, held by any person who is in the military services of the United States during the present war, shall be extended to the termination of such service.”

Section 9-1, supra, when read in conjunction with this Act discloses the intent of the Legislature to extend to any person in the military service who holds an operator’s or chauffeur’s license, issued by this State or another State, the right to operate a motor vehicle in this State and perpetuate such license during the holder’s term of military service.

The answer to your first question relative to the application of section 9-1 to a person in the military service while operating a privately owned vehicle, is that such a circumstance is within the exemption.

Your second question, does the presence of Nevada license plates on a car owned by a person in military service indicate intention of residence to the extent that a driver’s license would be required, is answered as noted by our answer to your first question—that military personnel are exempt from provisions of the act by section 9-1, irrespective of the question of residence.

Your third question as to a license issued by another State and held by a person in military service which has expired subsequent to the entrance of the holder into the military service, is answered in the affirmative. See answer to question one.

In addition, the plain evident policy and purpose of chapter 48, Statutes of 1943, was to provide exemption for military personnel from the provisions of the Driver’s License Act and the statutes should receive a liberal construction.

As stated by the court in the case of *Brown v. Bernstein et al.*, 49 Fed. Supp. 728, “* * * legislation enacted during a national emergency and in time of war must be expressed in broad terms and generalities. In the interpretation of such legislation the court must not hunt for limitations nor scrutinize the wordings with confining intent, but should seek for the purpose and spirit of the enactment.”

Very truly yours,

ALAN BIBLE, *Attorney-General.*

By GEORGE P. ANNAND, *Deputy Attorney-General.*

130. Agriculture—Revocation of Veterinary License Cannot Be Predicated on Acts or Conduct Not Specified in Statutes.

CARSON CITY, April 13, 1944.

DR. WARREN B. EARL, *Director Division of Animal Industry, Department of Agriculture, P.O. Box 1027, Reno, Nevada.*

DEAR DR. EARL: We submit our reply to your request of April 6, 1944, concerning the authority of the State Board of Veterinary Medical Examiners to revoke the license to practice veterinary medicine, surgery, or dentistry of a person charged with unprofessional conduct.

The charge of unprofessional conduct is based upon the circumstances wherein Mr. X, a licensed veterinary, sold to Mr. Y, also a licensed practitioner, a veterinary business and in the bill of sale agreed not to practice in the profession of veterinarian in the certain county for a period of ten years. The bill of sale further provided, if the vendor did enter into practice, the purchaser would be entitled to \$2,000 damages. Subsequently the purchaser entered the military service and the vendor resumed practice in the county. Complaint is thereupon made to the board, charging Mr. X, the vendor, with unprofessional conduct.

We are of the opinion that the term of unprofessional conduct contained in the statute relates to acts of a nature likely to jeopardize the interests of the public, and cannot be construed to apply to conduct that involves a civil action between two parties.

We do not believe that the board, under the facts submitted, is authorized to revoke the license in question. The contracting parties in this case have provided exactly what would happen if the seller renewed practice (*i.e.*, the purchaser would be entitled to \$2,000 damages.) This is a matter upon which the parties voluntarily agreed as a matter of private contract.

Section 7794 N.C.L. 1929 which authorizes the board to adopt rules, issue licenses and provides for the revocation of licenses under certain conditions, reads in part as follows: "any license issued by the board may be revoked by them upon satisfactory proof that the holder of said license is guilty of unprofessional conduct; * * *."

Revocation of a license cannot be predicated upon acts or conduct not specified in the statute or embraced within its terms.

As stated in 41 American Jurisprudence, under the title Physicians and Surgeons, at page 175, "Thus, a statute authorizing revocation for 'immoral,' 'dishonorable,' or 'unprofessional' conduct contemplates conduct which either shows that the person guilty of it is intellectually or morally incompetent to practice the profession or has committed an act or acts of a nature likely to jeopardize the interests of the public."

The principles of law applicable to the licensing of physicians and surgeons also apply to the practice of veterinary medicine, surgery, or dentistry.

Very truly yours,

ALAN BIBLE, *Attorney-General.*

By GEORGE P. ANNAND, *Deputy Attorney-General.*

131. Public Schools—Retirement Salary—Substitute Teachers.

CARSON CITY, April 13, 1944.

MR. DWIGHT DILTS, *Retirement Clerk, Public School Teachers' Retirement Salary Fund Board, Carson City, Nevada.*

DEAR MR. DILTS: Relative to our conversation had April 10, 1944, we submit the following answer to your question concerning substitute teachers.

We are of the opinion that the Teacher's Retirement Salary Fund Board has the authority to make regulations defining substitute teachers, and under such classification, may exempt them from membership in the retirement system, provided, any teacher so exempt may become a member upon application.

Chapter 114, Statutes of Nevada 1943, page 148, defines the term "teacher" and places them in eight classes as follows:

SECTION 1. * * * (1) As a legally qualified teacher in, or a principal or superintendent of, the public schools of the State of Nevada; (2) as an instructor in the Nevada state orphans' home, teaching under a valid Nevada teacher's certificate; (3) as an instructor in the Nevada school of industry, teaching under a valid Nevada teacher's certificate; (4) as a legally qualified instructor in county normal schools of the State of Nevada; (5) as a legally qualified instructor serving as local supervisor for industrial training in the vocational education department of this state; (6) as a legally qualified supervising executive or educational administrator of the public schools of this state; (7) as a state superintendent of public instruction of the State of Nevada, a deputy superintendent of public instruction of the State of Nevada, or a state vocational supervisor of the vocational education department of the State of Nevada; (8) as an employee of the public school teachers' retirement salary fund board of the State of Nevada who holds a valid teaching certificate.

Each of these classes mentioned in this section contemplate persons who are elected, appointed, or employed for a definite period.

Section 29 provides that the Act shall be binding upon all teachers elected or appointed to teach in the public schools after the effective date of the Act.

Section 11 provides a certain deduction from the salary of the teacher of each fiscal year.

Persons coming under the term "teacher" as defined in section 1 are not required to make application to become members.

Section 22, being section 6077.42, 1929 Nevada Compiled Laws, 1941 Supp., subdivision 10, reads as follows:

The public school teachers retirement salary fund board, in addition to the foregoing powers, may in its discretion, exempt from membership in the retirement system any class of teachers; *provided*, that any teacher so exempted may become a member of the retirement system upon application; * * *.

This paragraph was added to subdivision 10, *supra*, by chapter 190, Statutes of Nevada 1939, which said statute under section 1(b) defined the term "teacher" in seven classes.

Under the teachers' tenure laws of other States, teachers are usually classed as permanent, probationary and substitute teachers. It might be well for our State Legislature to enact similar statutes.

Since the Legislature did not classify substitute teachers, the board has the power to adopt regulations to define the classification of substitute teachers. When so classified, the board has authority to exempt this class from membership in the retirement system. However, if a teacher so exempt desires to become a member, the statute affords this right upon application.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

132. Employment Security—Veterans Not Entitled to Advantage of Five to Ten Points in Scoring Merit Board Examination.

CARSON CITY, April 17, 1944.

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

DEAR MR. MCGINTY: Reference is hereby made to your letter of April 14, 1944, requesting an opinion of this office as to whether the State Merit Board under present State statutes could, under a regulation adopted by your department, provide for allowing veterans from five to ten points advantage in the scoring of the required examinations.

Your inquiry is, in effect, whether the State Merit Board and your department can accord preferential treatment to ex-servicemen and veterans of the wars of the United States.

This office rendered an opinion with respect to such preferential treatment to ex-servicemen, applicants to positions in the Unemployment Compensation Division of Nevada, on July 22, 1938. This opinion is No. 263 in the Report of the Attorney-General, 1938-1940. Such opinion was premised upon the statutes of Nevada with respect thereto in effect at that time. Such statutes being section 6173, N.C.L. 1929 and section 11 of the Unemployment Compensation Law of 1937. It was there held that ex-servicemen, citizens of Nevada, were entitled to preference in filling positions in the Unemployment Compensation Division, provided they comply with all requirements of such law and have as high a rating, after examination, as non-servicemen.

Section 6173 N.C.L. 1929, provides that only citizens or wards of the United States or persons who have been honorably discharged from the military service of the United States shall be employed by any officer of the State of Nevada, or by any contractor of the State of Nevada, or any political subdivision of the State, or by any person acting under or for such officer or contractor in the construction of public works, or in any office or department of the State of Nevada, etc. it is further provided that preference shall be given, qualifications of the applicants being equal, first, to honorably discharged soldiers, sailors and marines of the United States who are citizens of the State of Nevada; second, to other citizens of the State of Nevada. This section of the law has not been changed in any way since 1929.

Section 11 of the Unemployment Compensation Law of 1937 was repealed in 1941 by the enactment of the Employment Security Administration Law. Chapter 59, page 67, Statutes of 1941. However, the provisions of section 11 of the Unemployment Compensation Law were carried into the said 1941 law and appear there as subsection (d) of section 4 and subsections (a) and (b) of section 5 of the 1941 Act. There was no major change made in the 1941 Act in this respect, save and except, in said subsection (d) of section 4 the provision of the prior Act with respect to personnel appointed on a temporary basis was dropped from the law. Otherwise, the 1941 law was and is substantially the same, if not identical, with section 11 of the 1937 law.

There being no change in the law with respect to the matter of preference of ex-servicemen since the rendering of Opinion No. 263, it is our opinion that Opinion No. 263 governs with respect to the instant inquiry. We cannot consistently advise, under the law as it stands today, that regulations may be adopted by your department allowing veterans certain points advantage in the scoring on the required examinations. Otherwise, if the ratings of the respective applicants are equal, ex-servicemen would be and are entitled to preference.

Respectfully submitted,

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

133. Elections—Applications for Absent Voter's Ballot for Military Personnel May Be Made by Another Person.

CARSON CITY, April 18, 1944.

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

DEAR MR. McEACHIN: This will acknowledge receipt of your letter of April 13, 1944, in which you request an opinion concerning the authority of the clerks of the various counties to send an official absent voter's ballot to an elector who is attached to the armed forces of the United States upon the request of a person other than the elector.

We are of the opinion that the County Clerks of the various counties may send an absent voter's official ballot to any qualified elector of the State of Nevada who is attached to the armed forces of the United States, and who expects to be absent on the day of any general, special, or primary election, whether such application is made in person by mail or telegram, or by another person for such elector. If upon receipt of such application, the clerk shall determine that such elector is entitled to vote at such election, he shall send him an absent voter's ballot.

Chapter 90, Statutes of Nevada 1921, was the original act to provide a method of voting by absent voter's ballot.

Section 3 of this Act provided that application shall be made in person or by mail on a blank to be furnished by the County Clerk. The form of the blank set out in this section required the applicant to state his qualifications as an elector, to the reason for his absence, and the same had to be subscribed and sworn to.

Chapter 209, Statutes of Nevada 1929, amended the Act and specifically repealed section 3.

The Legislature in 1943, chapter 119, Statutes of 1943, amended the Act, and in section 2 directly mentioned electors in the service and extended the time in which to make application. The language deemed relevant read as follows:

* * * or attached to the armed forces of the United States, may, not more than ninety (90) days nor less than three days prior to the date of such election, make application in person by mail or telegram to the county clerk of the county in which his precinct is situated, for an absent voter's ballot to be voted by him at such election.

Section 4 of the Act was amended to permit such elector to make the certificate required on the envelope containing the ballot before a military officer. Such an acknowledgment was made possible by the same Legislature under chapter 145, Statutes of Nevada 1943.

The intention of the legislature to provide a means by which those in the military service could exercise their right to vote is unmistakable.

The mandatory provisions contained in section 3 of the Act were definitely repealed by the 1929 Legislature.

Section 2, as it now stands on our statutes, contains the directory words "may make application." This is a permissive section and cannot be construed as being the only method available by which the elector may secure a ballot.

Corpus Juris 20, Elections, paragraph 201, states the rule in construing statutes regulating the

conduct of elections as follows:

Statutes regulating the conduct of elections should be liberally construed so as to effectuate their object of securing to all citizens possessing the necessary qualifications the right to cast their ballot freely for offices to be filled by election and to have those ballots, when cast in compliance with the law, received and fairly counted. Also no statute regulating the conduct of elections should be so construed as to place arbitrary or unreasonable obstructions in the way of a citizen in the exercise of his right to vote.

The words "appearing before" as used in the election registration law were construed in the Attorney-General's Opinion No. 323, 1940-1942 Biennial Report, wherein it was stated that it would be a manifest distortion of the law to assume from the language of the section that the legislature intended that every such elector living outside the State of Nevada and those in the armed forces of the United States be required to present themselves in person before the registrar for the purpose of registering to vote.

This same section of the registration law was construed in the Attorney-General's Opinion No. 208, 1917-1918 Biennial Report, which held that citizens of Nevada compelled to live outside of the State by reason of their connections with the United States Government were entitled to receive registration cards from the registrar, and when properly filled out and returned must be accepted by the registrar and the applicant registered.

To refuse to extend to a qualified elector in the military service of the United States the privilege of voting an absent voter's ballot because application was made by a friend or a relative, and not upon personal request of the elector, would sacrifice the substance of the legislative Act to a mere matter of form.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

135. Attorneys—Attorney Appointed by Court to Defend Person Charged With Murder Entitled to Receive Additional Compensation in Case on Appeal.

CARSON CITY, April 25, 1944.

HON. JOHN W. BONNER, *District Attorney White Pine County, Ely, Nevada*.

DEAR MR. BONNER: This will acknowledge receipt of your letter dated April 22, 1944, and received in this office April 24, 1944, in which you request an opinion as to the right of an attorney at law, appointed by the court to defend a person charged with murder, to receive the compensation provided by sections 11357 and 11358 N.C.L. 1929, when such attorney follows the case into the Supreme Court.

We are of the opinion that the attorney in such a case is entitled to receive an additional compensation in the sum of one hundred dollars for his services in the case on appeal, such sum to be paid by the Treasurer of the county upon the certificate of the Judge of the District Court that the attorney has performed such services.

The spirit of our law is not only to secure to the accused a full and fair trial in the lower court, but also a full review of his case on appeal.

Section 10338 N.C.L. 1929 provides as follows: "If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being

arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him.”

Section 11357 N.C.L. 1929 provides in part, “An attorney appointed by a court to defend a person * * *.” For a case of murder, one hundred dollars.”

Section 11358 N.C.L. 1929 provides as follows: “An attorney cannot, in such case, be compelled to follow a case to another county or into the Supreme Court, and if he does so, may recover an enlarged compensation, to be graduated on a scale corresponding to the prices allowed.”

The Statutes of Iowa provide that an attorney appointed to defend an indigent defendant in a criminal case is entitled to a fee the amount of which is based on the gravity of the offense, and further provides “* * * that such attorney cannot be compelled to follow the case into another county or into the supreme court, but if he does so, he may recover an enlarged compensation, to be graduated on a scale corresponding to the fee allowed for services in the trial court.”

The decisions in that State are uniform in holding that the attorney is entitled to an additional fee upon appeal. See 100 A.L.R., page 22, and cases cited.

The corresponding statute of Nevada was enacted in 1875, and, before, amendment by Statutes of 1911, page 318, provided in part relevant as follows: “An attorney appointed by a court to defend a person for any offense is entitled to receive from the county treasurer the following fees: For a case of murder, such fee as the court may fix, not to exceed fifty dollars * * *.”

In the case of Washoe County v. Humboldt County, decided in 1879 and reported in [14 Nev. 123](#), the court said, “We are of the opinion that it was the intention of the legislature to provide for the payment of a fee, not exceeding fifty dollars, to every attorney who defends a prisoner charged with crime, under appointment from the court; that an attorney appointed to defend a prisoner charged with any of the offenses specified in section one is entitled to a fee, not exceeding fifty dollars, to every attorney who defends a prisoner charged with crime, under appointment from the court; that an attorney appointed to defend a prisoner charged with any of the offenses specified in section one is entitled to a fee, not exceeding fifty dollars, for defending the case in the county where the prisoner is indicted, and if, after the trial in that county, the cause is transferred to another county, and the attorney thus voluntarily follows the case and defends the prisoner, he would be entitled to an additional compensation, not to exceed the sum of fifty dollars. If the case was thereafter followed to the supreme court, the attorney would be entitled to a further compensation, not to exceed fifty dollars.”

When this Act was amended in 1911 the wording in section one which read “For a case of murder, such fee as the court may fix, not to exceed fifty dollars,” was changed to read “for a case of murder, one hundred dollars,” and then followed the wording “for a case of murder, one hundred dollars,” and then followed the wording, “for a felony or misdemeanor, such fee as the court may fix, not to exceed fifty dollars.”

Section 2 of the Act, now section 11358, remained unchanged.

The Act provides that the attorney so appointed is entitled to receive from the County Treasurer such fee upon certificate of the judge of the court.

This section does not confer authority upon the Supreme Court to audit claims for services of an attorney rendered in the Supreme Court in defending any indigent prisoner.

In the case of Edmonds v. State, reported in 62 N.W. 199, a Nebraska case in which a statute similar to the Nevada statute was construed, the court held, “When the district court appoints

counsel, under section 437 of the Criminal Code, to conduct the defense of an indigent prisoner, the claim of such attorney for services rendered in the case in the trial court and in this court shall be presented to the district court for examination and allowance.

The Supreme Court of Wisconsin decided a similar question in the case of *State v. Wentler*, 45 N.W. 816, holding therein as follows: “* * * that the Supreme Court will not certify for services rendered in prosecuting the case therein, but it is the duty of the trial court to make such certificate upon notice to the district attorney, and due proof of the services rendered.”

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

136. Motor Vehicle Registration Law—Motor Vehicles of Housing Authority Exempt.

CARSON CITY, April 28, 1944.

HON. MALCOLM McEACHIN, *Motor Vehicle Commissioner, Carson City, Nevada*.

DEAR MR. McEACHIN: Reference is hereby made to your letter of April 27, 1944, requesting an opinion of this office as to whether a housing authority created by chapter 20, Statutes of Nevada 1943, is such an authority, bureau, or department of the State of Nevada or some political subdivision thereof which is entitled to exempt motor vehicle registration under section 6 of the Motor Vehicle Registration Law of this State as amended at 1941 Statutes, page 52.

An examination of chapter 20, Statutes of Nevada 1943, discloses that the housing authority provided therein is, in our opinion, a department and commission of a city or town in this State, the governing body of which has appointed such housing authority for the purpose of providing additional housing mainly for defense workers in aid of the government of the United States in time of war. This being the status of such housing authority, when so properly created and brought into existence under the statute, the motor vehicles owned by such authority, and not personally owned motor vehicles, are entitled to exempt registration under the amendment to said section 6 of the law above stated.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

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

137. Newspapers—Qualifications Required to Publish Legal Notices.

CARSON CITY, April 27, 1944.

HON. V. GRAY GUBLER, *District Attorney, Clark County, Las Vegas, Nevada*.

DEAR MR. GUBLER: This will acknowledge receipt of your letter dated April 21, 1944, which arrived in this office April 24, 1944, containing your request for an opinion upon the following question: A newspaper began publication as a weekly newspaper on April 2, 1943. It was published as a weekly newspaper thereafter on Friday of each week up to and including Friday, November 26, 1943, on which date it began publication as a daily newspaper and has since been published daily, 3except Monday of each week, without interruption. If the

newspaper continues to publish as a daily newspaper, when, under our statutes, one year after November 26, 1943, provided the paper shall continue the publication uninterrupted and continuously on each of any five days in every week, excepting legal holidays and including or excluding Sundays, during said period.

Section 4701 N.C.L. 1929, as amended by the Statutes of 1943, page 56, defining the classification of newspapers, provides in part as follows: "Every newspaper printed and published daily, or daily except Sundays and legal holidays, or which shall be printed and published on each of any five days in every week excepting legal holidays and including or excluding Sundays, shall be considered and held to be and to have been a daily newspaper with the meaning of this act * * *."

The condition precedent to qualify as a weekly newspaper is defined in the same section as follows: "* * * and every newspaper printed and published at regular intervals once each week shall be considered and held to be a weekly newspaper within the meaning of this act * * *."

This section defines the meaning of a daily, triweekly, semiweekly, weekly, and semimonthly newspaper and the essential conditions that must be present. There is no provision for any combination of the classes so defined.

Section 3 of the act, being section 4702, 1929 N.C.L., 1941 Supp., as amended by chapter 39, Statutes of Nevada 1943, at page 47, defines the period of publication required to entitle a newspaper to qualify as a medium for the publication of legal notices and advertisements, and reads in part as follows: "any and all legal notices or advertisements shall be published in only in a daily, a triweekly, a semiweekly, a semimonthly, or a weekly newspaper * * * which said newspaper if published * * * or weekly, shall have been so published in such county, continuously and uninterruptedly, during the period of at least one hundred four consecutive weeks next prior to the first issue thereof containing any such notice or advertisement, and which said newspaper, if published daily, shall have been so published in such county, uninterruptedly and continuously, during the period of at least one year next prior to the first issue thereof containing any such notice or advertisement * * *."

The statute is clear and unambiguous and there is no occasion for construction.

The only exceptions to the above provisions are found in the latter part of said section 3, none of which, however, from the facts stated, apply to the newspaper in question.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

138. State Officers—Secretary of State May Charge Travel Expense as Motor Vehicle Commissioner to Motor Vehicle Department.

CARSON CITY, May 2, 1944.

HON. HENRY C. SCHMIDT, *State Controller, Carson City, Nevada*.

DEAR MR. SCHMIDT: Under date of April 24, 1944, you submitted the following question to this office:

May an elected officer in the discharge of his duty as an ex officio pay travel expenses out of a fund passing through his possession even though there is no explicit authority given by the Legislature when an appropriation has been made

to the principal office to cover travel expenses?

On April 25, 1944, you requested and had a conference with met at which time you stated that your question was directed to the following set of facts: The Secretary of State has presented to you for allowance a claim for traveling and subsistence expenses in connection with his trip to Portland, Oregon, and return, to attend a convention of motor vehicle administrators. You ask whether or not this claim should be charged against the legislative appropriation made for traveling expenses under section 4, entitled "The Office of Secretary of State," chapter 194, 1943 Statutes of Nevada, or whether such claim is a proper charge against the Motor Vehicle Fund.

It is the opinion of this office that where it is necessary for the Secretary of State as ex officio Motor Vehicle Commissioner to travel in connection with his duties as such commissioner, he is entitled to reimbursement for his necessary and proper traveling and living expenses directly from the Motor Vehicle Fund, which was created and set up by section 4435.29, 1929 Nevada Compiled Laws, 1941 Supp., (Section 30, chapter 202, 1931 Statutes of Nevada, as amended by chapter 17, 1941 Statutes of Nevada.)

This section of the law, in so far as pertinent to your inquiry, provides as follows:

(a) There is hereby created in the state treasury a fund which shall be known as the "Motor Vehicle Fund." The state treasurer shall deposit all money received by him from the department or otherwise under the provisions of this act in such motor vehicle fund.

(b) There is hereby appropriated out of such fund the sum of fifty cents for each motor vehicle registered by the department, and out of such appropriation the department shall pay each and every item of expense which may be properly charged against the department, including the salaries of the clerks employed in said department * * *.

The Legislature in this same Act named the Secretary of State as the executive officer of the Motor Vehicle Department and delegated to him the authority to adopt administrative rules and regulations. Although the Secretary of State and Motor Vehicle Commissioner is one and the same person, the departments are entirely separate, distinct, and different offices, and the limitation of the appropriation for traveling expenses imposed by the Legislature upon the Secretary of State cannot be extended to control the appropriation made to the Motor Vehicle Fund.

The amount of the appropriation to the Motor Vehicle Fund is determined by the number of vehicles registered and within the limitation of money received from such registrations the Motor Vehicle Commissioner may pay each and every item of expense which may be properly charged against the department.

I believe that the Legislature, by using the words "each and every item of expense" used almost as all-inclusive language as could be devised. Certainly, if it is necessary for the Motor Vehicle Commissioner to travel in the proper performances of his duties, such traveling expenses fall within this broad language.

Since the two offices are separate and distinct, it would be equally improper for the Secretary of State to attend a Secretary of States' convention and attempt to charge the Motor Vehicle Fund for this item of expense.

Whether or not it is necessary nor desirable to place a definite limitation upon the amount which the Motor Vehicle Commissioner can use for traveling expenses, both in and out of the State, is purely question for legislative determination and not for judicial interpretation.

Very truly yours,
ALAN BIBLE, *Attorney-General*.

139. Surveyor General—Reservation of Railroad Rights of Way Across Certain State Lands—Railroad Companies Not Under Obligation to Obtain Title from Patentee.

CARSON CITY, May 4, 1944.

HON. WAYNE McLEOD, *Surveyor General, Carson City, Nevada*.

DEAR MR. McLEOD: You inquire whether the issuance of a land patent by you as State Land Register should contain reservation of railroad rights of way on and across certain State lands acquired by the State of Nevada under “An Act accepting from the United States a grant of two million or more acres of land, in lieu of the sixteenth and a thirty-sixth sections, and relinquishing to the United States all such sixteenth and thirty-sixth sections as have not been sold or disposed by the State,” approved March 8, 1879, known as the two million acre land grant to the State of Nevada. It appearing that a particular area of land upon which a patent is now requested is burdened by the rights of way of the Southern Pacific Company, successor in interest to the Central Pacific Railroad Company, successor in interest to the Central Pacific Railroad Company, and the Western Pacific Railroad Company. You specifically inquire whether, “Shall we plot out the railroad rights of way and charge the applicant for the unencumbered acreage, or shall we insist on payment of the full legal subdivision over which the railroads pass?”

You further inquire, “Is it up to the railroad companies to obtain title from the patentee in the event that you find that the contractor must buy the legal subdivisions in their entirety.”

You further advise that the Western Pacific Railroad Company has a right of way of one hundred feet in width over the land in question and that the Southern Pacific Company has a right of way of four hundred feet in width through the same land.

We will first deal with the right of way acquired and used by the Central Pacific Railroad Company and now used by the Southern Pacific Company over the land in question.

The Central Pacific Railroad Company was granted a right of way under what is known as the Pacific Railroads Act, the same being an Act of Congress, approved July 1, 1862, which said Act is found at 12 U.S. Stats. at L. 489. Pursuant to section 2 of this Act the Central Pacific Railroad Company was granted a right of way over the public lands to the extent of two hundred feet in width on each side of the central line of the main track. This right of way was granted over the public lands across the States of California, Nevada and Utah and, as you know, was so granted prior to the time that Nevada became a State of the Union. The right of way was also granted long prior to the acquisition by the State of Nevada of land under the two million acre land grant and unquestionably was granted over public lands of the United States. Such being the state of the grant under the Act of Congress, it is clearly apparent that such grant was made prior to the acquisition of any of the land in the two million acre land grant thereafter acquired by the State of Nevada. We think that it follows that the State of Nevada, in listing land under the two million acre land grant statute, must necessarily have accepted grants of land so listed burdened with the rights of way theretofore granted to the Central Pacific Railroad Company by Congress.

It was held by the Circuit Court of Appeals of the Ninth Circuit in the City of Reno v. Southern Pacific Company, 268 Fed. 751, as follows:

Act July 1, 1862, held to have granted to the Central Pacific Railroad company of California in present right of way for its road through the Territory of Nevada over all land which was then public land of the United States the title of company to which attached on the definite location of its route as of the date of the act, and any rights acquired by others to the lands under the land laws subsequent to that date held subject to such grant.

It was held in Southern Pacific Company v. Burr, 86 Cal. 279, as follows:

The act of Congress of July 1, 1862, granting to the Central Pacific Railroad Company a right of way two hundred feet in width on each side of its road, did not grant a mere easement for the construction and operation of its road, but operated as a special grant of land, and is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and gave to the grantee the exclusive right to the possession of all the land embraced in the grant of such right of way; and the railroad company may maintain an action of ejectment to recover possession of the whole of the four hundred feet so granted, although only occupying a small portion thereof for its road-bed.

In the case of Union Pacific Railroad Company v. Davenport, 170 Pac. 993, it was held that:

The Union Pacific Railroad Company by the grant to its predecessors in interest under the act of Congress of July 1, 1862, c. 120 (12 Stat. 489, c. 120), and the amendatory act of July 2, 1864 (13 Stat. 356, c. 216), became the owner in fee of a right of way 200 feet from the center of the track, which right is superior to claims initiated after the act of 1864, and is not defeated by adverse possession. The grant is of the land itself, and not a mere right of passage over it.

In this latter case the Supreme Court of Kansas reviewed the cases decided by the Supreme Court of the United States upon the status of the rights of way granted by the Pacific Railroads Act and also the Act of Congress of similar import granting rights of way to the Northern Pacific Railway Company and quoted from the case of Missouri, Kansas & Texas Railway v. Roberts, 152 U.S. 114, as follows:

That is, the land itself—not a right of passage over it. So this court, in Missouri, Kansas & Texas Railway vs. Roberts, 152 U.S. 114 (14 Sup. Ct. 496, 38 L. Ed. 377), passing on a grant to one of the branches of the Union Pacific Railway Company of a right of way 200 feet wide, decided that it conveyed the fee.

The Kansas Supreme Court went on to point out as follows:

The act of Congress cannot be given the same construction as a warranty deed conveying a strip of land to a railroad company for right of way * * * nor by the rules of construction applied by state courts to condemnation proceedings under statutes of a state or to grants for railway purposes by a state.

Advertising to the Missouri, Kansas & Texas Railway v. Roberts, 152 U.S. 114, as above cited, we find that the Supreme Court of the United States said:

A tract of public land lawfully appropriated to any purpose becomes thereafter severed from the mass of public land, and no subsequent law or proclamation will

be construed to embrace or operate upon it, although no exception be made of it.

Thus the Supreme Court of the United States has driven its stakes upon the proposition that the grant of land for right-of-way purposes to the Central Pacific Railroad and kindred railroads under the Act was a grant of the land itself and not a mere right to use the land for railroad purposes. Such is the effect of *Union Pacific Railway Company v. Laramie Stockyards Company*, 231 U.S. 190, and *Union Pacific Railway Company v. Snow*, 231 U.S. 204.

It was held in the case of *Kindred v. Union Pacific Railway Company*, 168 Fed. 648, a case dealing with the same Pacific Railroads Act that “no part of the right of way granted by Congress to a railroad company over public lands can be alienated without the consent of Congress, nor lost by laches or acquisition, and private persons encroaching thereon can acquire no right by lapse of time.” This decision of the United States Circuit Court of Appeals of the Eighth Circuit was affirmed by the United States Supreme Court in 225 U.S. 582.

We think it is absolutely clear from the foregoing cases that the Central Pacific Railroad Company not only acquired a right of way over the land in question, as no doubt the Central Pacific Railroad company constructed its line of railroad over the land in question in the year 1868 or early in 1869 at the latest, but that it also acquired the land comprising the right of way itself and that it had title thereto and that the State of Nevada never acquired the title to such land nor the right to dispose thereof. It, therefore, necessarily follows that in the granting of a patent by the State Land Register that the area of land comprising the right of way now used by the Southern Pacific Company must be excluded from the acreage of the land sought to be purchased and patented by the contractor therefor. If, at some future time, which is very problematical, the Southern Pacific or its predecessor in interest, the Central Pacific Railroad Company, should abandon the use of such right of way and remove its railroad track therefrom, then the question of whether such land would revert to the United States, to the State of Nevada, or to the purchaser of the land or his or her heirs and/or assigns would certainly be a question for the courts. But, at the present time, the State has no right to sell or dispose of any lands within the limits of such right of way and/or to grant a patent therefor.

The situation and conditions surrounding the right of way across the land in question of the Western Pacific Railroad Company presents a somewhat different question. The Western Pacific undoubtedly acquired its right of way over the land belonging to the State of Nevada and which land was acquired under the two million acre land grant long after such land was listed and accepted by the State. We think that the Western Pacific Railroad was construed over the land sometime in the year 1908 or 1909, but, in any event, long after the land became the property of the State of Nevada.

The right of way acquired by the Western Pacific Railroad Company was undoubtedly acquired under section 6255 N.C.L. 1929. This section of the State law provided for a grant for right-of-way purposes to railroads of one hundred feet in width, save and except where additional land was required for stations and such like. Such section of the law contains a reversion clause to the effect that if, at any time, after the location of the railroad over land acquired under such section, such railroad shall be discontinued or abandoned by said company or the location of any part thereof be so changed as not to cover lands of the State thus previously occupied, then the land so abandoned or left shall revert to this State.

An examination of the general law on the question, we think, discloses that the Western Pacific Railroad Company was only granted an easement over the land in question and that in the event it should abandon the use of such right of way for railroad purposes that the easement

would cause a reversion to the State and, in such a case, if the State had theretofore disposed of adjoining land and land on the other side of such right of way, then the reversion would be to the owner of such land. While the statute provides for a reversion in the case of abandonment by a railroad, as stated above, still, we think the general law, sustained by the weight of authority, sustains the proposition that in the event such land had been disposed of by the State prior to the abandonment by the railroad company the reversion of such easement and the land covered by such easement would be to the owners of the land so purchased from the State.

We find no provision in the law of this State whereby the State Land Register may actually except such railroad rights of way from the land contract entered into by the contractor of the State land nor in the placing of an exception concerning such right of way in the patent granted such contractor. It is true that the railroad company would have the absolute right of use of the strip of land one hundred feet in width over the land in question so granted under section 6255 N.C.L. 1929, and that such use cannot be interfered with by any private person, or even by the State, still, the right granted being an easement subject to reversion, we are of the opinion that the patent granted the contractor to the land in question here should contain a provision showing beyond question the right of way of the Western Pacific Railroad Company and the right of such company to use such right of way to the exclusion of all other parties, but with the right of reversion in the case of abandonment, and that to protect the contractor's right to have the easement reverted to him in the event of abandonment he should pay to the State the requisite price for the acreage contained in such easement. Such being our opinion upon this phase of the question, we hold that the patent should refer to the easement of the Western Pacific Railroad Company but require the purchase price to be paid by the contractor for the acreage contained in the right of way granted the Western Pacific Railroad Company.

In all probability the Western Pacific Railroad may never abandon its right of way over the land in question. It is somewhat inequitable to require the contractor to pay for something which he may never be able to use. It is a matter that should receive the attention of the Legislature and a statute enacted whereby the State Land Register would have the right to except such rights of way from the contract of purchase and also from the patent granted thereafter. Such statute should contain a provision, however, that in the event of the abandonment of such right of way by a railroad company that the owners of the land adjacent thereto and over which the easement appertinent should have the first right to purchase such land from the State upon the abandonment thereof by the railroad company.

From the foregoing it is apparent that the railroad companies in question are not under any obligation to obtain title from the patentee in any event.

Respectfully submitted,

ALAN BIBLE, *Attorney-General*.

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

140. Old-Age Assistance—Wife May Dispose of Her Separate Property—State of Nevada Has No Claim Against Property Under Section 12 of Old-Age Assistance Law.

CARSON CITY, May 10, 1944.

MISS HERMINE GIROUX, *Supervisor, Division of Old-Age Assistance, P.O. Box*

1331, Reno, Nevada.

DEAR MISS GIROUX: This will acknowledge receipt of your letter dated May 6, 1944, received in this office May 8, 1944, in which you request our advice as to the application of the provisions of section 12 of the Old-Age Assistance Act (section 5154.12, 1929 Nevada Compiled Laws, 1941 Supp.) under the facts stated below:

A husband has been receiving payments under the Old-Age Assistance law since July 1943. He is living with his wife in a home which is assessed to her and which was acquired by her through a will from her sister-in-law some eight years previously, but during the time of her marriage to her present husband. It is not so stated, but we are assuming that for the purposes of this inquiry that the wife is not an old-age pensioner. The wife wishes to will the property to her children by a former marriage.

Upon this set of facts you ask the following two questions:

1. May the wife dispose of the property by will?
2. Would the State of Nevada have a claim against the property under section 12 of the Old-Age Assistance Law in the event of the death of the husband?

We are of the opinion that the property is the separate property of the wife, and that she may dispose of it by will or in any other manner that she may desire. In the event of the death of the husband the State would have no claim against this property as long as it remained the separate property of the wife.

Section 3355 Nevada Compiled Laws 1929 defines "separate property" as follows:

All property of the wife, owned by her before marriage, and that acquired by her afterwards by gift, bequest, devise or descent, with the rents, issue, and profits thereof, is her separate property; * * *.

Section 3363 Nevada Compiled Laws 1929 provides as follows:

The wife may, without the consent of her husband, convey, charge, encumber, or otherwise in any manner dispose of her separate property.

Section 12 of the Old-Age Assistance Act noted above provides that upon the death of any recipient the total amount of assistance shall be allowed as a claim against the estate of such person after payment of funeral expenses, expenses of last illness, and administration expenses.

It appearing from the set of facts that the home in question is the separate property of the wife and is subject to her disposition, she may legally will the same to her children and such property would not constitute a part of the estate of the deceased husband.

Very truly yours,

ALAN BIBLE, *Attorney-General.*

141. Grazing Board—Procedure Required to Enable Board to Acquire Site for Warehouse and Storage Yard To Be Used by United States Grazing Service.

CARSON CITY, May 16, 1944.

MR. J.B. DANBERG, *Secretary, Virginia City District State Grazing Board,*
Minden, Nevada.

DEAR MR. DANBERG: This will acknowledge receipt of your letter of May 11, 1944, directed to this office by William F. Taber, State Board Clerk, in which you request our opinion

as to the procedure required to enable your State Grazing Board to acquire from the city of Yerington a site for warehouse and storage yard for use by the United States Grazing Service. You submit a form of resolution which, as you state in your letter, does not specifically authorize the purchase of land and you suggest that another resolution covering this subject matter may be required.

We are of the opinion that another resolution should be drawn and adopted setting forth the disbursement, upon order of the State board, from the Range Improvement Fund of the Virginia City Grazing District of the sum of money necessary to pay the purchase price of the land described in the resolution, the purpose for which the land is to be used and directing the conveyance of the land to be made to the Secretary of the Interior on behalf of the United States.

We suggest that the conveyance be made in this manner since the Taylor Grazing Act, Title 43, paragraph 315 i, of the United States Code Annotated, provides that the Secretary of the Interior is authorized to accept as a gift, on behalf of the United States, any lands within the exterior boundaries of a grazing district when such action will promote the purposes of the district or facilitate its administration. The particular phraseology might well be discussed with Federal representatives.

Section 5581.16, 1929 N.C.L., 1941 Supp., creates the State boards for the established grazing districts, making it the duty of the State boards to direct and guide the disposition of the range improvement fund of its district.

The decisions of such board are recorded in the form of resolutions properly adopted and certified to as such by the chairman and secretary of such board. The certificate shall show that a quorum of such board was present and that at least a majority of the members voted in favor of such resolution.

The decisions of such board are recorded in the form of resolutions properly adopted and certified to as such by the chairman and secretary of such board. The certificate shall show that a quorum of such board was present and that at least a majority of the members voted in favor of such resolution.

Section 5581.17, 1929 N.C.L., 1941 Supp., authorizes the uses of the funds for the construction and maintenance of range improvements or any other purpose beneficial to the stock raising and ranching industries; providing that the funds may not be so disposed of unless some legally constituted and authorized Federal or State governmental department, division, bureau, service, board or commission is available for and authorized and willing to undertake direct management and supervision of the project concerned.

Section 5581.19, 1929 N.C.L., 1941 Supp., provides for cooperative agreements to be entered into on the part of the State Grazing boards and the Federal officials in charge of the grazing districts concerned, or with the governmental department having jurisdiction over the kind of project concerned.

Very truly yours,
ALAN BIBLE, *Attorney-General*.

142. Constitutional Law—Christian Science Reader is Minister of the Gospel, So As To Entitle Him to Perform Divine Services at State Prison.

CARSON CITY, May 31, 1944.

HON. HENRY C. SCHMIDT, *State Controller, Carson City, Nevada.*

DEAR MR. SCHMIDT: This will acknowledge receipt of your recent inquiry concerning the legality of a claim presented by a Reader of the Christian Science Church who had been authorized by the Board of Prison Commissioners to conduct religious services at the State Prison.

It is the opinion of this office that such claim is a legal claim and that the Board of Prison Commissioners was correct in holding that Christian Science Readers, when conducting divine services, are ministers of the gospel within the meaning of the Nevada Constitution and statutes.

The pertinent section of the Nevada law reads as follows:

It shall be the duty of the commissioners to provide for the holding of *divine service* in the state prison on each Sabbath day, and for that purpose may secure the services of one or more *ministers of the gospel*; * * * expense * * *. They shall also furnish each convict with a copy of the Bible, and such other books and papers as may be deemed for the well being of the prisoners. (Section 11465 Nevada Compiled Laws 1929.)

Although there are many definitions of the word “minister” and the words “minister of the gospel,” we believe the definition found in *Kidder v. French*, New Hampshire, Smith 155-156, is ample to support our finding. The court here defined “minister” or “minister of the gospel” by saying that it “is a comprehensive term, and of uncertain significance—ministers are spoken of as publish teachers of piety, religion, and morality.” We are advised that the first and Second Readers of the First Church of Christ Scientist must have certain qualifications and must be regularly elected, and we believe that when such Reader is engaged in the performance of his religion duties he is a public teacher of piety, religion, and morality.

The forefathers of our State went to great length to perfect, preserve, and maintain religious freedom. They saw fit to write into section 4 of article I of our Constitution the following provision:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall forever be allowed in this state; * * *.

The Board of Prison Commissioners in the problem before us has clearly carried out this constitutional mandate by allowing the free exercise of religious profession and worship without discrimination or preference.

This opinion is in full accord with a former opinion of this office, B-81, 1940-1942 Biennium, in which the then Attorney-General, Hon. Gray Mashburn, a member of the Board of Prison Commissioners, authorized the selection of a Reader of the Christian Science Church and held that such Reader was, in his opinion, a minister of the gospel.

In preparing this opinion we have likewise had the benefit of a very full and able brief submitted by F.F. Curler on behalf of the Christian Science Church. We believe that he has correctly sustained the position that a Christian Science Reader is a minister of the gospel.

Very truly yours,

ALAN BIBLE, *Attorney-General.*

143. State Highway Department—Road Funds May Not Be Used to Finance, Acquire, Construct, and Maintain Highways or Rights of Way Unless Extensions of Federal Aid System or State Highway System.

CARSON CITY, June 2, 1944.

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

Attention: H.D. Mills, Assistant State Highway Engineer.

DEAR MR. ALLEN: This will acknowledge receipt of your recent letter in which you submit to this office the following questions contained in an inquiry from the Public Roads Administration as to the legal authority of the State to expend road funds to finance, acquire lands in the name of the State, construct and maintain:

1. Urban extensions of the Federal-aid system;
2. Urban extensions of the State Highway systems, including feeder road system;
3. Urban highways other than extensions of the Federal-aid and State Highway systems; and
4. To acquire rights of way, finance construction and maintenance, and operate off-street parking facilities in cities.

We are of the opinion that the answers to questions Nos. 1 and 2 are in the affirmative.

The Legislature in 1917 adopted the general highway law which created a department of highways and authorized such department to adopt such rules and bylaws, not inconsistent with the Act, as may be necessary to govern its acts and proceedings.

Section 8 of the Act, as amended, being section 5327, 1929 N.C.L., 1941 Supp., provides, in part, as follows:

The highways which are constructed or improved by the department of highways in accordance with the routes set forth and described in this section shall be state highways and shall be constructed or improved and maintained by the department of highways; provided, that the funds available to the state through the act of Congress or other federal acts may be used therefor; * * *. Such state highways are hereby designated and are set forth and described as follows * * *.

Then follows a description of the various routes, a number of which are designated through towns and incorporated cities.

Section 12 of the Act as amended under section 5335 Nevada Compiled Laws 1929, provides as follows:

All work of construction and improvement of the state highways as defined and established under the provisions of this act shall be under the supervision and direction of the state highway engineer and shall be performed in accordance with the plans, specifications, and contracts prepared and executed by him therefor.

Section 21 of the Act, as amended, being section 5344 Nevada Compiled Laws 1929 authorizes the department to acquire rights of way, providing, in part as follows:

In all cases of a highway constructed under the provisions of this act which is located or relocated over a new right of way, such right of way shall be acquired by the department of highways in the name of the state, either by donation by the owners * * * or through the exercise by the department of highways in the name of and on behalf of the state of the power of eminent domain in the same manner as provided for acquiring property for other public uses, * * *.

Once a route is set forth, described, and designated a State highway every provision in the

Highway Act becomes operative.

As stated in 25 Am. Jur., page 545, "Subject to constitutional limitations, the state has absolute control of the highways, including streets, within its borders, even though the fee is in the municipality." Citing numerous cases.

As stated in *Hardman v. Cabot*, 55 S.E. 756, a West Virginia case, "With respect to the rights of the public in highways, held under valid dedications and acceptances, and the power of the legislature over the same, there is no distinction between the streets of incorporated cities and towns and county roads."

Among the cases cited to support the rule stated above is that of *State ex rel. Reno v. Reno Traction Co.*, 41 Nev. P. 413, in which the court said: "It is established by almost universal acceptance that the state, acting through its legislature, may exercise complete control and dominance over the streets, avenues, and alleyways of towns, cities, and municipal corporations."

The answers to questions Nos. 3 and 4 must be in the negative.

The Legislature has not seen fit to exercise its control over streets within urban boundaries beyond those included in designated highway routes. The highway department would therefore have no authority over urban highways other than extensions of the Federal aid and State Highway Systems, nor authority to acquire rights of way, finance construction and maintenance, and operate off-street parking facilities in cities.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

144. Wills—Nuncupative Will Under Section 9909 N.C.L. 1929 Valid to Extent of \$1,000.

CARSON CITY, June 13, 1944.

MR. W.C. McCLUSKEY, *Attorney at Law*, 118 West Second Street, Suite 11-12, Reno, Nevada.

DEAR MR. McCLUSKEY: This will reply to your letter received June 8, 1944, relative to the probate of an estate under a nuncupative will wherein the inventory in the estate discloses assets in excess of one thousand dollars.

As stated in your letter, the will was admitted to probate under the assumption that the estate did not exceed one thousand dollars, but subsequently it was discovered that decedent left an insurance policy in the sum of about seven hundred dollars additional.

You state that decedent in her will left her property to a friend and that no next of kin nor heirs at law have been discovered. The question is does the will, under section 9909 N.C.L. 1929, fail and the entire estate escheat to the State or does the will have the effect of passing property to the value of one thousand dollars, but not in excess of that sum. Since the State is involved and interested in the question of a possible escheat, we are glad to give you our opinion.

We are of the opinion that the will passes property to the value of one thousand dollars and the balance of the estate would be distributable as intestate property and, if no heirs, would escheat to the State.

Section 9909 N.C.L. 1929, quoting that part deemed relevant, provides:

No nuncupative or verbal will shall be good where the estate bequeathed exceeds the value of one thousand dollars, * * *.

The remaining part of the section defines that which is required to make a valid nuncupative

will.

The will in question, having been admitted to probate, is presumed to be valid. Does section 9909 N.C.L. 1929 then become operative and set the entire will aside or does it limit the amount of the estate that will pass under the will? The statutes provide for a nuncupative will and a method whereby such will must be offered for probate. The value of the estate and the residue of the estate is determined by the probate proceedings. Under the statute the testatrix was authorized to make the will and section 9909 should be construed as a limitation and not a restriction.

In the case of *Brown v. United States*, 65 Fed. (2) 65, this same question was determined by the court. Under the statement of facts a soldier by nuncupative will left to a friend of all his property and money which was of a value not in excess of one hundred dollars. There were no heirs or next of kin. The will was admitted to probate and a claim for the ten thousand dollar war risk insurance was made. The Veterans' Bureau refused to pay the claim and suit was instituted by the executor. Judgment in the lower court was rendered for the United States upon the ground that the court had no jurisdiction in the matter of the probate for the reason that the will under the statute of California was invalid.

The California statute quoted in the opinion reads: "To make a nuncupative will valid, and to entitle it to be admitted to probate, * * * the estate bequeathed must not exceed in value the sum of one thousand dollars."

In the Federal court the judgment in the lower court was reversed, holding that the upper court was concluded from considering whether or not the California court erred in admitting to probate the will bequeathing the entire estate amounting to over ten thousand dollars and stated, "But, while the probate is conclusive that the will is valid, we must now determine how much passed thereby to the legatees. * * * We hold that it disposed of the statutory maximum of \$1,000. The balance of the estate would be distributed as intestate property."

The court, quoting from the case of *Mulligan v. Leonard*, 46 Iowa 692, said, "The law is careful to carry out the intention of a testator when ascertained. If there be restrictions imposed by statute or otherwise, whereby the intention is partly defeated, the whole will is not to be set aside, but shall be enforced so far as it is not inconsistent with the law. The intention so far as established must prevail."

There were no heirs at law of the testator in the case before the court and any property not effectually bequeathed by the will would escheat.

Under the Federal statute the United States is not obligated to pay any insurance when the same would escheat.

In reversing the judgment of the lower court, the Federal court held, "But before distribution, administrative expenses and claims allowed against the estate must be paid. The balance only would escheat. The obligation of the government, therefore, is measured by the \$1,000 for the legacy plus the sum required for the claims allowed and the administrative costs, less the value of any other property in the estate."

We believe that the reasoning and decision in this case is sound, and adequately presents our views.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

145. County Hospitals—Authority of Trustees to Receive Reimbursement for Traveling Expenses—Advertising for Bids to Secure Services of Architect Not Necessary.

CARSON CITY, June 17, 1944.

HON. MELVIN E. JEPSON, *District Attorney, Washoe County, Reno, Nevada.*

DEAR MR. JEPSON: This will acknowledge receipt of your letter dated June 10, 1944, and received in this office June 12, 1944, in which you request our opinion on the following questions:

1. Do members of the board of hospital trustees of a county public hospital established under the provisions of section 2225, 1929 N.C.L., 1941 Supp., come under the provisions of section 2207, 1929 N.C.L. 1941 Supp., relating to per diem and traveling expenses of county and township officers?

2. Authority of the hospital trustees to receive reimbursement for traveling expenses incurred in a trip to Carson City for the purpose of securing a legal opinion from the Attorney-General.

3. Is it necessary under the statutes for hospital trustees to advertise for bids in order to secure the services of an architect to prepare plans and specifications for hospital buildings when the amount involved is over \$500?

In answer to your first question, we are of the opinion that the board of hospital trustees are not governed by the provisions of section 2207, 1929 N.C.L., 1941 Supp. but come under the specific provisions of section 3 of the Hospital Act, the same being section 2227 N.C.L. 1929, such expenses to be paid out of the hospital fund as in that section provided.

Answering question No. 2, we are of the opinion that the expenses incurred by the trustees traveling to Carson City for the purpose mentioned are not within the provisions of section 2227 N.C.L. 1929, for the reason that the District Attorney of the county, and not the Attorney-general, is by statute the legal adviser of the trustees. The trustees were so informed at the time of their visit, and hence it would appear that expenses incurred for the trip to Carson City are not a proper legal charge.

Our answer to question No. 3 is that the hospital trustees do not have to advertise for bids to secure the services of an architect for the purpose specified.

TRAVELING EXPENSES

The Legislature on March 22, 1913, section 2206 N.C.L. 1929 approved an Act requiring that any county or township officer presenting a claim to the county for traveling or other expenses allowed by law should attach vouchers to his claim and the county commissioners were prohibited from allowing a greater sum for a private conveyance than that usually charged by public carriers. If the service was rendered by automobile the amount allowed was to be determined by the commissioners, but in no case to exceed the sum of fifty cents per mile one way. Automobile service was to be used only in case of emergency or with consent of the commissioners.

This Act was superseded by a new Act, chapter 16, 1928, section 2207 N.C.L. 1929, providing when any county or township officer, or any employee of the county, shall be entitled to receive his necessary traveling expenses and actual living expenses, his living expenses not to

exceed six dollars per day and traveling expenses when by private conveyance not to exceed the amount charged by public conveyance, providing, if the County Commissioners were satisfied that private conveyance was more economical or convenient, the board is authorized to allow an amount not in excess of fifteen cents per mile traveled.

On March 27, 1929, the Legislature approved an Act to enable counties to establish and maintain public hospitals. Section 3 of the Act (section 2227 N.C.L. 1929) provides for the organization of the Board of Trustees and designates the County Treasurer as the Treasurer for the Board of Trustees. This section further provides as follows:

No trustee shall receive any compensation for his services performed, but he may receive reimbursement for any cash expenditures actually made for personal expenses incurred as such trustee, and an itemized statement of all such expenses, and money paid out, shall be made under oath by each of such trustees and filed with the secretary, and allowed only by an affirmative vote of all trustees present at a meeting of the board.

This Act was passed one year later than chapter 16, 1928, and section 3 has never been amended.

Section 4 of the original Act (section 2228 N.C.L. 1929), quoting that part deemed relevant provides:

They (trustees) shall have exclusive control of the expenditures of all moneys collected to the credit of the hospital fund * * * *provided*, that all moneys received for such hospital shall be deposited in the treasury of the county in which such hospital is situated to the credit of the hospital fund, and paid out only upon warrants drawn by the board of hospital trustees of said county or counties upon properly authenticated vouchers of the hospital board, after approval of the same by the county auditor.

This section was amended in 1937 and again in 1943 (chap. 19, page 17), but there was no change made in that part above quoted.

Chapter 16, 1928 statutes, fixing travel allowances was amended in 1939, section 2207, 1929, which was a general Act indicated the purpose of the Legislature to limit the expenses of county officers entitled to receive the same when transacting public business. Such expenses are to be allowed by the County Commissioners when claims are properly presented. The amount allowed for living expenses and travel is fixed in a certain amount and is in addition to regular compensation. The amendments to the Act did not extend its scope, but merely changed the amount of the allowance.

One year after the adoption of the general Act of 1928 providing for travel expenses the Legislature passed the new County Hospital Act and repealed the old Act of 1923. Section 3 of the old Act (section 2227 N.C.L. 1929) was incorporated in the new Act which indicated the purpose of the Legislature to make special provision to reimburse the trustees of the hospital, who serve without compensation, for any cash expenditure actually made for personal expenses incurred as such trustee, and designated the method by which sum reimbursements were to be made out of the hospital fund.

A principle of law recognized by our Supreme Court is stated in *Clover Valley Co. v. Lamb*, [43 Nev. 383](#), "The Legislature is presumed to have a knowledge of the stat of the law upon the subject upon which it legislates."

It is evident that the general Act allowing expenses to county officers, passed one year before,

was not deemed applicable to the hospital trustees or the legislature would have referred to such expenditures as by law allowed. Any change in this legislative policy must, of course, be submitted directly to the Legislature itself.

As stated in *Quilici v. Strosnider*, [34 Nev. 21](#), “* * * where a special act has been passed in reference to a matter affecting only a portion of the people it would be presumed to valid unless facts showing beyond any reasonable doubt that a general law is applicable * * * and if a special Act be passed for a particular case, the presumption of the applicability of the general law is overcome by the presumption in favor of the special Act that the general Act was not applicable in that case.”

There is no indication in the amendments to the 1928 Act, fixing generally the expense allowances to county officers, to repeal the provisions in section 3 (section 2227 N.C.L. 1929) of the Hospital Act.

In 50 Am. Jur., page 567, under the title repeal of specific Acts by general or broad statutes, it is stated: “Unless there is a plain Act, the special Act will continue to have effect, and the general words with which it conflicts will be restrained and modified accordingly, so that the two are deemed to stand together, one as the general law of the land, and the other as the law of the particular case.”

ADVERTISING FOR BIDS

Section 228, 1929, N.C.L., 1941 Supp., amended by chapter 19, 1943 Statutes of Nevada, page 17, defines the powers and duties of the hospital trustees, reading in part as follows:

They shall have the exclusive control of the expenditure of all moneys collected to the credit of the hospital fund, and of the purchase of the site or sites, the purchase or construction of any hospital building or buildings, and of the supervision, care and custody of the grounds, rooms, or buildings purchased, constructed, leased, or set apart for that purpose.

Under the authority granted to construct any hospital building it will naturally follow that the trustees may employ an architect to prepare plans and specifications for such construction before advertising for bids on the project.

The general rule for the letting of such contracts is stated in 43 Am. Jur., page 770, as follows: “As a general rule, statutory constitutional provisions prohibiting letting of contracts by a State or by municipal subdivisions, without first advertising for bids, do not apply to contracts for professional services * * * or contracts requiring special training and skill, such as contracts calling for the services of architects * * *.”

In the case of *City of Houston v. Glover*, 89 S.W. 425, cited with approval in *Lockett v. Middleton*, 280 S.W. 565, *Glover* was an architect employed by the city of Houston to prepare plans and specifications for a city hall and market house, but at the time of employment no special provision was made to pay for his services. It was held that “The employment of an architect and others of special technical learning by authorities of a municipality is not controlled by statutes requiring bids in writing for services or work to be done, and the payment of such services so performed by an architect or others of special technical learning may be made out of the current revenues of a city.”

As held in the case of *Louisiana v. McIlhenny*, 9 So.(2), page 471, citing *Miller v. Boyle*, a California case in 184 P.421, “An architect is an artist. His work requires taste, skill, and technical learning of a high and rare kind. Advertising might bring many bids, but it is beyond peradventure that the lowest bidder would be the least capable and most inexperienced and

absolutely unacceptable. As well advertise for a lawyer or civil engineer for the city and intrust its vast affairs and important interests to the one who would work for the least money.”

And again, quoting from *Krolinberg v. Pass*, a Minn. case in 244 N.W. 329, as follows: “It was not the intention of the statute that for such services there should be a public advertising for bids and a letting of the contract of employment to the lowest responsible bidder, as is the requirement for the letting of a contract for work or labor, or for the purchase of furniture, fixtures or other property, or the construction of a building.”

In addition to the foregoing it appears that section 1963 N.C.L. 1929, governing the letting of contracts, applies only to Boards of County Commissioners.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

146. State Police—Accidental Killing of Cattle on Highways Private Matter Between Parties—No Statute Making Killing a Crime.

CARSON CITY, June 19, 1944.

HON. LESTER MOODY, *Superintendent, Nevada State Police, Carson City, Nevada.*

Attention: Ward Swain.

DEAR MR. MOODY: The recent letter from Mr. Swain addressed to Miss Hobson, Clerk for the Nevada State Police, was referred to this office for answer.

You request information relative to the duty of the State Police toward securing a prosecution for the killing of cattle running at large on the highways by the drivers of transportation companies' trucks.

Basing our conclusion upon the assumption that such killing is accidental, we find no statute that makes such killing a crime.

Sections 4024-4027 Nevada Compiled Laws 1929 provide that it shall be unlawful for owners of livestock to permit stock to run at large upon the highways of certain counties when such highways are enclosed on one or both sides by a fence, and fixes a penalty for the violation thereof.

Section 4361 Nevada Compiled Laws 1929 provides that the driver of a motor vehicle shall proceed in a cautious manner on meeting a flock of sheep or herd of cattle being lawfully driven on the highway.

These are the only sections relating to livestock on the highways outside of cities and towns.

It appears, therefore, that the accidental killing of cattle on the highways is a private matter between the parties involved.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

147. Cannot Determine in Advance Effect of Deleterious Substance in Water.

CARSON CITY, June 20, 1944.

DR. EDWARD E. HAMER, *State Health Officer, Carson City, Nevada.*

Attention: Silvo Mastroianni.

DEAR DR. HAMER: This reply is in reference to our recent conference with you concerning the question presented to your department as to the application of section 10552 Nevada Compiled Laws 1929, in a circumstances where a business for the dehydration of onions would result in the discharge of onion water into the Truckee River.

Although we are of the opinion that a violation of section 10552 must of necessity be submitted to the District Attorney of Washoe County and that your department could not determine in advance as to the possible violation of this law, nevertheless we believe that your advice in pointing out that a probable nuisance might be created is correct.

As you suggested, the onion water might flavor the milk from dairy cattle in such a way as to affect public health. We are not advised, and do not have sufficient facts before us, to determine whether or not the proposed flow of onion water into a body of water as large as the Truckee and with the volume of the Truckee at the proposed place of discharge would result in creating a deleterious substance. This discharge would result in creating a deleterious substance. This would depend upon a complete examination, as to the result of which we cannot conjecture.

In our opinion neither your department nor yourself can guarantee that such business, when operating, would not violate the statute in question. Even if you were able to make this guarantee, you could not assure the prospective operator that it would be free from civil actions by persons claiming injury.

Very truly yours,

ALAN BIBLE, *Attorney-General.*

By GEORGE P. ANNAND, *Deputy Attorney-General.*

148. Old-Age Assistance—Claims Against Estate—Mortgaging of Real Property Belonging to Pensioner—Separate Property Subject to Claim.

CARSON CITY, June 27, 1944.

MRS. HERMINE FRANKE, *Supervisor, Division of Old-Age Assistance, Nevada State Welfare Department, P.O. Box 1331, Reno, Nevada.*

DEAR MRS. FRANKE: This will acknowledge receipt of your letter dated June 20, 1944, received in this office June 22, 1944, in which your request our opinion upon a subject which may be embraced in the following questions:

1. Do the provisions of section 12, chapter 67, Statutes of Nevada 1937, the "Old-Age Assistance Act," apply to the recovery of assistance paid to a recipient who has at any time received such assistance, but was not receiving it at time of death, and would the existence of legal heirs have any effect to modify the operation of the section?

2. May the recipient of old-age assistance mortgage real property belonging to him without violating the provisions of section 19 of the Act?

3. Would the separate real property of the recipient, which property is apart from his home, and produces a rental income, be subject to the claim of recovery under section 12, although his wife be alive at the death of recipient?

Our opinion is, in answer to your first question, that the total of the amounts paid to a recipient at any time, whether or not the recipient was actively listed as receiving t the time of his

death, are under the statute a claim against the estate.

The existence of heirs at law or legatees would not modify the provisions of section 12, as the "assets of the estate" would be chargeable with the debt claim before distribution of the estate.

Section 12 of the Act, being section 5154.12, 1941 Supplement to Nevada Compiled Laws 1929, provides as follows: "On the death of any recipient, the total amount of assistance paid under this act shall be allowed a claim against the estate of such person after funeral expenses, the expenses of last illness and the expense of administering the estate have been paid. No claim shall be enforced against any real estate of a recipient while it is occupied by the surviving spouse or dependent."

The language is plain and means that all of the money paid at any time to recipient should be included and allowed as a claim.

Section 9882.230, 1941 Supplement to Nevada Compiled Laws 1929, provides, in part, as follows: "When the whole of the debts and liabilities of an estate have been paid, the court shall proceed to direct the payment of legacies and the distribution of the estate among those entitled, * * *."

The answer to your second question depends upon the facts in each case, and is within the discretion of the county boards and the State department.

The purpose of the Act as expressed in section 12 is to reimburse the Old-Age Assistance Fund from the assets of the estate of a deceased recipient when possible.

Section 19, being section 5154.19, 1941 Supplement to Nevada Compiled Laws 1929, was enacted to secure this purpose as indicated in the following language: * * * "or whoever aids or abets in buying or in any way disposing of the property, either personal or real of a recipient of assistance without the consent of the county board, and with intent to defeat the purpose of this act, shall be guilty of a misdemeanor, * * *."

A mortgage could be a means of disposing of property as the property would be lost to the recipient upon his failure to pay off the mortgage.

The Act does not contemplate the payment of interest on loans made by the recipient, or provide for the security of relations of the recipient. This is beyond the scope of the Act which extends only "to provide such person with a reasonable subsistence, compatible with decency and his or her needs and health."

We are of the opinion that the answer to your third question should be in the affirmative.

Section 12 of the Act exempts only the real estate of the recipient while the same is occupied by the surviving spouse or dependent of the deceased recipient.

This is the only exception enumerated and is an exclusion of all cases not mentioned, which is a rule adopted in the construction of statutes by our Supreme Court in the case of *Ex parte Arascada*, [44 Nev. 30](#).

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

149. Counties—Resignation of County Treasurer.

CARSON CITY, July 3, 1944.

HON. V. GRAY GUBLER, *District Attorney, Clark County, Las Vegas, Nevada*.

Re: Resignation of County Treasurer.

DEAR MR. GUBLER: Receipt is hereby acknowledged of your letter of June 30, 1944, advising that the County Treasurer of Clark County had resigned. You further advise that in the letter of resignation the following language appears: "Thanking you for your kind consideration and asking that relief be arranged if possible approximately July 1, I beg to remain." You propound the following inquiries:

1. If a successor is appointed at this time, how long would the appointment be effective?
2. Would the 1939 amendment of section 4813, Nevada Compiled Laws 1929, change the rule declared by the Supreme Court in *Bridges v. Jepsen*, [48 Nev. 64](#)?
3. Is it mandatory that the Board of County Commissioners accept the resignation or could its acceptance be deferred until after the November general election?
4. Could the Board of County Commissioners grant the present County Treasurer a leave of absence, appoint or accept his appointment of a deputy to serve until after the general election, and thereafter appoint a successor for the unexpired term?

Answering query No. 1. An appointment at this time of a successor in the office of County Treasurer would be effective only until the next biennial election in November of this year and upon the qualification of the person so elected.

Answering query No. 2. Undoubtedly the amendment of section 4813, Nevada Compiled Laws 1929, changes the rule announced in *Bridges v. Jepsen*, [48 Nev. 64](#), and requires the election to fill the vacancy in a county office at the very next ensuing election instead of the next general election at which the office would have been filled in regular course of events. In this connection, we beg to advise that the statement of the Supreme Court in *Grant v. Payne*, [60 Nev. 250](#), was not dictum. It was a plain statement of fact.

Answering query No. 3. The law upon the question of acceptance of resignations of public officers in this State is well settled. The law of resignations of public officers in this State is well settled. The law is that a public officer may resign his office at any time and it makes no difference whether the board to whom such resignation is tendered accepts or not. *State v. Clarke*, [3 Nev. 566](#); *State v. Beck*, [24 Nev. 92](#); *State v. Murphy*, [30 Nev. 409](#); and section 4797, Nevada Compiled Laws 1929. It further appears from section 4799, Nevada Compiled Laws 1929, that an office becomes vacant upon the resignation of the incumbent, and as pointed out in *State v. Beck* and *State v. Murphy*, unless there is such a qualification annexed to the resignation as would thereafter permit a withdrawal of the resignation prior to the happening of a contingency mentioned in the resignation, the resignation is final upon the tendering thereof by the incumbent of the office to the officer or board to whom such resignation is required to be made by statute.

We are inclined to the view that the resignation of the County Treasurer mentioned in your letter became effective on or about July 1, 1944, in any event, and that it was incumbent upon the Board of County Commissioners to take steps to fill the vacancy according to law.

Answering query No. 4. We are of the opinion that under the law of this State as declared by our Supreme Court, it is now somewhat late for the Board of County Commissioners to grant the present County Treasurer a leave of absence since it would seem that under the authorities above-mentioned the County Treasurer has resigned and, as stated in *State v. Murphy*, *supra*, "A public officer will not be permitted to vacate an office and then assume it again at will." This is what we think would happen in the event that the County Commissioners did not grant a leave of absence and proceed in the manner stated in your letter.

Very truly yours,
ALAN BIBLE, *Attorney-General*.
By W.T. MATHEWS, *Deputy Attorney-General*.

150. District Attorneys—Vacancy in Office by Reason of Military Service.

CARSON CITY, July 6, 1944.

HON. GEORGE F. WRIGHT, *District Attorney, Elko County, Elko, Nevada*.

DEAR MR. WRIGHT: This will acknowledge receipt of your letter dated June 23, 1944, received in this office June 26, 1944, in which you request our opinion in connection with the office of District Attorney for the county of Elko.

We have read your competent summary of the law and appreciate very much the assistance offered.

This office has been called upon several times to construe the 1941 Act of the Legislature relative to the reemployment of persons who have been called into the military service, and have interpreted that Act to be broad enough to include elective officers, under certain conditions.

We believe that the communication from Mr. Puccinelli to the Board of County Commissioners was not a resignation as contemplated in the law, but was a notification of a compulsory vacancy in office caused by his induction into the military service. Therefore, when the County Commissioners, on March 5, 1943, took action to fill an involuntary vacancy in the office of the District Attorney, such vacancy should have been filled pursuant to the provisions of section 4b, chapter 58, Statutes of Nevada 1943.

A determination by the board of County Commissioners that a vacancy existed in the office was necessary before proceeding to fill the position.

Considering vacancies in office, either voluntary or involuntary, the court in the case of O'Neal v. McClinton, 5 Nev. on page 334, said:

An office presently filled cannot become or be vacant without a removal, either voluntary or involuntary. When voluntary, no judicial determination resulting in vacancy is necessary; when involuntary, such determination is essential unless otherwise provided by the constitution or laws in pursuance thereof; and in all cases is of that nature by whatever body performed.

The communication from Mr. Puccinelli addressed to the Board of Elko County Commissioners read, in part, as follows:

Whereas, I am compelled to vacate my office by virtue of being inducted into the United States Army, I hereby tender to you my resignation as District Attorney of the County of Elko, State of Nevada.

In the case of Munroe v. Cirus et al. 127 Pac. (2) 914, the court held as follows:

A "resignation" is characteristically a voluntary surrender of a position by one resigning made freely and not under duress. * * * Whenever a person is severed from his employment by coercion the severance is effected not by his own will to surrender his employment voluntarily.

See Words and Phrases and also Watkins v. City of Seattle, 97 P.(2) 427.

The letter from Mr. Puccinelli did not state the date on which he was inducted into the Army and the County Commissioners by their action determined that a vacancy in the office existed on

March 5, 1943.

The Supreme Court of the United States in the case of *Billings v. Truesdell*, 64 S. Ct. 737, Advance Sheets No. 11, determined when induction into the Army actually occurred. Quoting in part relevant:

*** actually inducted within the meaning of sec. 11 of the Act when in obedience to the order of his board and after the Army has found him to be acceptable for service, he undergoes whatever ceremony or requirement of admission the War Department has prescribed *** induction will be performed by an officer in a short dignified ceremony in which the men are administered the oath.

Such an involuntary vacancy was, on March 5, 1943, provided for by the enactment of section 4b, chapter 58, Statutes of Nevada 1943.

The Legislature declared the Act to be *** “effective immediately upon its passage and approval.”

The United States Circuit Court in the case of *United States v. Williams et al.*, 28 Federal Cases, page 677, construing an Act of Congress, declared to be effective from and after its passage, which was July 1 of that year, held that the Act was in effect the whole of the day of July 1. The court said:

*** and the least which courts have ever said on such occasions, is that when an act is to take place from the day of its passage, as in this case here, it must embrace the whole of that day.

The rule stated in *Arnold et al. v. United States*, 3 L. Ed. 671, is thus:

*** when computation is to be made from an act done, the day on which the act is done is to be included.

In the 1943 Act of the Legislature the words “immediately upon” were used, and will warrant a construction that the Act approved March 5, 1943, was in effect on that date.

As stated by you in your opinion, “Induction into the United States Army does not ordinarily create a vacancy in office.” Citing 143 A.L.R. 1470. On page 1472 of that volume we find the following:

*** although absence of a public officer in the military service would not per se deprive him of his office it might be the cause of forfeiture, but that the office continued until proper legal proceedings were taken to put him out of it.

The record of the County Commissioners noted the request of A.L. Puccinelli with reference to a leave of absence.

When the Board of County Commissioners declared a vacancy in the office of District Attorney by making an appointment until the next ensuing biennial election, the provision of section 4b of the 1943 Act was in effect, and provides that such entry into the military service of the United States *** “shall be deemed to have been granted a leave of absence for such period of service; *provided, however*, that no leave of absence *** shall operate to extend the term for which the occupant of any elective position shall have been elected.”

The involuntary vacancy was provided for by law and a leave of absence not to extend beyond his term was granted. Provision was also made that the position *** “shall be filled temporarily by an appointment to be made ***.”

It is our opinion that there is no such vacancy in the office of District Attorney for Elko

County which will require the election of a person to fill that office at the next biennial election.

If our above construction of the statute is correct and our reasoning sound, we see no cause to apprehend a successful attack of the authority of the person so appointed to exercise the powers and duties of the office.

The County Commissioners of Elko County, should, therefore, make an appointment to fill the office of District Attorney for that county, effective during the absence of A.L. Puccinelli in the military service of the United States, but in no event to extend beyond the term for which he was elected.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

151. Public Schools—Evening Schools are Public Schools—Evening School Teaching May Be Considered in Determining Months of Service for Life Diploma.

CARSON CITY, July 11, 1944.

HON. MILDRED BRAY, *State Superintendent of Public Instruction, Carson City, Nevada*.

DEAR MISS BRAY: This will acknowledge receipt of your letter dated July 6, 1944, in which you request an opinion from this office relative to the question of whether the work of a teacher in evening school may be considered as public school teaching and as to the granting of a life diploma under the following circumstances:

The teacher has not been employed as a regular teacher in the public schools, but has been employed for a number of years as an evening school teacher by a Board of School Trustees. The teacher has held a Nevada second grade elementary certificate and the necessary special certificate enabling her to teach American and naturalization classes in evening school. Counting the days she has been regularly employed as a substitute teacher in Nevada school districts and the hours she has conducted evening schools she believes she has the equivalent of three and one-half years of elementary teaching in Nevada. She has eight years of experience in elementary schools in another State.

The problem is whether the statutes contemplate that hours of evening school instruction may be considered in determining actual months of teaching experience.

We are of the opinion that evening schools established under the Act to provide for the establishment of evening schools are public schools.

If the teacher in question has the other necessary qualifications, we are of the opinion that the State Board of Education may consider the hours of teaching in evening school to determine the actual months of teaching experience.

Sections 6022-6025, both inclusive, Nevada Compiled Laws 1929, provide for the establishment, by Boards of School Trustees, of evening schools in their school districts. The school is open to the public and only such courses of instruction shall be given therein shall have been approved by the State Board of Education. Teachers employed in such evening schools must hold legal certificates for corresponding work in the public day schools, or special evening school certificates which the Act authorized the State Board of Education to issue.

Provision is made for an apportionment of funds from the State Distributive School Fund,

and the respective counties wherein such schools are established are authorized to pay for equipment, maintenance, and additional salaries of teachers.

Evening schools established under the provisions of the foregoing sections are therefore public schools; the teachers in such schools must qualify as do teachers in day schools, and the hours spent in such teaching should be considered in determining months of teaching experience.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

152. State Board of Health—Death Certificates—Registrar of Vital Statistics Not Authorized to Add to or Change.

CARSON CITY, July 14, 1944.

MR. JOHN J. SULLIVAN, *Director, Division of Vital Statistics, Nevada State Department of Health, Carson City, Nevada.*

DEAR MR. SULLIVAN: This will acknowledge receipt of your letter of July 11, 1944, in which you request an opinion as to the duty required by law of persons issuing death certificates, when the cause of death is determined to be due to external causes, to also furnish the information whether (probably) accidental, suicidal, or homicidal.

From the sample of certificates enclosed in your letter it appears that your office in many cases is compelled to make this determination in order to complete your classifications as required under the United States standard form of certificate.

You also inquire if it is within the province of the coroner to act in cases other than those which indicate unlawful or suspicious means.

In answer to your first question, we are of the opinion that the person required to make the death certificate should furnish the detail required by statute. The registrar of vital statistics does not know the facts surrounding the death and is not in a position to make the classification that the means of death was probably accidental, suicidal, or homicidal.

Section 5241, 1929 Nevada Compiled Laws, 1941 Supp., quoting parts deemed relevant, provides as follows:

The certificate of death that shall be used is of the United States standard form as approved by the Bureau of Census. * * * The medical certificate shall be signed by the physician, if any, last in attendance on deceased, * * *. Causes of death, * * * if from violence, the means of the injury shall be stated, and whether (probably) accidental, suicidal, or homicidal.

Section 5242, 1929 Nevada Compiled Laws, 1941 Supp., relating to death without medical attendance, quoting that part relating to coroners, provides:

* * * And any coroner whose duty it is to hold an inquest on the body of any deceased person, and to make the certificate of death required for burial permit, shall state in his certificate * * * if from external causes (1) the means of death; and (2) whether (probably) accidental, suicidal, or homicidal; and shall, in either case, furnish such information as may be required by the State Board of Health in order properly to classify the death.

The certificate when filed with the Registrar of Vital Statistics becomes a public record.

Section 5254, Nevada Compiled Laws 1929, declares as follows:

* * * And any such copy of the record of birth or death, when properly certified by the Secretary of the State Board of Health to be a true copy thereof, shall be prima-facie evidence in all courts and places of the facts therein stated.

The statute does not authorize the Registrar of Vital Statistics to add to or change any statement on the certificate, but he is authorized under section 5252, Nevada Compiled Laws 1929, to require further information if such certificate is incomplete or unsatisfactory. In many cases where death was due to external causes it may be highly difficult to determine that death was probably due to accidental, suicidal, or homicidal means, but those in charge of the investigation are in a better position to make this decision than is the Registrar of Vital Statistics.

Answering your second question, we refer you to the opinion from this office dated December 8, 1943, in which we determined from the provisions of section 11427, Nevada Compiled Laws 1929, under what circumstances a coroner's inquest should be held.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

153. Fish and Game—Number of Doe Deer Tags Permissible.

CARSON CITY, July 18, 1944.

NEVADA FISH AND GAME COMMISSION, *Box 678, Reno, Nevada*.

Attention: E.H. Herman, Assistant Secretary.

GENTLEMEN: Reference is hereby made to your letter of July 15, 1944, wherein you request the opinion of this office upon the following inquiry:

Would it be permissible to sell more than one doe deer tags to one hunter?

Section 66 of the Fish and Game Law was amended at the 1943 Legislature, 1943 Statutes, page 52, to provide for the removal of so-called surplus deer from areas in the State where it has been determined by the Committee appointed by the Board of County Commissioners of any particularly county that it would be advisable to remove excess deer from such areas, and which said amendment further provided that the State Fish and Game Commission would have the power, among other things, to determine the number of hunting licenses to be issued for such purpose and the number of sex of deer that may be killed by each license holder. By the use of this language the Legislature has vested the State Fish and Game Commission with the power to determine how many licenses shall be issued for the purpose of removing such surplus deer and empowered the commission to determine the number of deer that may be killed by each person licensed so to do.

Section 91 of the Fish and Game Act, as amended at 1933 Statutes, page 286, provides, among other things, that each person holding a hunting license for the current year shall be entitled, upon compliance with the provisions of such section, to receive only one duplicate tags for each deer allowed to be killed in the open season under the laws of this State. We think that this provision of section 91 and the amendment to section 66, above mentioned, must be read in *pari materia* and the two sections construed together. As so read and construed, we think the law of this State now provides that each person possessing a hunting license is entitled to as many separate deer tags as the law permits to be killed during the open season of such current year.

Section 66 as amended, as stated above, empowers the State Fish and Game Commission, among other things, to declare an open season on doe deer in the areas set apart by such commission wherein such doe deer may be removed, the same amendment providing that the State Fish and Game Commission may determine the number of deer that may be killed by each license holder in such areas, we think admits of the construction that, upon the adoption of a proper resolution by the commission expressly designating therein the number of doe deer that may be killed by each license holder, permit the selling of the number of doe deer tags to such licensee as will correspond with the number of doe deer authorized to be killed by any one person properly licensed.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

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

154. Nurses—New Registration Certificates Incorporating Their Married Names May Be Issued to Nurses.

CARSON CITY, July 26, 1944.

NEVADA STATE NURSE'S EXAMINING BOARD, *1134 West First Street, Reno, Nevada.*

Attention: Clare Souchereau, R.N., Secretary.

DEAR MISS SOUCHEREAU: Reference is hereby made to your letter of July 25, 1944, advising that nurses previously registered by your board, and after being so registered have married and have now returned to the nursing service, desire to have their names changed on their registration certificates, that is to say, have their married names placed thereon.

You inquire whether this may be done in view of the fact that there is nothing in the law of this State regulating professional nursing covering the matter.

The law of this State does not prohibit a married woman from practicing her profession as a registered nurse. There is nothing in the law prohibiting the marriage of nurses. It is fundamental that when a woman marries she takes the surname of her husband and is known by that name thereafter and, in fact, transacts all of her business and professional duties, that is to say, legally, under her married name.

A similar question arose in this State by reason of the Clerk of the Supreme Court having married after election to office. This office rendered an opinion upon the proper signature of such Clerk after her marriage and held that she should use her maiden surname hyphenated with her married surname, illustrated thus "Eva Doe-Roe," Doe being her maiden surname and Roe her married surname.

It is our opinion that a new registration certificate may be issued to the nurses in question, incorporating therein their names as illustrated hereinabove, and that your board has ample power to so issue such certificates.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

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

155. Taxation—Assessment of Patented Mines—Development Work on Contiguous

Patented Mines.

CARSON CITY, August 2, 1944.

HON. J.G. ALLARD, *Chief Clerk, Nevada Tax Commission, Carson City, Nevada.*

DEAR MR. ALLARD: This will acknowledge receipt of your letter of August 1, 1944, in which you request advice from this office as to whether or not, under chapter 170, Statutes of 1933, an Act providing for the assessment of patented mines, an owner has to perform one hundred dollars worth of development work on each claim when numerous patented mining claims are operated as a unit.

The statute provides that the owner of two or more contiguous patented mines may perform all the work required on one claim. If the claims are operated or worked as a unit, they must also be contiguous to come within the provisions of this statute.

Section 1, chapter 206, Statutes of 1915, being section 6592, N.C.L. 1929, provides as follows:

The term "patented mine" where hereinafter used in this Act, shall be taken and deemed to mean each separate, whole, or fractional patented mining location, whether such whole or fractional mining location be covered by an independent patent or be included under a single patent with other mining locations.

Section 2 of the Act as amended in 1933, being section 6593, 1929 N.C.L., 1941 Supp., provides as follows:

Each patented mine shall be assessed at not less than five hundred dollars, except where one hundred dollars in development work has been actually performed upon such patented mine during the Federal mining assessment work period ending within the year for which assessment is levied; said tax assessment to be in addition to the tax on net proceeds of said mine.

Section 9 of the Act, which is section 6600, N.C.L. 1929, provides:

The owner of two or more contiguous patented mines may perform all the work required by article X of the constitution of this State upon one mine only; *provided*, the aggregate amount of such work shall be equal to one hundred (\$100) dollars for each of such contiguous patented mines.

The statute uses the terms "development work" and "contiguous patented mines" which give to the word contiguous a particular meaning in law and brings the statute in analogy with the law in regard to assessment work on unpatented mining claims. Nearness or "worked as a unit" is not the idea expressed by the use of the word contiguous in the statute.

As stated by the Court in the case of *Anvil Hydraulic & Drainage Co. v. Code*, 182 F.205, "Mining claims which touch each other only at a common corner are not contiguous within the rule authorizing the performance of assessment work for several contiguous claims on any one of them."

Hence the affidavit required by section 6598, 1929 N.C.L., 1941 Supp., when the work is performed on one patented mine for the benefit of the other patented mines, must state that the mines in the group are contiguous in order to claim the exemption.

The statement in an affidavit that the patented mines named therein are "worked as a unit" is not sufficient to comply with the provisions of section 6600, N.C.L. 1929.

Very truly yours,

ALAN BIBLE, *Attorney-General*.
By GEORGE P. ANNAND, *Deputy Attorney-General*.

156. Elections—If there Is No Party Contest to be Determined at Primary, Nominees for Office Should be Placed on General Election Ballot.

CARSON CITY, August 9, 1944.

MESSRS. GEORGE F. WRIGHT AND JOHN W. BONNER, *District Attorneys*, *Elko and White Pine Counties, Elko and Ely, Nevada*.

GENTLEMEN: This will confirm our telegram to you from this office on August 8, 1944, reading as follows:

It is our opinion that under subdivision (b), section 12 and section 22 of the Primary Election Law, six (or eight) Democratic candidates for Assembly need not be placed upon primary ballot, but entire six (or eight) should be certified as nominees for office of Assembly and placed on general election ballot in view of the fact that there is no Republican nor Independent candidate for Assembly. Formal opinion follows.

Section 22 of the Primary Election Law, quoting that part relevant to the question involved, provides as follows:

“* * * *provided*, that if only one party shall have candidates for an office or offices for which there is no independent candidate, then the candidates of such party who receive the highest number of votes at such primary (not to exceed in number twice the number to be elected to such office or offices at the general election) shall be declared the nominees of said office or offices.”

Under that proviso if the only candidates for an office are all of the same party and there is no independent candidate for that office, and the number of candidates filed for that office, and the number of candidates filed for that office exceed in number twice the number to be elected at the general election, there is a party contest to be determined at the primary election. At such primary the candidates not to exceed twice the number to be elected at the general election receiving the highest number of votes shall be declared the nominees, not of their party, but the nominees of said office.

The second proviso in the section should be considered in order to arrive at the intention of the Legislature.

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

The two candidates under this proviso do not exceed in number twice the number to be elected, hence there is nothing to be determined at the primary, and there is no party contest. The same principle is exceed twice the number to be elected.

Subdivision (b) of section 12 of the Primary Law, which was amended in 1935, two years later than the last amendment, to section 22, provides as follows:

Where there is no party contest for any office the name of the candidate for party nomination shall be omitted from the ballot and shall be certified by the proper officer as a nominee of his party for such office.

The intention of the Legislature is to avoid any unnecessary proceedings, when there is nothing to be determined at the primary election. Should the names of the six or eight candidates in question be placed on the primary ballot, the voting at such election would be unnecessary, as all six or eight, being a number not in excess of twice the number to be elected would be declared to be the nominees of the office of Assembly.

Reading subdivision (b) of section 12 in pari materia with section 22, it is our opinion that the names need not go on the primary ballot should all be placed on the general election ballot.

A rule of interpretation as stated by the court in *Roney v. Buckland*, [4 Nev. 45](#), is as follows:

In the interpretation of any phrase, section or sentence of a statute, the first thing to be ascertained is the ultimate and general purpose of the Legislature in the enactment of the law; and when that is known or ascertained, every sentence and section of the entire Act should be interpreted with reference to such general object, and with a view to giving it full and complete effect, extending to it all its logical and legitimate results.

There is no reason that the proviso, where only two candidates filed on only one party ticket and no other candidates have filed that the two names shall be omitted from the primary ballot, should not extend to those cases where more than one candidate is to be elected to an office and not more than twice the number have filed.

In the case of *State v. Beemer*, [51 Nev. 192](#), where provisos within section 22, were determined, the court said:

There could be no substantial reason why the Legislature should intend to limit its proviso to the nominees for an office, where more than one candidate is to be elected, in preference to the office or offices where one candidate is to be elected.

This principle applies to the instant problem.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

157. State Highway Department—Maintenance Second Street Underpass, Reno.

CARSON CITY, August 14, 1944.

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

Attention: H.D. Mills, Assistant Highway Engineer.

DEAR MR. ALLEN: This will acknowledge receipt of your letter dated August 3, 1944, enclosing a copy of an agreement with the County Commissioners of Washoe County, together with an opinion of the District Attorney of that county with respect to the agreement, and a request from you for an opinion of this office on the statement of facts set forth below. This will likewise confirm the oral opinion which we gave to you during our conference on August 14, 1944, in this office.

The Washoe County Commissioners have brought up the question of whether the maintenance of the Second Street underpass of the Southern Pacific tracks is an obligation of the county or the State. The county has maintained this structure since its completion under an

agreement entered into in 1935. In 1939, by legislative enactment, Second Street from its junction with Virginia Street, in the city of Reno, westerly through the underpass to connection with US 40, State Route 1, was placed on the State Highway System. The Washoe County District Attorney's office has ruled that as this structure is now on the State Highway System the county no longer has jurisdiction, and maintenance must be performed by the State.

In 1935 the Highway Department proposed a program of street and road improvement within the city of Reno and immediately adjacent thereto, the work to be financed wholly with the Federal Works Program Relief funds. The State, in order to construct the proposed project and receive aid from the Federal Government, secured an agreement from the county whereby the improvement, after completion, would be maintained thereafter by the county.

We are of the responsibility to maintain roads and streets placed by the Legislature on the State Highway System rests with the Highway Department, and the commissioners, under the facts presented, may refuse to continue to maintain the street in question.

The agreement entered into between the county of Washoe and the Department of Highways under the title "Agreement by municipality or political subdivision to maintain highways improved under emergency Relief Appropriation Act" was to the effect that the Highway Department would submit a project for the improvement of a specified number of miles of municipal highway within Washoe County.

West Second Street from Reno city limits to junction with State route (including new underpass) was designated in the agreement.

The Department agreed to recommend approval thereof to the Secretary of Agriculture for the construction with funds appropriated to the State under the Emergency Relief Appropriation Act, subject to the condition that the county shall provide for proper maintenance after the improvement. The county agreed if the project be constructed it would thereafter be maintained by the county.

Subdivision 2, section 404 U.S.C.A., Emergency Public Works Act, provides for the expenditure of Federal funds of the Federal Highway system and extension thereof into and through municipalities. Expenditure of Federal funds was limited to certain purposes: "The amount apportioned to any State under this paragraph may be used to pay all or any part of the cost of surveys, plans, and of highway and bridge construction, including the elimination of hazards to highway traffic, * * *."

Subdivision 2 provides that the expenditures are to be agreed upon by the State Highway Department and the Secretary of Agriculture. It also provides a condition as follows: "*Provided*, that the State or responsible political subdivision shall provide for the proper maintenance of said roads. * * *"

At the time the agreement was entered into between the State Highway Department and the county of Washoe, November 15, 1935, the State Highway Department was not authorized to maintain the improvement as it was not located on a designated State highway route and the county assumed responsibility.

Chapter 194, Statutes of Nevada 1939, amended section 8 of the Act to provide a highway law for the State. The amended section reads in part as follows: "The highways which are constructed or improved by the Department of Highways in accordance with the routes set forth and described in this section shall be State highways and shall be constructed or imported and maintained by the Department of Highways; *provided*, that the funds available to the State through the Act of Congress or other Federal Acts may be used therefor; * * *."

The State highway routes designated in the amendment added under Route 33b the following: "Beginning at a point on route 3 at the junction of South Virginia Street in the city of Reno; thence westerly along West Second Street to a connection with Route 1 near the west Reno city limits."

Section 5341 Nevada Compiled Laws 1929, provides as follows: "Whenever a road, being a part of the system of State highways herein created, shall be constructed or improved under the provisions of this Act, the board shall thereafter keep all such roads in repair and the total cost of such maintenance shall be paid out of the State Highway Fund."

The provision in the agreement by the County Commissioners to thereafter maintain the project cannot be construed to be perpetual as the statute. Section 1973 Nevada Compiled Laws 1929, provides that no member of any Board of county commissioners shall be allowed to vote on any contract which extends beyond his term of office.

A similar question was decided by the court in the case of Board of Supervisors of Apache County v. Udall, reported in 1 P.(2d) 343, wherein it was held, "If the road * * * be a State route, the supervisors certainly cannot bind themselves to maintain perpetually a road which may be removed from their jurisdiction at any time by the highway commission."

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

158. County Commissioners—Vacancy on Board Caused by Death—Unanimous Vote of All Members Required to Legally Authorize Emergency Loan.

CARSON CITY, August 21, 1944.

HON. LOWELL DANIELS, *District Attorney, Nye County, Tonopah, Nevada*.

DEAR MR. DANIELS: On August 19, 1944, Governor Carville, at your request, propounded the following inquiry to this office for purpose of obtaining an opinion thereon.

A vacancy on the Board of County Commissioners having arisen by reason of the death of a member of such board, which said member was a candidate for reelection, but having no opposition in the coming primary election, and it appearing that the County Central Committee of the party to which the decedent belonged has the power under the election laws of this State to fill the vacancy in the nomination for such office at the coming general election, and it appearing that the question has arisen concerning the application by such Board of County Commissioners for an emergency loan in the immediate future as to whether such board may make application for such emergency loan and adopt the proper resolution therefor, that such action can be taken by the two incumbent members of the board, or whether such action requires unanimous concurrence of all the members of the Board of County Commissioners as constituted by law?

We understand that the member of the Board of County Commissioners of the county in question here died after the time for filing of candidacy for the coming primary election had expired. That such person was a nominee of his party for the office. Consequently, under section 2429 N.C.L. 1929, the County Central Committee of the party to which the decedent belonged had and has the power to fill the nomination by appointment of some member of the same political party, and that such person would then become the candidate for his party at the November election, there being no contest in the primary election. Such is the construction of

such section by the opinion of a former Attorney General of this state in an analogous situation. See Opinion No. 221, dated July 30, 1936, Report of the Attorney General 1936-1938.

It appears that there is now a vacancy on the Board of County Commissioners, which, under the law of this State, is subject to be filled by appointment by the Governor until the November election, constituting an interim appointment. It is also true that section 2429 N.C.L. 1929, relates to vacancies occurring after the holding a primary election, but, as pointed out in Opinion NO. 221, such statute is directory and such vacancy on the ticket could, in a nature of things, be made by the County Central Committee of the proper party even before the primary election. But, this is beside the question presented here. The question being whether a Board of County Commissioners may adopt a resolution seeking an emergency loan without the concurrence of all the members of the Board of County Commissioners as constituted by law.

Boards of County Commissioners are constituted by a membership of three. Section 3014 N.C.L. 1929, provides that in case of great necessity or emergency the Board of County Commissioners, *by unanimous vote*, may authorize a temporary loan for the purpose of meeting such necessity or emergency.

From an examination of the general law relating to such subject, it appears that in several States the term "unanimous vote" of a board is held to relate to a quorum of such board, and that action by the quorum would comply with the law with respect to unanimous vote. However, we have found no case dealing with the question of emergency loans whereby the term "unanimous vote" has been construed in that light.

Section 3014, supra, is section 5 of the so-called Budget Law of Nevada. Such Budget Law has been strictly construed, and we think that said section 3014 is in the nature of a proviso permitting a departure from the strict provisions of the Budget Law requiring careful application thereof to the financial affairs of the county and that, in our opinion, when it becomes necessary to create an emergency loan that the law really requires unanimous consent of all members of the board as constituted by law in order to make sure that emergency loans are not adopted for frivolous purposes or that such loans are not easily acquired.

If the Board of County Commissioners composed of three living members were to meet for the purpose of adopting an emergency loan resolution and one member of that board shall vote adversely, then, of course, the resolution could not be adopted. So, we think, and it is our opinion, that for a Board of County Commissioners to legally authorize an emergency loan and adopt the necessary resolution it requires unanimous vote of the three members of such board.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

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

159. Old-Age Assistance—Adequate Office Space for the Visitors.

CARSON CITY, August 28, 1944.

MRS. HERMINE G. FRANKE, *Supervisor Division of Old-Age Assistance, Reno, Nevada*.

DEAR MRS. FRANKE: This will acknowledge receipt of your letter of August 12, 1944, received in this office on August 14, 1944, in which you state as follows:

The problem of adequate office space for Visitors of Old-Age Assistance has

arisen. There seems to be no clear understanding as to whether office space and equipment for Old-Age Assistance Visitors is furnished by the counties. In several instances the space provided by the county is inadequate and no other county accommodations are available. In such cases, and when space outside the county facilities is available, would the county or the department be responsible for the financial obligations?

In addition to section 14 which you cite, section 5154.55, 1929 Nevada Compiled Laws, 1941 Supp., provides in part as follows:

The boards of county commissioners of the several counties shall make necessary provision to maintain necessary welfare services * * *.

It is not completely clear to use whether this section of the State Welfare Act is sufficiently broad to include office space mentioned in your inquiry. Since there is some doubt about it in our minds and since the relevant section of the Old-Age Assistance Act is not clear on the point which you ask, we suggest that you present your problem to the coming Legislature for clarification and amendment. We make this suggestion in view of the fact that our Legislature will be convening in a very short time.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

160. Fish and Game—Commission Not Vested With Power to Close Open Season on Game—Legislature May Enact Game Laws Conforming to Federal Laws and Regulations.

CARSON CITY, September 1, 1944.

STATE FISH AND GAME COMMISSION, *Box 678, Reno, Nevada*.

Attention: E.H. Herman.

GENTLEMEN: Reference is hereby made to your letter of August 25, 1944, wherein you request the opinion of this office on the following questions:

1. Does the State Fish and Game Commission have the power to close open seasons on any game, or is this a matter for the Boards of County Commissioners to determine?
2. Can the State enact game laws to conform to Federal game laws and regulations?
3. Can the Boards of County Commissioners shorten open seasons on game as fixed by Federal law or regulation?

Answering Query No. 1. This question has been substantially answered heretofore in Opinion No. 116, dated August 24, 1933, addressed to your commission. Report of the Attorney General 1935-1934.

Opinion No. 116 dealt with the question of whether the State Fish and Game Commission had the authority to fix an open season for hunting of deer and other game for a lessor period than that prescribed by the fish and game statute. We held that the commissioners did not have the power to shorten the open seasons on game as fixed by the statute, other than to fix a statutory thirty-day period within the dates provided in the statute as the open season on deer, wherein deer could be killed. We there pointed out that the power to shorten and/or close the open season on game was lodged in the Boards of County Commissioners by the express provisions therefor contained in section 64 and 67 of the law.

An examination of the fish and game law as it stands today discloses that there has been no change in the law in this respect since the rendering of Opinion No. 116, save and except, that with regard to deer, antelope, elk, and bighorn sheep, the State Fish and Game Commissioners are granted broader powers with respect to such game in the amendment to section 66 of the law as found at pages 52, 53, 1943 Statutes.

We also direct your attention to Opinion No. 124, dated February 23, 1934, Report of the Attorney General 1932-1934, also addressed to your commission, wherein we dealt with the question of the power of the commission to close streams to fishing. We there held that such power was lodged in the Boards of County Commissioners and not in the commission, save and except as to such streams as were stocked with food fish by the State or the commission.

For the reasons contained in the foregoing opinions and the fact that the fish and game law has not been amended with respect to the question presented here, it is our opinion that the commission is not vested with the power to close the open season on game, save and except as provided in the amendment to section 66, being chapter 34, Statutes of 1943.

Answering Query No. 2. There is no question that the Legislature may enact game laws that will conform to Federal game laws and regulations. This it may do on its own initiative under its constitutional legislative power. Also, Congress, in the Federal Migratory Bird Treaty Act, has provided that nothing in such Act shall be construed to prevent the several States from making or enforcing laws or regulations dealing with migratory birds that are not inconsistent with the provisions of such Act. Tit. 16, Sec. 708, U.S.C.A.

Answering Query No. 3. In 1916 the United States and Great Britain entered into and approved a convention having for its purpose the protection and preservation of many named migratory game and nongame birds. A reading of the convention, which is in fact a treaty, discloses that it was the aim of both nations and their governments to preserve, so far as possible, such migratory birds from extinction. See 39 U.S. Statutes at Large 1702.

A similar convention was entered into with Mexico in 1936 and for the same purpose. See 50 Statutes at Large 1311.

In 1918 Congress enacted the Migratory Bird Treaty Act for the purpose of carrying out the provisions of the convention with the Great Britain, and amended such Act in 1936 to conform to the convention with Mexico. Such Act is now sections 703-711, Title 16, U.S.C.A. This Act, like the conventions, has for its purpose the protection and preservation of the migratory birds named in the conventions. It operates through and is administered by rules and regulations promulgated by the Secretary of the Interior. The open seasons on such birds are fixed from time to time by such rules along with all other matters relating thereto. These rules and regulations under the Act have the force and effect of law, and, of course, supersede and set aside State laws relating to the same subject where such laws are inconsistent with them. This is particularly true with respect to the open season on migratory birds as fixed by the Secretary of the Interior as such open season does not in all case square with open season fixed in the State law; in such case the State law becomes inoperative where it extends the open season beyond the limits fixed by the Secretary.

However, State laws relating to migratory birds are not entirely set aside. Section 7 of the Federal Act, being section 708, Title 16, U.S.C.A. provides:

Nothing in sections 703 to 711 of this title shall be construed to prevent the several States and Territories from making or enforcing laws or regulations which shall give further protection to migratory birds, their nests, and eggs, if such laws

or regulations do not extend the open seasons for such birds beyond the dates approved by the President in accordance with section 704 of this title.

Following said section 708, the Secretary of the Interior incorporated the language thereof in the rules and regulations promulgated by him. See Regulation No. 11, Migratory Bird Treaty Act Regulations of August 11, 1939, in note following section 704, Title 16, U.S.C.A.

It is clear that the State may enforce its game laws with respect to migratory birds where such laws are not inconsistent with the provisions of the conventions, the Federal Act, and regulations. The Secretary of the Interior fixes the open season on migratory birds in his rules and regulations. Under the convention with Great Britain no open season can be fixed by him from March 10 to September 1 relative to migratory birds, except in certain instances not applicable to Nevada, and in the convention with Mexico a closed season was established on wild ducks for the same period. See Article II, Convention with Great Britain, and Article 11D, Convention with Mexico. The conventions and the Federal regulations define migratory game birds and include therein practically the same migratory game birds as the Nevada statute. See Conventions, *supra*, Federal Rules and Regulations, Regulation No. 1, *supra*, and section 3036 Nevada Compiled Laws 1929, as amended at 1941 Statutes 241. So that all laws and regulations herein cover the same subject matter.

We note that section 3098 Nevada Compiled Laws 1929, provides an open season on waterfowl between September 16 and December 31 of each year, and provides that the Boards of County Commissioners may shorten or close hunting seasons entirely, and in the same section it is provided that the State Fish and Game Commission is empowered to fix the dates for hunting within the aforesaid statutory limits. Thus we find the power in the State law to fix, shorten, and/or close the open season on migratory birds.

Turning now to the latest rules and regulations of the Secretary of the Interior available to us, we find that the open season on migratory waterfowl as applicable to Nevada is October 15 to December 23, and on turtledoves September 1 to October 12. See Rules and Regulations of Secretary of the Interior, dated July 19, 1943, in note to section 704, Title 16, U.S.C.A. pocket part; 8 Federal Register 9897.

The open seasons fixed in the Federal regulations are within the limits of the open seasons provided for the same migratory birds in the State law. Such regulations govern as to the open seasons are, of course, shorter than those established in State law. But, the State law provides that boards of County Commissioners may shorten the open seasons so established. The Federal law and regulations provide that the State may enforce its game laws that are not inconsistent with the Federal law and regulations, and we think such law and regulations point out what the major inconsistency shall be, *i.e.*, that the open season provided thereby shall not be extended by the State or its officers.

All of the laws in question here have for their purpose the protection and preservation of game birds, migratory or otherwise. Such is the purpose of the State law as expressly stated in section 3044 Nevada Compiled Laws 1929. The Nevada law with respect to the open seasons in question here is inconsistent with the Federal regulation thereof, and as such could not be legally enforced as to length of seasons, however, as the Boards of County Commissioners are empowered to shorten such seasons, it therefore most certainly follows that such boards can legally shorten the seasons as determined by State law, and by reason of the power granted in the Federal law and Federal regulation to States whereby such States may enforce laws or regulations, not inconsistent with such Federal laws and regulations, "which shall give further

protection to migratory birds,” we are of the opinion that the respective Boards of County Commissioners of this State may by *regulation* shorten the open season as fixed by the Secretary of the Interior.

Respectfully submitted,
ALAN BIBLE, *Attorney-General*.
By W.T. MATHEWS, *Deputy Attorney-General*.

161. Taxation—Widow’s Exemption Provided in Section 6419 N.C.L. 1929, and as Amended, Has No Application to the Tax Levied for the Apiary Inspection Fund.

CARSON CITY, September 9, 1944.

STATE BOARD OF EQUALIZATION, *Carson City, Nevada*.

GENTLEMEN: You inquire whether the widow’s tax exemption applies to the tax levied to provide moneys for the Apiary Inspecting Fund, which said fund is used for the protection of the bee industry in this State.

This same question was presented to Attorney General Diskin in 1925. IN his opinion No. 207, dated October 28, 1925, he held that the apiary or bee tax was not properly a tax, but that the law providing therefor was an inspection measure and the tax was levied for a specific purpose, that is to say, the inspection of bees and stands and for the protection of the industry itself. He carefully differentiated between such an inspection fund for which it was created and the general tax law of the State providing for revenue for the support of the State and counties. His opinion, in brief, was to the effect that the tax exemption provided in the revenue law, to wit, section 6419, Nevada Compiled Laws 1929, as amended, has no application to the tax levy for the Apiary Inspection Fund.

We have examined the law of the State with respect to this matter and find that no change has been made in such law since the opinion rendered by Attorney General Diskin. We concur in his opinion.

Very truly yours,
ALAN BIBLE, *Attorney-General*.
By W.T. MATHEWS, *Deputy Attorney-General*.

162. Constitutional Law—Governor Has No Authority to Grant Reprieve When Sixty Days From Time of Conviction Has Expired.

CARSON CITY, September 21, 1944.

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

DEAR GOVERNOR CARVILLE: The following is in response to our telephone conversation on Friday, September 15, 1944, to affirm, and in support of our oral opinion upon the question as to your authority to grant a reprieve to Floyd Loveless now in the State Prison under a judgment of death and a warrant of execution directing the execution of the said defendant on Friday, the 29th day of September 1944.

After a very careful consideration of the language of the Constitution of Nevada and the law

on this subject, we are of the opinion that the period of sixty days dating from the time of conviction, as provided in the constitution, has expired.

Article V, section 13, of the Constitution of Nevada, provides, in part deemed relevant as follows: “The governor shall have the power to suspend the collection of fines and forfeitures, and grant reprieves for a period not exceeding sixty days dating from the time of conviction, for all offenses, except in cases of impeachment. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the legislature at its next meeting, when the legislature shall either pardon, direct the execution of the sentence, or grant a further reprieve. * * *.”

The power to grant a reprieve is limited to a definite period dating from a certain time—the time of conviction. Upon conviction of treason, the Governor is granted the power to suspend the execution of the sentence for a definite period. That period is until the case shall be reported to the Legislature at its next meeting. The Legislature is given the power to grant a further reprieve, to pardon, or direct the execution of the sentence.

In the next section the Governor is designated as one to constitute a board which is vested with power to remit fines and forfeitures, commute punishments, and grant pardons.

Reading the two sections together it appears that the intention is to limit the power of the Governor to act within a definite period.

Article V, section 14, reads as follows: “The governor, justices of the supreme court and attorney general, or a major part of them, of whom the governor shall be one, may upon such conditions and with such limitations and restrictions as they may think proper, remit fines and forfeitures, commute punishments, and grant pardons, after convictions, in all cases except treason and impeachments, subject to such regulations as may be provided by law relative to the manner of applying for pardons.”

These two sections were construed in the case of *Ex parte Shelor*, [33 Nev. 361](#). The question before the court was, has the Governor the authority to indefinitely suspend the collection of fines and forfeitures under the constitution.

It was contended that such authority was vested by section 13, article V, in the following words: “The governor shall have the power to suspend the collection of fines and forfeitures, and grant reprieves for a period not exceeding sixty days, dating from the time of conviction, for all offenses * * *,” contending that the words “for a period not exceeding sixty days dating from the time of conviction” did not qualify the first clause of the section.

The court said, “To give to the contention of petitioners the construction that the Governor has authority to remit a fine indefinitely would, in our judgment, be in variance with the plain words of the constitution and in total conflict with the succeeding section, which vests the power positively and unequivocally to remit fines and grant pardons, etc., in the board of pardons, which was created for these purposes.”

The decision of the court establishes the law to be that the power of the Governor, under this section, is strictly limited, by the plain words of the section, to a definite period of sixty days dating from the time of conviction. In the same section the Governor is empowered upon a conviction for treason, to suspend the execution of the sentence for a definite period. The framers of the constitution used the terms “conviction” and “execution of sentence” according to their plain and ordinary meaning.

In the case of *United States v. Watkins*, 6 Fed. Rep. 152, the question as to the meaning of the term “conviction used in the Constitution of the State of Oregon was expressed in the

following language: “In the argument for the defendant it has been assumed that ‘conviction’ of a crime includes and is the result of the judgment of sentence of the court imposing the punishment prescribed therefor. But this is altogether a mistake. The term conviction, as its composition (convinco, convicto) sufficiently indicates, signifies the act of convicting or overcoming one, and in criminal procedure the overthrow of the defendant by the establishment of his guilt according to some known legal mode. These modes are, (1) by the plea of guilty, and (2) by the verdict of a jury.” The court stated further, “But there is nothing in the subject of the language of the clause of the constitution under consideration to indicate that the term ‘conviction’ is used there in any other than the ordinary sense.” Following, the court said, “Of course, it is used there and elsewhere with the understanding that the conviction was not afterwards set aside or annulled by the court.”

Interpreting the word “conviction” used in the Constitution of California, the court in the case of *In re Anderson*, 92 P.(2) 1020, used the following language: “The ordinary legal meaning of conviction, when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or a verdict returned against him by a jury, which ascertains and publishes the fact of his guilt; while ‘judgment’ or ‘sentence’ is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained. A conviction then within the meaning of these constitutional provisions is a stage of the proceedings which precedes the judgment or sentence of the court, which later serves merely as the basis of an appeal or execution, and not to enlarge the verdict or aid in the determination of the guilt of the accused.”

“This rule of construction,” said the court, “finds support in many cases,” citing the following cases: *Commonwealth v. Lockwood*, 109 Mass. 232, 12 Am. Rep. 699; *State ex rel. Butler v. Moise*, 48 La. Ann. 109, 18 S. 943, 35 L.R.A. 701; *People v. Marsh*, 125 Mich. 410, 84 N.W. 472, 51 L.R.A. 461, 84 Am. St. Rep. 584; *Spafford v. Benzie*, 136 Mich. 25, 98 N.W. 741; *State ex rel. Barnes v. Garrett*, 135 Tenn. 617, 188 S.W. 58 L.R.A. 1917B 567; *Battiselli v. State*, 141 Tenn. 565, 213 S.W. 417; *Duke v. State*, 106 Tex. Cr. R. 154, 291 S.W. 539; *Goss v. State*, 107 Tex. Cr. R. 659, 298 S.W. 585.

The court mentioned that a minority of the States hold the term should not be given its popular meaning, but should be interpreted in a strict technical legal sense, following with the statement that “The reasoning of the cases stating the majority rule seems to us to be sound.” Several California cases were set out in the decision wherein the court had so interpreted the term “conviction.”

Fixing the period for the granting a reprieve in the words of the Constitution of Nevada, “not exceeding sixty days dating from the time of conviction,” warrants the conclusion that the term “conviction” should be given the ordinary legal meaning.

The verdict of the jury finding the said defendant guilty of murder in the first degree was entered on the 17th day of November 1943, and, dating from that time, more than sixty days had elapsed when the application for a reprieve was presented.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

163. Courts—Emergency Price Control Act Does Not Supersede Requirement of State Law for Payment of Fees.

CARSON CITY, September 25, 1944.

HON. MELVIN E. JEPSON, *District Attorney, Washoe County, Reno, Nevada.*

DEAR MR. JEPSON: This will acknowledge receipt of your letter, received September 19, 1944, inclosing a copy of a letter from Mr. R.K. Wittenberg, District Enforcement Attorney, with the request for an opinion from this office as to the authority of the Administrator of the Office of Price Administration to file actions in the State courts without payment of the regular filing fees.

Mr. Wittenberg takes the position that the Emergency Price Control Act of 1942, as amended, supersedes the State law and the provision in the Act which reads "No costs shall be assessed against the Administrator or the United States Government in any proceeding under the act" relieves the Administrator of the necessity of advancing filing fees under the State laws.

We are of the opinion that the Federal Act does not attempt to exempt the administrator from the payment of the required fees for filing civil actions in our State courts. As to whether or not costs may be assessed against the administrator in such actions is a matter for the courts to decide.

Section 16, article VI, of the Constitution of Nevada, provides that the Legislature shall provide by law that upon institution of each civil action and other proceedings, and also upon the perfecting of an appeal, a special court fee shall be advanced to the clerks of the courts by the parties bringing such action, and the money so paid shall be accounted for and applied toward the payment of the compensation of judges of such courts.

The Legislature, since 1865, has passed Acts general and special to provide that officers may demand and receive certain for their services rendered in discharging the duties imposed upon them by law. In some cases the fees are retained the duties imposed upon them by law. In some cases the fees are retained by the officers and in other cases the statutes provide that such fees be turned over to the County Treasurer.

The terms "fees" and "costs," while not synonymous, may be used interchangeably, but our opinion deals with the payment of fees as set out in the statutes.

As stated by the court in the case of Crawford v. Bradford, 2 So. 782, "Fees are distinguished from costs in being always a compensation for services while costs are an indemnification for money paid out and expended in a suit."

In the case of Galpin v. City of Chicago, 159 Ill. App. 135, the court distinguished the term as follows: "In ordinary sense 'costs' are 'fees' are compensation to officers for services rendered in process of the case."

The provision in the Emergency Price Control Act and the amendments under the Stabilization Extension Act of 1944 do not preclude the administrator from recovering as costs money paid out and expended in a suit.

The payment of costs is a liability fixed by statute and determined by the courts.

The State of Nevada is required to pay the regular fees for filing actions in the Federal courts. We cannot find in the statutes of Nevada a provision that exempts the Administrator of the Office of Price Administration from the payment of filing fees in court actions, and we are of the opinion that the Emergency Price Control Act does not supersede the requirement of the State law for the payment of such fees.

Very truly yours,

ALAN BIBLE, *Attorney-General.*

By GEORGE P. ANNAND, *Deputy Attorney-General*.

164. County Commissioners—Claims Rejected by Auditor Must Be Approved by Unanimous Vote of All Members.

CARSON CITY, September 27, 1944.

HON. LEONARD E. BLAISDELL, *District Attorney, Mineral County, Hawthorne, Nevada*.

DEAR MR. BLAISDELL: This will confirm our telephone conversation of September 26, 1944, relative to the authority of the remaining members of your Board of County commissioners to transact county business.

Due to the resignation of one of the members of the Board of County Commissioners a vacancy exists upon that board, and the question is directed to the authority of the remaining members, under the statutes, to allow claims against the county.

Section 1939 N.C.L. 1929 provides that a majority of the Board of County Commissioners shall form quorum and may transact business over the signature of both members.

As stated in Application of Crosby, 35 N.Y.S. (2) 301, “* * * a majority of the board constitutes a quorum, this means a majority of the officers constituting the board and not a majority of the board residuum resulting from vacancies.”

A different situation arises if the County Auditor at this time refuses to allow a claim approved by the board.

Section 1943 N.C.L. 1929 provides that the Board of County Commissioners is authorized to act on demands against the county, and the same may be allowed after being presented to the County auditor and allowed by him.

Should the County Auditor refuse to allow a claim submitted to him and the board wished to allow the same, notwithstanding the refusal of the Auditor, they must proceed under section 1944 N.C.L. 1929.

This section provides that in order to pass on and allow a claim rejected by the Auditor, the claim must be approved by the unanimous vote of all the members of the board elected appointed.

If the Auditor rejects a claim approved by the present two members of the board, it has no authority to allow the claim until the other member is appointed and qualified, and the vote on such claim is unanimous.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

165. Insurance—Filing and/or Approval of Rates, Forms, on Inland Marine Insurance.

CARSON CITY, October 3, 1944.

HON. HENRY C. SCHMIDT, *Insurance Commissioner, Carson City, Nevada*.

Re: Filing and/or approval of rates and/or forms on inland marine insurance.

DEAR MR. SCHMIDT: Reference is hereby made to your letter of September 20, 1944,

with respect to the above-entitled matter. We understand from your letter that your inquiry is whether the Insurance Commissioner has the power, under the insurance code, to require the filing in his office of rates by fire insurance companies which issue marine insurance by reason of the fact that section 121 of the insurance code does not specifically provide for the filing of such rates by fire insurance companies except as to insurance policies written covering fire insurance.

An examination of the insurance code discloses that fire insurance companies may write insurance covering risks specified in Class 2 or Class 3 of section 5 of the code, in addition to risks of direct loss or damage by fire. It is also provided in section 120 that forms of fire policies on the farm property may be approved by the commissioner and their use in connection with, or in lieu of, standard fire insurance policies may be authorized by the commissioner.

Section 121 of the insurance code requires that every fire insurance company, before it shall receive a license to transact the business of insurer in this State, must file, or cause to be filed, with the Insurance Commissioner its special, specific, and tariff rates, which said tariff rates shall be approved by the commissioner before any policy of insurance shall be written.

A strict construction of the law in this regard would seem to require that the Insurance Commissioner could require only the special, specific, or tariff rates on fire insurance loans. However, this office is of the opinion that the language contained in section 120, providing that supplemental contracts, or comprehensive contracts, whereby the property described may be insured against one or more risks specified in Class 2 or Class 3 of section 5 in addition to the risk of direct loss or damage by fire, construed in *pari materia* with section 121, would indicate that the Insurance Commissioner, in his discretion, could require the filing in his office of special, specific, or tariff rates covering other risks than fire insurance when written under the so-called marine insurance plan. We are further of the opinion that if it is desirable that such be made mandatory, this question should receive the attention of the Legislature.

Respectfully submitted,

ALAN BIBLE, *Attorney-General*.

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

166. Insurance—Indorsement Proposed by Commercial Travelers Insurance Company Prohibited by Section 82 of Nevada Insurance Code.

CARSON CITY, October 3, 1944.

HON. HENRY C. SCHMIDT, *Insurance Commissioner, Carson City, Nevada*.

DEAR MR. SCHMIDT: Referenced is hereby made to your letter of September 29, 1944, inquiring whether a certain indorsement proposed by the Commercial Travelers Insurance Company of Utah to be used in connection with the policies of life insurance written in the State of Nevada is such an indorsement that can be legally used in this State in connection with such life insurance policies.

This office has carefully examined the indorsement so proposed to be used and finds that such indorsement reads as follows:

The company agrees that at the end of each calendar year it will set aside into a special fund five per cent of the net premiums on life insurance received by the Company in the State of Nevada, and the Insured shall be paid in proportion the

premium deposit made by him to the total amount of premiums of this class collected in the State of Nevada. The distribution of the special fund shall be made by the Company on March 1st of each year to Certificate-holders of this class in force on December 31 of the preceding calendar year and such special fund payments shall continue so long as the Insured maintains this Certificate in force by the payment of the regular premiums specified in said Certificate; but in no event will this annual distribution extend beyond twenty years or to the maturity of this Certificate, whichever is sooner. In case of termination of this contract by death or through the failure of the Insured to continue regular premium payments, or by the surrender of the Certificate for its cash value, the Company shall not be held for any damage by reason of said termination.

Countersigned at Salt Lake City, Utah, this _____
day of _____, 194_____.

Authorized for the Purpose.

We think the proposed indorsement cannot be considered otherwise than an inducement held out to a proposed insured person to purchase the policy. A reading of the indorsement discloses that the company agrees at the end of each calendar year to set aside into a special fund five percent of the net premiums on life insurance received by the company in the State of Nevada, and that the insured shall be paid in proportion to the premium deposit made by him to the total amount of premiums of this class collected in the State of Nevada, and that the distribution of such special fund shall be made each year to the certificate holders of the class, and such fund payment shall continue so long as the insured maintains his certificate policy in force for a period of 20 years, or to the maturity of his policy. The indorsement is clearly a contract promising returns and profits as an inducement to the insured. We think it cannot be otherwise construed. It is, therefore, our opinion that such indorsement is prohibited by section 82 of the Nevada insurance code.

Respectfully submitted,

ALAN BIBLE, *Attorney-General*

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

167. Insurance—Nevada Code Does Not Prohibit Organizing or Licensing of Assessment Benefit Corporations.

CARSON CITY, October 5, 1944.

HON. HENRY C. SCHMIDT, *Insurance Commissioner, Carson City, Nevada*.

DEAR MR. SCHMIDT: Reference is hereby made to your letter of September 20, 1944, with respect to the Lincoln Mutual Health and Accident Insurance Association, Incorporated, of North Dakota. A reading of your letter discloses, as we understand it, that the question is whether such association is to be classified as a mutual company or association and, if so, whether such a company could be admitted to do business in the State of Nevada.

You submitted to this office the Articles of Incorporation of such association in North Dakota, together with its bylaws and the report of the Commissioner of Insurance of North Dakota with respect to the operations of such association.

We have carefully considered the papers furnished in this office with respect to the association in question and find that such association was undoubtedly incorporated under the laws of North Dakota and under such laws denominated a mutual company in that State. We have examined the laws of North Dakota with respect thereto, to-wit, chapters 18 and 19 of the Compiled Laws of North Dakota, 1913, and such subsequent amendments as we were able to find in the State Law Library. Without going into detail with respect to the association, we are of the opinion that, insofar as such association is concerned, under the laws of North Dakota, it was and is a mutual company empowered to transact a mutual health and accident insurance business under the laws of that State. Further, we are of the opinion that under the general law of the land the association is to be deemed a mutual company or association.

The question of whether such association may be admitted to do business in the state of Nevada, is we think, governed by the insurance code of this State. We note that it is thought the Nevada insurance code does not provide for the organizing or licensing of assessment benefit corporations. Frankly, we have examined the Nevada code very carefully and we are inclined to the view that such code does not prohibit the organizing or licensing of assessment benefit corporations. An examination of the general law with respect to this question discloses that there is very little, if any, difference between assessments and premiums as used in the insurance business. We think the major difference, if any difference exists, is that an insurance company may definitely fix the premiums to be paid upon a policy of insurance at a fixed sum, or, it may legally, in the formation of its company and business, arrange for the securing of money with which to pay benefits upon the assessment plan based, of course, upon the experience of such company in the past. We are of the opinion that either such plan is prohibited by the Nevada code. We make the foregoing statement after an exhaustive search of the authorities.

Whether the association in question here can legally qualify to do business in the State of Nevada is a question of fact and depends upon its ability to meet the conditions imposed upon a foreign concern of this nature by the Nevada code. We refer particularly to article 12 of the insurance code, the same being sections 86-97, both inclusive, and also to article 3, sections 23-31, inclusive, and particularly to section 23.

Therefore, we are of the opinion that the association in question is a mutual insurance association and so far as we are able to ascertain has been legally created and organized under the laws of the North Dakota. We are further of the opinion that if such association, as a matter of fact, can qualify under the laws of this State and meet the conditions therein imposed, then, and in that event only, it may be admitted to do business in Nevada.

Very truly yours,

ALAN BIBLE, *Attorney-General.*

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

168. Motor Vehicle Registration Law—Specially Constructed Passenger Cars, Regardless of Weight of Number of Passenger Capacity, Entitled to be Registered as Passenger Cars.

CARSON CITY, October 6, 1944.

HON. MALCOLM McEACHIN, *Vehicle Commissioner, Carson City, Nevada.*

DEAR MR. McEACHIN: Reference is hereby made to your letter of September 25, 1944,

with respect to a certain specially constructed motor vehicle used on a stage line in this State for the carriage of passengers. It is noted from your letter that this particular motor vehicle has a compartment constructed on the rear portion of such vehicle for the transportation of baggage which the passengers may have. It is noted that it is claimed express and freight matter is also transported in this compartment.

It is also stated that this vehicle is registered under the laws of this State as a passenger vehicle, but it is thought such vehicle should be registered under the truck classification. The opinion of this office is requested as to whether the vehicle in question may be registered under the truck classification.

This office is of the opinion that the motor vehicle in question is primarily constructed for the carriage of passengers and that the compartment added thereto is to be used as an incident to the carriage of passengers and not primarily for the transportation of freight.

An examination of section 25 of the Motor Vehicle Registration Act, as it stands today, discloses that each stock passenger car *or specially constructed passenger car*, regardless of weight or number of passenger capacity, is entitled to be registered at a flat registration fee of five dollars. It is our understanding that vehicles of this kind, practically ever since the change in the law beginning in 1933, have been registered as above stated. Thus, we have an administrative interpretation of the statute which is sufficient to sustain an interpretation of this kind without recourse to authorities.

However, a common designation of the term "truck" is "a large automotive vehicle for freight transportation," Webster's New International Dictionary. The same definition is found in the case of *Gaumnitz v. Indemnity Insurance Company*, 37 P.(2) 712, and in *Henlock 6400 Tire Company v. McLemore*, 268 S.W. 116. It appears that could not reasonably be classed as a truck.

We, therefore, conclude that such vehicle is legally registered as a passenger car.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

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

169. Fish and Game Commission Not Empowered to Enter Compact With State of Arizona With Respect to Commercial Fishing—Commission Can Designate Persons to Take Carp From Lake Mead.

CARSON CITY, October 25, 1944.

NEVADA FISH AND GAME COMMISSION, *Box 678, Reno, Nevada*.

Attention: E.H. Herman.

GENTLEMEN: Reference is hereby made to your letter of October 24, 1944, advising that it is the belief of the commission that commercial fishing should be allowed in order to reduce the number of carp in Lake Mead. You further advise that the State of Arizona is willing to enter into an agreement with Nevada whereby commercial fishing would be allowed by contractual arrangements with individuals obtained through bids and that thereby revenue would inure to the benefit of the two States. Your inquiry is, "Is there anything in the laws of our State which would prohibit Nevada entering into such a contract with Arizona?"

Your direct inquiry concerns a matter which approaches very closely the entering into a

contract between sovereign States. Such a matter really requires legislative sanction before such a contract could be entered into, and with respect to the question as presenting the matter in the nature of a compact with the State of Arizona, other than the Board of Fish and Game Commissioners of this State is authorized and directed, by section 5 of the Lake Mead Fishing Act of 1939, in the interest of uniformity, to promulgate rules and regulations concerning fishing on Lake Mead, such uniformity being necessary by reason of Lake Mead being on the boundary line between Arizona and Nevada. However, we are of the opinion that this provision in the Nevada law is hardly broad enough to authorize the entering into a compact with respect to commercial fishing.

On the other hand, however, section 47 of the State Fish and Game Act, the same being section 3081, N.C.L. 1929, does authorize the State Fish and Game Commission to take or permit the taking of minor unprotected fish from the waters of the State, either by seine or by trapping device for the purpose of revenue to the propagation of fish and game within the State. Carp are not protected by the game laws of this State and do not constitute game fish. Such section also authorizes the commission to fix a price to be paid for each fish so taken, and all money received therefrom shall be paid into the State Treasury to the credit of the State Fish and Game Preservation Fund.

Under this provision of the law, it is our opinion that the State Fish and Game Commission can designate persons to take carp from Lake Mead. Just how such persons shall be designated is, no doubt, left to the discretion of the commission, and we think that the commission could require bids for the right to take carp.

It is also our opinion that the parties designated by the Nevada Commission could also be designated by the Arizona authorities, and a reasonable division of the moneys be arrived at between the respective of a compact being entered into by the respective States.

Respectfully submitted,

ALAN BIBLE, *Attorney-General*.

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

170. Fish and Game—No State Law Covering Buffalo—Slaughter and Retail.

CARSON CITY, November 3, 1944.

NEVADA FISH AND GAME COMMISSION, *Box 678, Reno, Nevada.*

Attention: J.H. Leslie, Assistant Secretary.

GENTLEMEN: Reference is hereby made to your letter of November 2, 1944, with respect to the sale of buffalo by the city of Reno and the slaughtering and retailing of such animals. It is noted that you inquire whether there is any law prohibiting the purchasing of these buffalo, and whether they may be slaughtered and retailed over butcher counters in Reno.

We have examined the laws of the State of Nevada very carefully and find that buffalo are not protected by the game or other laws of this State and that they are not deemed to be game animals. In brief, there is no law in the State of Nevada covering buffalo.

We assume that the buffalo owned by the city of Reno were acquired from the Department of Agriculture of the United States or through some Federal agency. We do not find any Federal statute which would prohibit the sale of buffalo by the city of Reno. However, we are not advised as to the terms of any contract that the city of Reno may have entered into at the time of

acquiring the buffalo, and it may be that some provision in some contract relating thereto would have a bearing on the matter. This could only be determined from the records of the city of Reno.

In view of the fact that the buffalo are the property of the city of Reno and, no doubt, under the care, custody, and control of the City Council of that city, we advise that the disposal of such buffalo lies wholly within the power and discretion of that board unless prohibited by some contract as above. Therefore, the matter of the sale of such buffalo should be discussed with the City Council and the council's attorney.

We know of no State law which would prohibit the slaughter and retail of the buffalo. There may, however, be some ordinance in the city of Reno governing this question.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

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

**171. Labor—Wage Law Applies to Labor Employed by Public Bodies Direct—
Difference Between Day Labor and Salary on a Monthly Basis not Clearly
Defined.**

CARSON CITY, November 3, 1944.

MR. R. GIBSON, *Labor Commissioner, Carson City, Nevada*.

DEAR MR. GIBSON: This will acknowledge receipt of your letter dated October 19, 1944, which was received in this office October 21, 1944.

You asked for an interpretation of the Nevada wage law relative to the following questions:

1. Does the law apply to labor employed by public bodies direct, on a day labor basis, on the repair or reconstruction of public highways, roads, streets, or alleys?
2. Does the law apply to labor employed by public bodies direct, on a day labor basis, on regular maintenance works on all public-owned works or property?

The answer to your first question is in the affirmative.

In answer to your second question we are of the opinion that the statute does not clearly define the difference between day labor and salary on a monthly basis. It appears that the statutes apply to the payment of workmen, hired and paid directly by public bodies on public works by the day and not under contract in writing.

Where the statute is not clear as to its application, the facts should be called to the attention of the Legislature whose function it is to meet such situations by amendment or additional legislation.

Chapter 139, Statutes of Nevada, as amended by chapter 169, Statutes of Nevada 1941, is an Act providing for the adoption of prevailing wage for employment on State, county, city, municipal, and other public work in the State of Nevada. Section 1½ of the Act, as amended being section 6179.51½ of the 1929 Nevada Compiled Laws, 1941 Supp., defines the terms as used in the Act as follows: “* * * ‘public body’ shall mean the State, county, city, town, village, school district or any public agency of this state or political subdivisions sponsoring or financing a public work.”

“The term public work shall mean new construction of and the repair and reconstruction work on all public highways, public roads, public streets and alleys, public utilities paid for in

whole or in part by public funds, publicly owned water mains and sewers, public parks and lay grounds, and all other publicly owned works and property.”

“The terms ‘day labor’ shall mean all cases where public bodies, their officers, agents, or employees hire, supervise, and pay the wages thereof directly to a workman or workmen employed by them on public works by the day and not under a contract in writing.”

The statute makes it perfectly clear that workmen employed by the day and paid directly by public bodies in the repair and reconstruction of public highways, roads, streets, and alleys shall come within the provisions for the payment of the prevailing wage as defined in the Act, and also the provision fixing a minimum daily rate of wages.

Under the definition of public work, the words construction, repair and reconstruction are used, which appear broad enough to include the word “maintain.” According to Webster, one of the definitions of the word “maintain” is to hold or keep in any particular state or condition. Therefore, the employment by the day of workmen on regular maintenance work on public-owned works or property comes within the provisions of the statute.

The distinction between the payment for day labor and payment on a monthly salary basis is not clearly defined in the statute.

Wage is the term used in the title and throughout the Act.

The only exception to the payment of the prevailing wage or minimum wage to workmen employed by the day on public works by public bodies is contained in the definition “day labor” and reads “* * * by the day and not under a contract in writing.” It is evident that this does not apply generally to work performed under contract as section 1 of the Act specifically provides as follows:

Every contract to which a public body of this State is a party, requiring the employment of skilled mechanics, skilled workmen, semiskilled mechanics, semiskilled workmen or unskilled labor in the performance of public work shall contain in express terms the hourly and daily rate of wages to be paid each of the said classes of mechanics and workmen which said hourly and daily rate of wages shall not be less than the prevailing rate of such wages then prevailing in the county, city, town, village or district in this state in which said public work is located, and which said prevailing rate of wages shall have been determined in the manner provided in section 2 of this act; *provided*, that when public work is performed by day labor, as such labor is in this act defined, the prevailing wage for each said class of mechanics and workmen so employed shall apply and shall be clearly stated to such mechanics and workmen when employed; *provided*, that in no case shall the daily rate of wages be less than five (\$5) dollars.

Whether the payment for services is termed wages or salary, it appears that the employment of workmen by the day on public works by or through public bodies comes within the provisions for determining the rate of wages.

Under some authorities wages and salaries are classed as synonymous, other authorities hold a significance somewhat different as illustrated by the case of *State v. Ash*, 87 P.(2d) 270, which declared the purpose of the Minimum Wage Act of Arizona as follows: “The purpose of the Minimum Wage Act was to protect the man whose work was that of a ‘mechanic’ or ‘manual laborer’ in the usually accepted sense of the words, and whose tenure was therefore normally so limited and uncertain in duration that he was usually paid wages by the day rather than salary by the month or year, and whose total annual compensation was generally uncertain and fluctuating

* * *. A salary is the recompense or consideration paid, or stipulated to be paid to a person at regular intervals for services, especially to holders of official, executive, or clerical positions, and is a fixed compensation regularly paid by the year, quarter, month, or week, and is often distinguished from 'wages' which are pay given for labor, usually manual or mechanical at short stated intervals as distinguished from salaries or 'fees'." * * * This does not mean however, that the minimum wage law does not apply to employees whose occupation is within the generally accepted sense of the words truly mechanical or manual labor, merely because it may happen that for some reason or other their compensation may have been fixed on an annual or monthly basis rather than a per diem. The method of compensation is but one of the tests used to determine the real issue, and it cannot be used to evade the law."

The Arizona statute used the words mechanical and manual labor. The Nevada statute uses the terms "unskilled workman" and "unskilled labor."

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

172. State Orphans' Home—Sale of Real Property—Henry Wood Estate.

CARSON CITY, November 3, 1944.

MR. H.R. MARTIN, *Chairman, Nevada State Welfare Department, P.O. Box 1331, Reno, Nevada.*

DEAR MR. MARTIN: This will acknowledge receipt of your letter in this office on October 19, 1944, in which you made inquiry as to the authority of the State Board of Relief, Work Planning and Pension Control, as directors of the State Orphan's Home, to sell certain real property situated in California and devised to the Orphans' Home under the will of Henry Wood, deceased.

On October 4, 1944, we wrote you in answer to a telephone conversation regarding this matter and called attention to the statute which provides that the donor may direct how such property may be disposed of and that the directors are governed by such directions when given.

Our delay in answering your inquiry was due to the fact that we were unable to secure a copy of the will of Henry Wood, deceased, until today.

We are of the opinion that in order for the directors of the State Orphans' Home to convey title to the real property in question it will be necessary to obtain authority do so by an Act of the Legislature.

It appears from the terms used in the will that the real property was devised to the State Orphans; Home and thereby came property of the State of Nevada subject to conversion into money to become a part of the trust fund created by the will.

Under the term "bequeath" the personal property vested in the Board of Directors and its successors in office have and hold as a perpetual trust with authority to expend the interest therefrom as directed in the will.

It does not appear from the will that the testator used the terms "devise" and "bequeath" interchangeably, but according to their respective legal meanings.

Our Supreme Court has distinguished the meaning of the term "bequeath" from "devise" in the case of *In re Estate of Lewis*, [39 Nev. 445](#). On page 452 the court said, "It will not be

gainsaid, we apprehend, that the word 'bequeath' is generally used to express a gift of personality made in a last will and testament." The word devise is a term generally used to express a gift of realty made by a last will or testament.

We will be glad to prepare an Act for your submission to the Nevada Legislature if you will furnish us the necessary descriptions of the land to be sold.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

173. Taxation—Net Proceeds of Mines—Northern Nevada Mining Company—Payment From Metals Reserve Company Not Taxable.

CARSON CITY, November 4, 1944.

NEVADA TAX COMMISSION, *Carson City, Nevada*.

Attention: Mr. J.G. Allard, Chief Clerk.

Re: Northern Nevada Mining Company

GENTLEMEN: Your commission recently submitted to this office a file relative to the payment of net proceeds of mines by J.E. Riley, or his successor, the Northern Nevada Mining Company.

The question involved in your inquiry is whether or not the amount of \$32,864.97 received as an unfilled production payment from the Metals Reserve Company should be included as a part of the gross proceeds from mines under the Nevada law.

Under date of October 17, 1944, Bruce R. Thompson, one of the attorneys for the Northern Nevada Mining Company, furnished this office copies of contracts, the circular concerning the Federal program and the letter from the Metals Reserve Company covering the remittance of \$32,864.97 to J.E. Riley. We have carefully examined these documents and the law governing your inquiry. It is our opinion that the item of \$32,864.97 is actually a cancellation payment under the contract and is paid by the Metals Reserve Company for total unfulfilled production pursuant to its contract with the mining company. We do not believe that the Nevada law applies since such payment for unfulfilled production does not represent a return for the ore produced from the mine, a net proceeds of mines, or a production from the mine as defined under the Nevada law. Accordingly, such item is not taxable as net proceeds.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

cc to Bruce R. Thompson, Reno, Nevada.

174. Health—Leprosy—Afflicted Person Cannot Be Forced to Leave Home and Enter Institution Out of State.

CARSON CITY, November 15, 1944.

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

DEAR DR. HAMER: Reference is hereby made to your letter of November 8, 1944, with respect to the case of leprosy in Churchill County. It is noted that the afflicted person had, in

effect, refused to go to a national institution in Louisiana for the purpose of isolation and treatment. You inquire whether the Department of Health now has the power to force her to leave her home and enter an institution out of the State of Nevada.

This office has given this question a great deal of thought and study and we have come to the conclusion that the Department of Health now possesses no legal authority to require the afflicted person to leave her home in Nevada and become an inmate of a national institution for the isolation and treatment leprosy.

We direct your attention to two opinions of this office furnished you with respect to the inoculation of persons for typhoid and compulsory vaccination of school children, such opinions being No. 113, dated August 14, 1933, relating to the inoculation for typhoid, and No. 146, dated August 22, 1934, concerning the compulsory vaccination of school children. In each of these opinions we pointed out what was necessary to enable boards of health must be empowered by the law of the State to proceed in such matters and if not so empowered, it gained no such power by implication and, as pointed out in those opinions, the law contained no provision empowering the board of health to inoculate for typhoid or to compulsory vaccinate school children, that is to say, against the will of the persons who might thereafter become afflicted with the diseases in question.

Such holdings in the opinions above stated are based squarely upon the general law of this country as pointed out in the leading case on the subject, *Rock v. Carney*, 185 N.W. 798, 22 A.L.R. 1178.

An examination of the law of this State with respect to health matters discloses that the State Board of Health is not empowered to force any person to leave the State of Nevada for the purpose of isolation and treatment. And even if it can be said that the State Board of Health has the power, under the present law, to promulgate rules with respect to this question, it has not done so, and, in this connection, we entertain grave doubts as to whether the Legislature, in a legislative Act, could so provide as to coerce a person to leave the State of Nevada for the purpose of isolation and treatment of a disease.

There is no question but what the afflicted person in question here can be isolated in this State, and, of course, given proper treatment. This, we think, is indicated and taken care of by the rules for the control of communicable diseases, including leprosy, which you furnished this office in connection with your request.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

175. County Commissioners—Fire Protection Districts—Chapter 57, Statutes of 1939, Valid Exercise of Legislative Authority.

CARSON CITY, November 25, 1944.

HON. W.O. JEPSON, *District Attorney, Lyon County, Yerington, Nevada*.

DEAR MR. JEPSON: This will acknowledge receipt of your letter of November 9, 1944, which was received in this office November 13, 1944.

You ask for an opinion from this office as to the validity of chapter 57, Session Laws 1939, and base your inquiry upon a certain condition arising in Lyon County.

It appears that residents in two sections of the county wish to provide means for fire

protection. The two sections are separated in such a manner that it would not be practical to combine them in one fire protection district. One district is located near a city with an established fire department and could secure fire protection by cooperative agreement with the city whereby the general county would bear the expense, as provided in the 1939 Act, while the other section of the county could only operate under chapter 121 session laws of 1937, and provide the necessary funds through a special tax on the district.

We should approach the question as to the validity of a legislative Act with the admonition of Chief Justice Marshall, cited in *Evans v. Job*, [8 Nev. 337](#), reading as follows: “The question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom if ever to be decided in the affirmative in a doubtful case.”

After a careful consideration of the statutes and the law on the subject of the power of the Legislature, we are of the opinion that chapter 47, Statutes of 1939, is a valid exercise of legislative authority.

Chapter 121, Statutes of 1937, in effect, provides for the establishment of fire protection districts within contiguous unincorporated territory within the State; it defines the procedure for the organization of such territory and authorizes the levy of a tax within the boundaries of the district to secure sufficient funds to establish and maintain proper fire protection. The Act provides for the election of district directors and gives them full power to manage and conduct the administration and government of the district for the furnishing of fire protection.

Section 1231 N.C.L. 1929, as amended by chapter 46, Statutes of Nevada 1943, which provides for the government of unincorporated towns and cities, gives the County Commissioners of the various counties power to provide for the prevention and extinguishment of fires, and they may organize and establish fire departments, and under the provisions of section 1282 N.C.L. 1929, may levy and collect a tax within the unincorporated town for the benefit of its fire department.

Chapter 57, Statutes of 1939, section 1, reads as follows:

The county commissioners of the various counties of this state, wherein are located city fire departments, are hereby authorized and empowered to enter into cooperative agreements with the city council of the respective cities, whereby the city fire department may be enabled to use its personnel and equipment, upon such terms and agreements, and within such area within said county beyond the city limits of the city concerned, as may be determined, for the protection of property and for the prevention and suppression of fire.

Section 2 of the Act provides that the expenses incident and necessary for the participation of the counties in such agreements shall be paid out of the general fund of such county and the commissioners shall annually make estimate of the expenses at the time of making its budget under the provision of this Act and the budget law.

The Act of 1937 provides for the organization of fire protection districts throughout the State which are not included in any other fire protection district.

Chapter 57, Statutes of 1939, provides fire protection in sections of the counties beyond the limits of a city which has an established fire department. The county commissioners and the city council by agreement determine the area to be protected whereby the city fire department may be enabled to use its equipment.

The Legislature has, in this statute, manifested a definite purpose, which purpose is to provide fire protection for certain areas in the county in which it would not be practical to

organize and equip fire departments under existing statutes, and to provide for cooperative agreements between County Commissioners and city councils for a reasonable use of established fire departments.

As it is stated in the case of *Clover Valley Co. v. Lamb*, 43 Nev. on page 383, “The legislature is presumed to have a knowledge of the state of the law upon the subject upon which it legislates.”

The purpose of the Legislature may appear in the Act, but the power of the Legislature to enact the statute is controlled by the constitution. A rule as to legislative power is expressed by our Supreme Court as follows:

Legislative power, except when the constitution has imposed limits upon it, is practically absolute, and, when limitations are imposed, they are to be strictly construed, and are not to be given effect as against the general power of the legislature, unless such limitations clearly inhibit the act in question. *In re Platz*, 60 Nev. on page 308.

It is not a question as to what powers are granted, but what restrictions are placed upon legislation. As stated in the case of *Gibson v. Mason*, 5 Nev. on page 292:

The state legislature is not like the Congress of the United States confined in its legislative action to such powers as are expressly mentioned in its legislative action to such powers as are expressly mentioned and delegated to it in the Constitution * * * but rather to grant the power in general terms, and then to specify such restrictions upon it as might be deemed advisable.

Article IV, section 20, of the Nevada Constitution defines certain restrictions in legislative powers. The section provides that the Legislature shall not pass local or special laws in certain cases, among which is “regulating county and township business.” Section 21 of the same Article IV provides that where a general law can be made applicable all laws shall be general and of uniform operation throughout the State.

Chapter 57, Statutes of 1939, is not a local or special law as it applies the same in every part of the state to sections in the counties under similar circumstances. The fact that some counties and parts of counties cannot receive the benefits of the Act does not destroy its general nature.

In the case of *Gibson v. Mason*, supra, the court said:

If the act * * * be of a general nature, although it may not be applicable to all the counties of the state by reason of the fact that the localities and objects upon which it was intended to act are distinguished from others by characteristics evincing a peculiar relation to the legislative purpose, and showing the legislation to be appropriate to some counties or localities and inappropriate to others, the counties or localities will be considered as a class by themselves as respect such legislation, * * *.

The court, in the case of *Worthington v. District Court*, 37 Nev. on page 226, in passing on the question of a special or general act, held:

The provision * * * is of general and uniform operation throughout the state, and not in conflict with the requirements that all such laws must be of uniform and general operation. It applies the same in every part of the state, and the same to all persons under similar circumstances.

The statutes indirectly raises a question of taxation as the County Commissioners are authorized to pay the expenses of the fire protection out of the General Fund and make the

necessary estimates for such expenditure in the county budget.

The constitution provides in section 1 of article X, in part, as follows: "The legislature shall provide by law for a uniform and equal ratio of assessment and taxation, * * *." Statutes providing for the establishment of fire protection in organized districts and within unincorporated towns in the State require the levy of a tax within the boundaries of the districts and towns to pay for the same, while the statute in question places the burden of the expense of fire protection within the area determined by agreement upon the general county.

Upon the question of equality of burden, the Supreme Court of the United States in the case of *Southern Pac. Co. v. Kentucky*, 222 U.S. on page 76, said:

The legality of a tax is not to be measured by the benefit received by the taxpayer, although equality of burdens be the general standard sought to be attained. Protection and taxation are not necessarily correlative obligations, nor precise equality of burden attainable however desirable. The taxing power is one which may be interfered with upon grounds of unjustness only when there has been flagrant abuse as may be remedied by some affirmative principle of constitutional law.

Again referring to *Gibson v. Mason*, supra, the court, citing from *McCullough v.*, Maryland, said:

The people of the state, therefore, give to their government a right of taxing themselves and their property; they prescribe no limit to the exercise of this right resting confidently in the interest of the legislature, and the influence of its constituents over their representatives, to guard against its abuse.

Continuing the court said:

This language is perfectly applicable and entirely true respecting the legislative power of this state. * * * But so far as * * * the purposes for which taxes may be levied, there is no restriction placed upon the power. * * * Independently of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires or will be promoted by it, and it is the judge of what is for the public good.

On page 295, the court said:

It is evident that a law or legislative act may be clearly unjust in the individual case; opposed in its operations upon some individuals to the principles of natural justice; and still be not only an expedient law, but essential to the welfare of the community at large. Who is to determine * * *? Certainly, the legislature and not the courts. They have admittedly no right to inquire into the question as to whether it were necessary or unnecessary, expedient or inexpedient, to adopt a law.

Undoubtedly, the prevention and suppression of fire is a matter of public well-being.

Expediency of a law based upon the determination of facts by the legislature is not a matter for the courts, and so expressed in 11 Am. Jur. 823 as follows:

Since the determination of questions of fact on which the constitutionality of statutes may depend is primarily for the legislature, the general rule is that the courts will acquiesce in the legislative decision unless it is clearly erroneous, arbitrary, or wholly unwarranted.

Whenever the determination by the legislature is in reference to open or

debatable questions concerning which there is a reasonable ground for difference of opinion, and there is a probably basis for sustaining the conclusion reached, its findings are not subject to judicial review. Thus the legislature is the proper authority to determine what should and what should not constitute a public burden, and with the exercise of its discretion in such matters the courts are loath to interfere.

We are, therefore, of the opinion that chapter 57, Statutes of Nevada 1939, is a valid Act of the Legislature and any question of unjustness or inequality of the burden is a matter that should be referred to the Legislature which will meet in January.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

176. Taxation—Exemption of Property of Persons in Military Service—No Limitation on Time to File Affidavit—Rule Does Not Apply to Widows, Orphans, Etc.

CARSON CITY, November 27, 1944.

HN. V. GRAY GUBLER, *District Attorney, Clark County, Las Vegas, Nevada*.

DEAR MR. GUBLER: Reference is hereby made to your letter of November 20, 1944, wherein you inquire with respect to the tax exemption of property of persons in the military service of the United States in time of war. Such exemption arising and being claimed under the provisions of section 6418, Nevada Compiled Laws 1929, amended at 1943 Statutes, pages 5, 6.

You inquire as follows:

1. Is there any limitation on the time within which servicemen may file affidavits for tax exemption?
2. Does the same rule apply to widows, orphans and other persons entitled to tax exemption on the filing of similar affidavits?
3. If exemptions to any or all of such classes of persons may be granted on affidavits filed after the third Monday in July, how can the County Auditor and Assessor legally change the assessment roll of the county to show such exemptions?
4. Anticipating that there may be numerous similar filings after July 3, of each year, if the same are permitted, how can the Boards of County Commissioners of the respective counties of the State allow in their respective budgets for diminution of revenue, which may be substantial by reason of the granting of exemptions after the assessment roll has been completed and certified pursuant to the provisions of section 6431, N.C.L. 1929?

Answering query No. 1. We note from your letter of inquiry that it is thought that the qualifying affidavits claiming the servicemen's exemption should be filed on or before the third Monday of July in each year, that that date, inferentially, would constitute the time limitation within which the exemption could be claimed, there being no time limitation in the exemption statute, save the qualifying affidavit must be filed annually. It may be that an early filing of such affidavit is desirable, and in most instances, if not in all, were it peacetime, such a requirement would be beneficial and perhaps legally required. But, these are not normal times. No young man can with certainty foresee his status. Today he is a civilian, tomorrow a soldier or in some other branch of the armed forces of the United State. As a civilian, unless he is an ex-service

man, the exemption statute has no application. But, immediately he is inducted into the armed service the statute become applicable. There is no waiting period provided therein. If the Legislature intended a waiting period provided or had intended that the qualifying affidavits must be filed by a certain date, it would have said so.

In the case of *Internat. Ass'n. of Machinists v. E.C. Stearns & Co.*, 36 N.Y.S. 2d 156, the New York court, dealing with the application of peacetime statutes to wartime conditions, said:

When the Supreme Court of this State is called upon to construe and enforce a State statute based upon a peacetime economy—at a time when our Nation is at war and in relation to a subject which vitally affects the national defense—it is clear to me that realism requires such construction as permits the most efficient co-operation with the Federal agencies directly charged with the duty of carrying on the war. In this view, the present proceeding and pertinent sections of article 84 of the Civil Practice Act of this State are examined.

The economic policy of the Nation in the employment of the military and naval forces of the United States and the resources of the Government to carry on the war, must inevitably differ radically from an economic policy that is adequate and desirable under our concept of democracy in time of peace. In time of war, the construction of peacetime statutes, contractual relations and individual liberties must be subject to such changes and modifications as are the natural offspring of national emergency and necessity. Inherent in the power to create are the elements to destroy. Congress has the power to declare war and that carries with it, as an incident, the power to put into effect such procedures as are reasonably adapted to achieve victory.

Such is the case here. We think the Nevada Legislature, in writing into the exemption law the provision exempting persons actually serving in the armed forces in time of war, clearly intended such provision to be presently applicable whenever any such person was inducted into such service. Such provision is one of Nevada's contributions to the war effort and is to be construed in that light, in brief, the extending to all persons presently in the service of the armed forces of the United States in time of war a partial relief from State taxation that such relief was and is to be extended to such persons at any time after induction, provided, of course, that proper application is made therefore. Certainly the Legislature would and did have as much right to give thought to this question as Congress did in the enactment of the Solders' and Sailors' Civil Relief Act, wherein, inter alia, it legislated to protect the inductees from worry over many matters, including the payment of State taxes on their property and preventing the sale thereof for nonpayment of taxes and providing for an extended period of redemption in the event such property was so sold upon order of a court of competent jurisdiction. See Act, Title 50 U.S.C.A., secs. 500, 700. 56 U.S. Stats. 776, 777.

The word "annually" in said section 6418, as amended and used in connection with the making of the qualifying affidavit, means once in each year. *Continental Nat. Bank v. Berford*, 07 Fed. 188.

"Annual means yearly or once a year, but does not signify what time of year." *Robers v. Standard Life Ins. Co.*, 244 S.W. 845.

The first installment of property taxes are due and payable in this State on the first Monday in December of each year. If not paid on that date, such installment becomes delinquent. We think the Legislature did not intend that the exemption should apply to delinquent taxes, that is, be

retroactive, but that such exemption, as applicable to persons in the armed forces of the United States in time of war, should be made applicable during the period preceding the first Monday in December during which taxes are receivable without delinquency, *i.e.*, up to such day.

Answering query No. 2. In the answer to query No. 1 we made clear that such answer was based upon wartime conditions and the opinion there given is limited to those persons actually serving in the armed forces of the United States in time of war and that portion of section 6418, Nevada Compiled Laws 1929, as amended at 1943 Statutes, pages 5, 6, providing such an exemption was given a liberal construction for that reason only. Every consideration must given to the winning of the war.

As to query No. 2, dealing with the tax exemption as applied to widows, orphans, and blind persons as set forth in subdivision sixth of said section 6418, we think a stricter rule applies. This subdivision of the exemption statute has been the law for many years. We are not advised that it was enacted as or ever intended to be a wartime measure. We, therefore, conclude that the application of this exemption is to be had in accordance with such administrative interpretation and practice as may have been followed in the past.

If there are inequities prevalent in the application of the foregoing exemptions, either to the persons in the service of their country, or to the widows, orphans and blind persons and a specified time within which applications should be filed as to either of such classes, the matter should be laid before the Legislature at its next session.

Answering query No. 3. It is our opinion, based upon the liberal construction given the statute in answer to query No. 1, that if and when the Assessor shall receive the affidavit of the person in actual service in the armed forces of the United States, and shall be satisfied as to the truth thereof, and shall approve the same, that he then may present such affidavit to the County Auditor or the tax receiver, as the case may be, and such affidavit would then constitute the authority for either of such officers to change the assessment, endorsing on the tax roll on a notation of the reason for such change.

Answering query No. 4. Frankly, the answer to this query is one to be found by the Boards of County Commissioners. They undoubtedly have the right to place in the county budget at the time of the making thereof an estimate of the reduction of taxes by reason of the exemptions that may be allowed, based upon a computation of those granted the previous year. Also, we think, that if the volume of exemptions in any one year granted to persons serving in the armed forces of the United States in time of war should seriously interfere with the proper functions of government, recourse could be had to an emergency loan.

Re Claiming Exemption Under Power of Attorney

During the preparation of the foregoing opinion, the Nevada Tax Commission requested an opinion on the question of whether a person serving in the armed forces of the United States may claim the exemption provided in said section 6418, as amended in 1943, by providing his mother or other relative with a power of attorney to act for him in the matter. We add the following:

In opinion No. 293, March 4, 1940, Report of Attorney General 1938-1940, we held that the exemption provided in section 6418 to the then mentioned veterans was personal to them and that the annual affidavit must be made by the veteran claimant. The 1943 amendment did not change the statute in this respect.

In opinion No. 45, May 27, 1943, Report of the Attorney General 1943-1944, we held that the qualifying affidavit of persons serving in the armed forces of the United States in time of war could be made by such persons out of the State and forwarded to the County Assessor.

The general law with respect to the making of affidavits is that where the statute points out the parties who may make a certain affidavit, it is construed to exclude all other except those designated, so that the principle that what a party may do in person he may do in person he may do by agent has no application.

1 Am. Jur. 936, Sec. 5.

The statute in question here clearly designates the person who is to make the affidavit claiming the exemption, and that is the person who owns the property subject to taxation.

Sec. 6418 N.C.L. 1929, as amended, 1943 Stats. 5, 6.

If the person serving in the armed forces of this country attempted to secure his tax exemption by means of a power of attorney, nothing would be gained thereby. He would of necessity have to acknowledge a written instrument, designating therein the power granted, which, we think, would have to be specific in nature, showing that he was the owner of a certain property subject to the exemption claimed. He can accomplish the same purpose by making his sworn affidavit to the assessor, and this in accordance with law. The inquiry is answered in the negative.

If it is thought that powers of attorney are desirable in the above situation, the matter should be submitted to the next Legislature for its consideration.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

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

177. County Commissioners—No Power to Let Real Property of County Under a Lease for Twenty-five Years.

CARSON CITY, December 1, 1944.

HON. FRANK B. GREGORY, *District Attorney, Ormsby County, Carson City, Nevada.*

DEAR MR. GREGORY: This will acknowledge receipt of your letter dated November 28, 1944, in which your request an opinion from this office as to the authority of County Commissioners under the law to lease real property of the county for a term of twenty-five years.

We are of the opinion that County Commissioners of the various counties in the State of Nevada have no power to let real property of the county under a lease for twenty-five years.

See Opinion No. 54, Attorney General's Biennial Report 1923-1924.

Section 1942, 1929 N.C.L. 1941 Supp., provides in part as follows:

First—To make orders respecting the property of the county in conformity with any law of this State, and to take care of and preserve such property.

Eighth—to control and manage the property, real and personal, belonging to the county. * * *

Ninth—Lease or purchase of any real or personal property, *necessary for the use of the county* * * *. (Italics ours.)

Section 1973, N.C.L. 1929, provides as follows:

No member of any Board of County Commissioners within this State shall be allowed to vote on any contract which extends beyond his term of office.

Provision is made by statute authorizing County Commissioners to grant franchises, conditioned upon specified procedure. Chapter 42, Statutes of 1943, authorizes County Commissioners to sell or lease certain personal property to the United States essential to the prosecution of the war.

Whether the Board of County Commissioners may exercise powers not expressly granted, but which may be implied from the language "to control and manage the property, real and personal, belonging to the county" contained in paragraph eight, section 1942, supra, is controlled by section 1973 N.C.L. 1929, which language is expressed in negative terms. "Negative statutes are mandatory, and must be presumed to have been intended as a repeal of all conflicting provisions, unless the contrary can be clearly seen." *State v. Commissioners Washoe Co.*, 22 Nev, on page 210.

It is suggested that this matter be placed before the Legislature for appropriate action.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

By GEORGE P. ANNAND, *Deputy Attorney-General*.

178. Food and Drugs—Commissioner to Make Report to President of the University of Nevada.

CARSON CITY, December 1, 1944.

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

MY DEAR GOVERNOR: This will acknowledge receipt of your letter of November 29, 1944, received in this office on November 30, 1944, with which you enclosed a letter written to you by Wayne B. Adams, Commissioner and State Sealer of the State of Nevada, relative to the manner of publishing his biennial report.

In my opinion, Mr. Adams is absolutely correct in the manner in which he has proceeded. It should be noted that section 23 of the Pure Food Law of 1913 required that his report be made to the Governor. In 1939 the Nevada State Legislature adopted a completely new Act and section 17 thereof authorized the Commissioner to make his report to the President of the University of Nevada.

In view of this later section I believe that Mr. Adams should make his biennial report to the President of the University of Nevada, and since this report will be embodied in the biennial report of the Board of Regents, you will be advised through reference to such report the activities of the Commissioner of Food and Drugs.

My highest personal regards.

Very truly yours,

ALAN BIBLE, *Attorney-General*.

cc to Wayne B. Adams, Commissioner and State Sealer, Food and Drugs and Weights and Measures, University of Nevada, Reno, Nevada.

179. Labor—Value of Meals Furnished as Part of Wages Shall Be Added to Wages for Purposes of Determining Amount Subject to Withholding Tax.

CARSON CITY, December 4, 1944.

MR. R.N. GIBSON, *Labor Commissioner, Carson City, Nevada.*

DEAR MR. GIBSON: This will acknowledge receipt of your letter of November 28, 1944, in which you inquire as to the legality of certain additions to wages in arriving at deductions for collection of income taxes at source on wages.

The letter enclosed from the Culinary Workers' Union presents two questions. First, has an employer the authority, under the female employment Act of this State, to add the sum of one dollar per day for meals furnished as part of the wages paid employees, when determining the bases for withholding taxes? The second question is, should taxes be withheld on the value of meals furnished under a contract of employment which includes meals as part of the wages paid for services?

The answer to the first question is that under chapter 207, Statutes of 1937, as amended, when meals without lodging are furnished as part payment for wages, the value of such meals shall not exceed twenty-five cents for each meal consumed. There is no authority for using an arbitrary sum of one dollar.

The answer to the second question is yes. When meals are included as part of the wages agreed upon in a contract of employment, the value to such person of the meals agreed upon shall be added to the wages otherwise paid for the purpose of determining the amount of wages subject to the withholding tax. The value of such meals under the statute is fixed at twenty-five cents per meal. If the contract calls for three meals per day the value under the state law would be a total of seventy-five cents per day.

Section 2825.44 Nevada Compiled Laws 1929, 1941 Supp., which is paragraph (b) under section 4 of the Act, provides in part as follows: "A part of such wages or compensation may, if mutually agreed upon by the female and her employer in the contract of employment, but not otherwise, consist of food and lodging or food or lodging; *provided*, that in no case shall the value of food and lodging be computed at more than one dollar per day; *provided further*, that in no case shall the value of the meals consumed by such female employee if lodging facilities are not accorded to her, but meals only are purchased, be computed or valued at more than twenty-five cents for each meal actually consumed."

When the contract provides that meals will be furnished in addition to wages paid, it may be inferred that the meals will be consumed, and are of value to the employee, which brings such contract within purview of the regulations of Federal Income Tax.

Section 404.101 of Regulations 115 relating to the collection of income tax at source on wages, provides in part as follows: "If a person receives as remuneration for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished shall be added to the remuneration otherwise paid for the purpose of determining the amount of wages subject to withholding."

Very truly yours,

ALAN BIBLE, *Attorney-General.*

By GEORGE P. ANNAND, *Deputy Attorney-General.*

180. Gasoline—Required Specifications—State Sealer Charged with Proper Enforcement.

CARSON CITY, December 5, 1944.

MR. WAYNE B. ADAMS, *State Sealer, Department of Petroleum Products, P.O. Box 719, Reno, Nevada.*

DEAR MR. ADAMS: This will acknowledge receipt of your letter of November 25, 1944, received in this office on November 27, 1944.

Section 5035.04, Nevada Compiled Laws of 1929, 1941 Supp., which is section 5 of the Act of 1931, and has not been amended, defines the required specifications for gasoline, and declares it unlawful to sell any petroleum or petroleum product unless the same shall conform to the specifications listed therein.

Section 5035.12 Nevada Compiled Laws of 1929, 1941 Supp., being section 13 of the Act, provides that the State Sealer of Weights and Measures shall be charged with proper enforcement of the provisions of the Act.

The second paragraph authorizes the State Sealer to promulgate rules and regulations for the purpose of carrying out the provisions of the Act.

Usage or custom cannot be availed of to enlarge the statutory powers of a public officer to include acts otherwise unauthorized or contrary to established law, or to enable the officer to perform his duties in a manner other than that prescribed by statutes. 43 Am. Jur. page 70.

The statutes fixes a standard specification for gasoline and the administrative officer could not adopted a rule or regulation in violation or contrary to such statute.

This principle of law is stated in the case of Nye County v. Schmidt, 39 Nevada 456, in the following language:

Where the legislative body manifests a definite purpose in an act, it will presumed that in furtherance of such purpose the law-making power formulated the subsidiary provisions in harmony therewith.

If broader powers are desirable under present conditions, they must be conferred by the Legislature, and this matter could be brought before the Legislature at its next session in January, 1945.

Very truly yours,
ALAN BIBLE, *Attorney-General.*

181. Old-Age Assistance—Rules and Regulations Safeguarding Confidential Nature of Records Valid and Binding.

CARSON CITY, December 8, 1944.

MRS. HERMINE G. FRANKE, *Supervisor, Division of Old-Age Assistance, Nevada State Welfare Department, P.O. Box 1331, Reno, Nevada.*

DEAR MRS. FRANKE: This will acknowledge receipt of your request of November 24, 1944, received in this office on November 27, 1944, relative to the authority of your State agency to make rules and regulations under the so-called old-age initiative petition for safeguarding the confidential nature of old-age assistance records to comply with the Social Security Act. You likewise ask whether such rules and regulations would be valid and binding.

The official canvass shows that question No. 2 received a majority of the qualified electors voting thereon. Accordingly, it is our opinion, that pursuant to section 3, article XIX of the constitution and section 2463, 1929 Nevada Compiled Laws, 1941 Supp., such old-age initiative measure became a law on Wednesday, December 6, 1944. See Attorney-General-s Opinion No. 32, 1917-1918 Biennial Report.

It is our unqualified opinion that the State agency under the provisions of the new initiative old-age measure has ample authority to make rules and regulations for safeguarding the confidential nature of old-age assistance records in order to comply with the Federal Social Security Act and that such rules and regulations are valid and binding.

The title of the old-age initiative measure, insofar as pertinent to this inquiry, reads, “An Act * * * providing for cooperation with the Government of the United States in furnishing such pensions or assistance pursuant to the provisions of the so-called Social Security Act of Congress, approved August 14, 1935, * * * authorizing the making and promulgation of rules and regulations relating to administration of this act * * * repealing a certain act and all other acts and parts of acts of this state in conflict herewith; * * *.” At the time that the initiative measure was voted on the Social Security Act of Congress required in section 302(a) that a State plan for old-age assistance must “effective July 1, 1941, provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of old-age assistance.” In the consideration of an Act reference may be had to the title for the purposes of construction. See *Torreyson v. Board of Examiners*, [7 Nev. 19](#).

It is clear to us, not only from the title but from the many sections of the initiative Act itself, that it was the intent of the people of the State to cooperate with the federal Government pursuant to the provisions of the Social Security Act. The actual authority for promulgating a rule and regulation to restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of old-age assistance is found in section 4 which reads, in part, as follows:

The state department shall—

(b) make such rules and regulations and take such actions as may be necessary or desirable for carrying out the provisions of this act. All rules and regulations made by the state department shall be binding on the counties and shall be complied with by the respective county boards.

* * * * *

(c) cooperate with the Federal government in matters of mutual concern pertaining to assistance to the needy aged, including the adoption of such methods of administration as are found by the Federal government to be necessary for the efficient operation for the plan of such assistance.

These provisions which are made mandatory upon the State Welfare Department constitute ample and adequate authority for the adoption and promulgation of rules and regulations restricting the disclosure of information concerning applicants or recipients. The title as well as numerous sections throughout the Act demonstrate conclusively that the State Initiative Act was intended to cooperate with the Federal Act and to be construed in connection therewith. See the case of *Morgan v. Department of Social Security*, 127 Pac. (2d) 686.

It is our opinion that the state agency may adequately safeguard the confidentiality of the records and comply with the Social Security Law by adopting rules and regulations in the nature

of restrictions as to information obtained in the course of administering assistance to be utilized in the furtherance of the assistance program, in establishing eligibility, and determining the amount of assistance. Names and addresses of applicants and recipients, reports of investigation, reports of medical examinations, correspondence, records concerning the conditions and circumstances of persons' visits are the principal matters which can be safeguarded from publicity.

General information not identified with particular individuals, such as total expenditures made, number of recipients, and other statistical information and social data contained in general study reports, or surveys of welfare problems would not seem to fall within the class of material necessary to be safeguarded in order to comply with the Federal Social Security Law.

Section 7 of the old-age initiative measure specifically repeals the provisions of the pauper law, under which the applicant was required to appear before meetings of County Commissioners and State publicly every detail as to his needs.

The Act specifically provides that every needy person as defined therein shall be entitled as a matter of right to old-age assistance. It seems to us that the specific repealing of statutes governing the Pauper Laws directly refutes any intention in the Act, due to its failure to define "safeguards," to make matters (required by the Social Security Act to be confidential) public records.

In addition, the Initiative Act provides specifically in section 27, that "all other laws and parts of laws of this State in conflict with this Act are hereby repealed." It is our opinion that section 5620 Nevada Compiled Laws 1929 insofar as it conflicts cannot stand in the face of the initiative measure which is an Act complete in itself, providing a full framework for the administration of old-age assistance.

"In the interpretation of any phrase, section or sentence of a statute, the first thing to be ascertained is the ultimate and general purpose of the legislature in the enactment of the law, and when that is known or ascertained, every sentence and section of the entire act should be interpreted with reference to such general object, and with a view to giving it full and complete effect, extending to it all its logical and legitimate results." *Rodney v. Buckland*, [4 Nev. 45](#). "[Legislative acts](#) should be construed so as to make all parts thereof harmonious if a reasonable construction can accomplish the results." *Nye County v. Schmidt*, [39 Nev. 456](#).

The fact that a provision to safeguard certain records was omitted from the Act does not establish the fact that such matter is excluded from the general purpose of the act.

50 Am. Jur., page 323, states the following rule: "The fact that the Legislature has failed to adopt an administrative recommendation as to a specific provision in regard to a particular matter, does not establish the fact that such matter is excluded from a general provision on the subject," citing *Helvering v. Clifford*, 309 U.S. 331.

In the Nevada Initiative Act the language which clearly defines the purpose of the Act shows a generalized treatment of details and a specific provision to safeguard certain matters would confine the state board to regulations to which a rule of thumb might be applied until the Act could be amended to supply required detail.

"Where the legislative body manifests a definite purpose in an Act, it will be presumed that in furtherance of such purpose the lawmaking power formulated the subsidiary provisions in harmony therewith."

"Whenever a power is given by statute, everything lawful and necessary to the effectual execution of the power is given by implication of law." *State ex re. Hinckley v. District Court*,

Very truly yours,
ALAN BIBLE, *Attorney-General.*

182. Elections—Statement of Expenses Required from Candidates Shall Be Substantially in Form Set Out in Statute.

CARSON CITY, December 12, 1944.

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

DEAR MR. McEACHIN: This will acknowledge receipt of your letter dated December 11, 1944, regarding the expenses incurred by Mr. Rex Bell in the recent general election.

Section 2608 Nevada Compiled Laws 1929 provides generally that the several officers with whom statements are required to be filed shall inspect all statements, and if it appears to them that the statement filed with them does not conform to law they shall notify such person.

Section 2639 Nevada Compiled Laws 1929 provides that the statement of expenses required from candidates and others by the Act shall be substantially in the form set out in the section.

There is a provision in the statutory form which requires a statement that the candidate has read the laws of the State concerning elections and that he has not knowingly violated any such laws. This does not appear in the submitted form.

The statute gives the officers with whom the statements are filed some discretion in the determination of the sufficiency of such statements and the authority to have them corrected.

It is quite obvious that Mr. Bell is doing everything in his power to comply with the requirements of the Nevada law and to meet your request. It is suggested that you retain the sworn statement which he has made, but that you likewise send him a new form the Nevada affidavit so that he might likewise execute this in accordance with the Nevada law and thereby avoid any possible question of noncompliance.

Very truly yours,
ALAN BIBLE, *Attorney-General.*
By GEORGE P. ANNAND, *Deputy Attorney-General.*